

**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  
and  
Thiru.K.Venugopal .... Member

**D.R.P.No.12 of 2009**

and

**I.A. Nos. 12 & 13 of 2009 in D.R.P. No. 12 of 2009**

PPN Power Generating Company Private Ltd.  
III Floor, Jhaver Plaza  
1-A, Nungambakkam High Road  
Chennai – 600 034.

Represented by its Managing Director .... Petitioner  
(Thiru.Rahul Balaji, Advocate  
Thiru. Jeyant Bhushan, Senior Advocate)  
Counsel for Petitioner

**Vs.**

Tamil Nadu Electricity Board  
800, Anna Salai  
Chennai – 600 002  
Represented by its Chairman

.... Respondent  
(Thiru.H.S.Mohammed Rafi, Advocate &  
Thiru. P.S.Raman, Advocate General)  
Counsel for Respondent

**dates of hearing:**

**22-07-2009, 26-08-2009, 26-11-009, 18-12-2009, 05-01-2010, 29-01-2010,  
24-02-2010, 03-03-2010, 10-03-2010, 01-07-2010 and 02-07-2010.**

**date of Order: 17-6-2011**

The above petitions came up for final hearing on 2-7-2010. The Commission upon perusing the above petitions and the connected records and upon hearing Thiru.Jeyanth Bhusan, Senior

Counsel, representing the Petitioner and Thiru.P.S.Raman, Advocate General representing the Respondent passes the following:-

**ORDER**

**Prayer in DRP No. 12 of 2009 as amended in I.A No. 13 of 2009 :-**

To pass an order directing the Respondent to make payment of a sum of Rs.1,89,91,17,264, being the sum due as at 19-03-2009 under the invoices raised under the Power Purchase Agreement (PPA) by the Petitioner and interest thereon in terms of Article 10.6 of the PPA from the due date till date of actual payment forthwith and further direct the Respondent to comply with the terms of the PPA by making payment against the invoices raised from time to time by the Petitioner's strictly in terms of the PPA.

**Prayer in I.A. 11 of 2009 as amended in IA No. 12 of 2009 :-**

To pass an interim order directing the Respondent to make payment of a sum of Rs.1,89,91,17,264, being the principal sum due under the invoices raised under the PPA by the Petitioner after adjustment of the sums paid upto 19-03-2009 pending disposal of the Petition.

**Facts of the case:-**

1. The Petitioner is a generating company. The Petitioner entered into a Power Purchase Agreement (PPA) with the Respondent on 03-01-1997 for sale of the entire energy generated by the power generating station, pursuant to the terms and conditions set out in the PPA. The Petitioner, thereafter set up a 330.5 Mega Watt power generating station and has been generating power through a Combined

Cycle Gas Turbine Power Station situated at Pillaiperumalnallur Village, Tharangambadi Taluk, Nagapattinam District, Tamil Nadu. The Petitioner commenced Commercial Operation on 26-04-2001. In view of the continued failure of the Respondent in making payments towards its dues under the PPA, the above DRP has been filed by the Petitioner.

**Contention of the Petitioner :-**

**Contention of the Petitioner in the affidavit:-**

2. The Petitioner has been raising monthly invoices since 26-04-2001 and annual invoices for the years 2001 to 2007 as contemplated under the PPA. Since June 2001, the Respondent has been paying adhoc payments without providing any details for such adhoc payments in contravention of the PPA. The Respondent has not provided necessary and proper intimation in respect of such adhoc payments. Even the information provided by the Respondent as late as in 2007 has not facilitated proper reconciliation of the claims / receipt / outstanding and this has led to mounting over dues from the Respondent to Petitioner.

3. Since the Respondent has not provided complete and adequate details the Petitioner has therefore been adjusting the amounts received by it on a "FIRST IN FIRST OUT" (FIFO) basis whereby the payments made are adjusted on chronological order with the payment first being appropriated to the first pending invoice and the balance with the next invoice and so on.

4. Pursuant to the partial information forwarded by the report in 2007 and pursuant to the terms of the provisions contained in Article 10.2 (b) (ii) of the PPA, the Petitioner revised annual

invoices for the period from Commercial Operation Date (COD) till 31-03-2007. The total amount claimed by the Petitioner (over the specified taxes) from COD till 31-03-2007 under the annual invoices as on the date of the said demand was Rs.404,39,92,2474/-. As one year time-limit has expired, the Respondent cannot any longer seek to even dispute the invoices and has nevertheless got to pay the pending dues with interest as specified in the PPA.

5. There is a lack of response from Respondent despite the issue of more than 100 reminders, some of which were dated 05-05-2003, 22-09-2003, 20-07-2004 and 23-05-2005.

6. The Petitioner has sent a communication dated 01-04-2009 to the Member (Generation), TNEB stating that a sum of Rs.178,72,72,534/- was due and payable to the Petitioner and if not received by 16-04-2009 together with interest in terms of Article 10.6 of the PPA, the Petitioner would file appropriate petition before the TNERC. The Respondent sent a one-liner on the last date viz 16-04-2009 that the matter was under examination and the reply to the matter would be sent to the Petitioner shortly.

7. In respect of the Petitioner's further letter dated 17-04-2009, the Respondent in letter dated 06-05-2009 stated that as per their accounts a sum of Rs.31.12 crores is due from the Petitioner and that the parties could meet to reconcile their accounts. The Petitioner immediately sent a reply letter dated 08-05-2009 stating that there could not be any amount payable by it to the Respondent and also sought particulars that formed the basis for such claim but no reply was received from the Respondent.

8. The Respondent has not raised a single dispute in respect of any of the invoices till date and the Respondent is contractually bound to make payments and relinquished their rights to dispute any invoice after a period of one year from the due date of such invoice.

9. The Respondent by its failure to make payment within the due dates of the respective invoices has rendered itself liable to make payment of late payment interest as per Article 10.6 of the PPA.

10. The Respondent has clearly admitted to its liabilities to make payments in full against the invoices and cannot therefore seek to deny payments that are due.

**Contention of the Petitioner in the common reply to counter affidavit of the Respondent and the reply affidavit dated 30-6-2010:-**

11. The Petitioner is entitled for payment even as an interim measure in view of the express terms of the PPA which contains a mandatory requirement to pay the full value of the invoices and even in the case of a dispute, to first pay and then raise a dispute.

12. The Respondent in letter no. D 539/2005 dated 17-12-2005 admitted that the completed capital cost is Rs.1379.25 crores and in letter No. D 353/2006 dated 29-07-2006 informed that it would continue to pay FCC payment in monthly tariff invoices without any change pending finalization of the capital cost. Further, the capital cost finalization is independent of the right to dispute a claim beyond one year.

13. It was only after all efforts failed and after the Petitioner saw no positive response to its notice of dispute resolution, it was forced to file the present petition.

14. The Respondent had raised the identical issue of limitation unsuccessfully in earlier proceedings. The Respondent has issued two letters dated 10-09-2001 and 27-07-2004 reiterating that the Respondent accepts all claims and reconfirmed its commitment to meet all of its contractual obligations under the PPA.

15. The 2.5% discount on infirm power had been conceded under severe cash flow constraints just after the project achieved COD and the matter stands closed.

16. The PPA does not contemplate oral intimations. It is common knowledge that a body like the Respondent would never transact on the basis of oral representations.

17. The Respondent was informed on several occasions that due to non-availability of payments made by the Respondent, the Petitioner was unable to raise annual invoices.

18. The Respondent in Letter No. D234/2006 dated 31-05-2006 has communicated the approval of the Respondent board of the raised capacity FCC for the year 2006–2007 which was submitted on 27-02-2006.

19. The stand of the Respondent that the one year time limit will not apply when it unilaterally determines that invoices are claims without complete details is wholly baseless and unsupported by any provision of the PPA.

20. The Respondent is fully aware that unless details are provided in respect of both invoices and payments made by it, the Petitioner would not be able to finalize the annual invoices. In fact, it was only after data was provided by the Respondent (even if incomplete) by its letter dated 13-04-2007 that the annual invoices could be compiled by the Petitioner for submission to the Respondent.

21. The PPA does not provide for the Respondent to determine arbitrarily what is due or to disallow any part of an invoice. In fact, the PPA specifically provides that the Respondent to pay the entire invoice and then to raise a dispute.

22. The Respondent had never communicated to the Petitioner (prior to 13-04-2007 on the basis of which the annual invoices were submitted) any details of how the invoices or claims were treated and now seeks to take umbrage under irrelevant issues.

23. There is no provision in the PPA to permit the Respondent to “admit” a part of an invoice. The Respondent never communicated to the Petitioner that they were making deductions nor provided the details thereof.

24. The Respondent is put to strict proof of the Petitioner not having met with the provisions of clause 2 (b) (i) of Schedule “A” of the PPA.

25. The Respondent did not make payments as per the PPA. The obvious consequence of this is that the Petitioner had to resort to costly bank borrowings.

26. Since inception, less than half a dozen cheques had been collected by Vice President (Technical), Mr. Sundaramurthy, of the Petitioner. All other cheques were collected by Accounts Department staff of the Petitioner. The Petitioner staff collects payment of cheques from the office of the Respondent and signs the register maintained by Respondent.

27. The Respondent never provided any details of deductions despite several request and reminders. Never once had the Respondent denied the Petitioner's communication that no information had been provided. In fact, the Respondent's conduct shows the contrary, when they provided sketchy information in April 2007 and then further detailed information within 3 days of filing this petition.

**Contention of the Petitioner in the rejoinders to the counter affidavit:-**

28. The Findings of the Commission in DRP.NO.7 of 2008 Specifically show that the claims of the Petitioner are not time barred. The Commission has already ruled that the Limitation Act will not apply to the proceedings before it.

29. It has been specifically pointed out in the amendment Petitions that there were calculation errors, certain inaccuracies and wrong adjustments which had been corrected. The Respondent refuses to go through the details provided and then alleges that details are not provided. There is no change in the statement in respect of the invoices nor receipts and the differences only relate to correction that were required to be made to clerical errors that had crept in.

30. No new cause of action or no new claim has been introduced in the amendment Petition and the Respondent can always contest the claim on merits during arguments.

**Contention of the Petitioner in the rejoinder to the reply of the Respondent to the common reply of the Petitioner:-**

31. The Annual Invoices were submitted as far back as in July 2007. Thereafter discussions and exchanges of correspondence have been going on. As far back as on 23-07-2007 (PPN/TNEB/806), the Petitioner had notified the Respondent of the outstandings of Rs.171.29 crores to be settled forthwith. The Respondent has been deliberately adopting delay tactics and is claiming that approvals were required. The Petitioner is in fact the person deeply prejudiced and under the excuse of getting approvals by the Respondent, the Petitioner suffered the “implication of several hundred crores” not being paid. The Respondent has gained out of its deliberate failures to adhere to contractual obligations.

32. The Petitioner became aware of the unilateral disallowances by the Respondent under broad heads, in brazen, willful and deliberate contravention of the provisions of the PPA. The amounts or the computations relating to the disallowance under different heads were never made available to the Petitioner, despite well over 100 reminders.

33. The Petitioner became aware that disallowances were being made by the Respondent under various heads during the meeting on 22-01-2005. The Respondent admitted six months earlier, that “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.....”

34. The Respondent is clearly seeking to arrogate to itself the power to ‘admit claims’ which is not provided for under the contract. The determination of whether an invoice is in excess or not is through the dispute resolution mechanism and not by arbitrary deductions, contrary to the express terms of the contract. The Petitioner had submitted the Annual Invoice dated 16-07-2008 taking into account the order of the Respondent dated 31-05-2006 in respect of capacity. The excuse of statutory audit is untenable, as this was fully known to the Respondent at the time of signing the PPA itself and PPA is binding on both parties.

35. The Petitioner had given a letter on 12-06-2001 to obtain payments from the Respondent, as the Respondent had not made any payments till that date for invoices raised since March 3, 2001. In fact, the first payment made by the Respondent was on 15-06-2001 immediately after the said letter was given. The Petitioner agreed to this, as it expected that the capital cost would be finalized quickly and within a reasonable period of time. In any event, the final claim and the subject matter of this petition, is only on the basis of the capital cost as finally submitted. The Respondent had also communicated in letter dated 17-12-2005 that payments would be made on the basis of the capital cost of Rs.1379.25Crs.

36. The Petitioner filed the capital cost application in terms of the provisions of the PPA in July 2001. Until September 2008, the Respondent failed in its obligation to finalise the capital cost, even

after over 7 years of submission of the request by the Petitioner in terms of the provisions of the PPA. In September 2008, the Respondent filed a petition before the commission and has since then consistently sought time from the commission both before the Evaluation Committee and also during the hearings posted so far. Various statutory audits can be no excuse, as these were well known even at the time of execution of the PPA and the provisions thereof are meant to be sacrosanct.

37. Both this commission as well as the Hon'ble APTEL have determined the position relating to both jurisdiction as well as limitation.

38. The records in the matter pertaining to the Capital Cost case pending before this Hon'ble Court clearly demonstrate the delay tactics adopted by the Respondent.

39. The capacity of 347.712 MW is the nameplate capacity. The Capacity Tests have been conducted in April 2001 and November 2002 as per provisions of the PPA and the capacity has been determined and communicated by the Respondent in its letter dated 31-05-2006.

40. It is a well-accepted practice to enclose payments with an advice/covering letter stating the purpose of payment. The Respondent's position of not providing anything in writing seems to clearly establish that it recognized that it was in breach of the provisions of the PPA and that any details –provided would catalyse dispute resolution processes being invoked by the Petitioner.

41. Supporting materials were submitted by the Petitioner along with monthly invoices, in the absence of which payments are not made by the Respondent. The same supporting materials are sought over and over again, primarily as an excuse to delay making any payments. In any event, the PPA does not permit 2 years for settling dues and in fact stipulates only 30 days. The Respondent has no defence of any sort.

42. The Respondent has never raised a dispute. Therefore, to claim that it is entitled to seek details and consequently to suggest that the time limit for disputes would not arise, is incorrect interpretation of the PPA. The internal approval and payment mechanism adopted by the Respondent is of no consequence in so far as the PPA is concerned.

43. The Petitioner submits the Invoices as per provisions of the PPA for the Month Billing; specified Taxes; FERV (Foreign Exchange Rate Variation). The cheque issued by the Respondent is not supported by any details relating to any of the above. In the absence of the same, it is impossible for the Petitioner to carry out reconciliation.

44. The Respondent would do everything within his powers to prevent the Petitioner from raising annual invoices as contemplated by the PPA and thereafter try to take advantage of such situation. Had the Respondent paid invoices in full as contemplated by the PPA, there would have been no need for any details to be provided by the Respondent.

45. The issues of Jurisdiction and Limitation have already been dealt with and determined by this Commission and the

Hon'ble APTEL in the appeals referred by the Respondent. In any event, the Hon'ble Supreme Court has itself decided issues relating to jurisdiction.

**Contention of the Petitioner in written submission:-**

**Jurisdiction:-**

46. An argument was made by the Respondent that the Hon'ble TNERC has no jurisdiction to entertain the petition in view of the Arbitration Clause in the PPA and the fact that there were various complicated issues involved. Such objection can no longer be raised in view of the determination of law recognising the jurisdiction of Regulatory Commissions by the Hon'ble Supreme Court in *Gujarat Urja Vikas Nigam's* case reported in (2008) 4 SCC 755. This Commission had already dismissed such similar challenge to jurisdiction in the Petitioner's own case in D.R.P No. 7 of 2008, which was also upheld by the Hon'ble Appellate Tribunal for Electricity in Appeal No. 41, 59 & 60 of 2009 and in its judgment in D.R.P No10 of 2008, in the case of GMR Power Corporation Ltd Vs. TNEB.

**Limitation, delay and laches:-**

47. It was urged by the Respondent that the claim is barred by limitation and in any event would have to be rejected on grounds of delay and laches. The said claim is without basis for the following reasons:

48. The Hon'ble TNERC has already determined that the Limitation Act will not apply to proceedings before it in *TCP Ltd.'s* case.

49. An argument raised by the learned Advocate General about the importation of Section 43 of the Arbitration and

Conciliation Act, 1996, to make limitation applicable to arbitration proceedings, apply to proceedings before the Commission was given up by him, due to the provisions of Section 2 (4) of the said Act, making Section 43 inapplicable.

50. The principles governing appropriation of payments are contained in Sections 59 & 60 of the Indian Contract Act, 1872. They provide as follows:

***“59. Application of payment where debt to be discharged is indicated. –***

*Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.*

Illustrations

*(a) A owes B, among other debts 1,000 rupees upon a promissory note which falls due on the first June. He owes B no other debt of that amount. On the first June A pays to B 1,000 rupees. The payment is to be applied to the discharge of the promissory note.*

*(b) A owes to B, among other debts, the sum of 567 rupees. B writes to A and demands payment' of this sum A sends to B 567 rupees. This payment is to be applied to the discharge of the debt of which B had demanded payment.*

**60. Application of payment where debt to be discharged is not indicated.-**

*Where the debtor has omitted to intimate and there are no other circumstances, indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.”*

51. Therefore when there is no express intimation or circumstances implying that payment is to be applied in discharge of some particular debt, the creditor (the Petitioner herein) is entitled to apply at its discretion the payments to any lawful debt whether its recovery is or is not barred by law. In the present case, no payment was expressly stated to be against any Invoice. Additionally, and contrary to the claim of the Respondent that payments were made from April 2005, circumstances would imply that a particular payment was against a particular Invoice, (a) there is not a single payment that has been made in full, (b) there has been no communication at the time of payment intimating any rebate or disallowance; (c) no payment by itself, both due to the ad-hoc payment policy being followed and also because it was impossible to relate to a particular payment, can be said to impliedly relate to a particular Invoice; and (d) the Petitioner had sent several communications to the Respondent that it was setting off payments received on a FIFO basis and this was never once refuted nor denied by the Respondent.

52. Therefore, the Petitioner was entitled to adjust the payments on a FIFO basis and the question of any limitation, delay or laches will not arise. There cannot be any delay or laches since the Petitioner has admittedly followed FIFO basis for adjustment of its Invoices, which it is entitled to in law as a creditor and at the time of filing of this petition, only the latest three Invoices were outstanding.

53. The reliance placed on Section 59 is without basis. It is settled law that a creditor should have an opportunity of considering the offer of payment made by the debtor subject to the appropriation suggested by him and deciding for himself to either accept payment or not, upon such conditions. If the circumstances are such that the money reaches the hands of the creditor and he accepts it without knowing the conditions subject to which the debtor proposed to make the payment, the creditor cannot be deprived of his normal right to make an appropriation which is to his best advantage. (*See Domingo John Picardo Vs. Gregory Pinto AIR 1962 Mys 190*). The burden on a debtor alleging appropriation to be made in a particular way has to discharge is a heavy burden which is to be completely discharged (*See Radha Kishun Vs. Hira Lal Sah AIR 1927 PC 50*). The Respondent has failed to show a single instance when it had given instructions contrary to adjustment on a FIFO basis and has failed to show any evidence supporting its weak claim that its payments were being made against specific Invoices. The payments never matched the full value of the Invoice or the reduced amount payable under the PPA if rebate were to be claimed. When full payments were never made, the question of rebate would never arise. Therefore, at the

time of filing of the petition, upon making such adjustment, Invoices remained due only from the months of February 2009 through May 2009. Alternatively, without prejudice to the above, there were clear acknowledgements of liability to pay in terms of the Invoices from time to time and thereafter the liability to pay arose under annual Invoices raised in the month of July 2007. The claim has been filed for failure to make payments upon such Invoices within 2 years thereafter. The cause of action for filing the present petition was the Respondent's letter of May 2009 refusing to make payment as demanded and stating that Rs.31.12 crores were due to it.

54. The Regulatory Commission being a forum of first resort and not invested with discretionary jurisdiction, the principles of delay and laches would have no applicability, inasmuch as, they are applicable only to forums invested with discretionary jurisdiction.

**PPN could not raise any dispute earlier than it did :-**

55. At no stage did the Respondent dispute any of the Invoices raised by the Petitioner. Until April 2007 the Respondents did not provide any details of disallowances or payments made. The Petitioner had sent in well over 100 reminders seeking details. The solitary response received from the Respondent dated 05-04-2004 was to depute the Petitioner's staff to take down the required details as is being done by other IPPs, a clear admission that details were indeed required to be provided to the Petitioner. In response, the Petitioner promptly declined in writing by its letter dated 08-04-2004, citing reasons therefor.

56. The Respondent sent a letter dated 10-09-2001 stating, inter alia, under the subject matter "Payment of Tariff Invoices" (i) Refers to discussions between parties relating to pending payments under the PPA. (ii) "TNEB is currently undergoing temporary financial strain resulting in its inability to make full payment against tariff invoices." (iii) full payment and arrears till December 2001 would be paid starting from January 2002. (iv) "Your invoices have been accepted in full by TNEB." (v) Part payment "does not in any manner prejudice your right to receive payment against invoices raised by the Company ..." (vi) "TNEB herewith accepts liability to pay the said outstandings and reconfirms its commitment to meet all dues of its contractual obligations under the PPA". Having sought for our forbearance, the company did not raise any disputes.

57. The Respondent thereafter sent another communication dated 27-07-2004, stating therein under the subject matter "Payment of Tariff Invoices" (i) the letter refers to discussions between parties relating to pending payments under the PPA; (ii) Para 2 reads "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 ..." (iii) "TNEB appreciates your concern over the level of part payment of Invoices being currently made which is insufficient to meet your payment obligations ..."

58. The Petitioner has been receiving ad hoc payments from inception. Not a single Invoice was ever paid in full, nor was any communication ever provided that a payment was against a specific

Invoice. There was never an intimation of even the so-called disallowances that the Respondent had made.

59. The Petitioner's cash flows were determined by the Respondent, its sole customer and the continued sustenance of the project, especially in the early years, was therefore dependant on the Respondent.

60. It was also noticed that cumulative payments received from the Respondent from 2005-06 to 2007-08 were more than Invoices raised on the Respondent, clearly indicative of the clearance of part of the past over dues.

61. The Petitioner had been setting off payments received from the Respondent on a FIFO basis, as had been communicated on several occasions. The Respondent had never once denied this position. Hence, only the past few bills were outstanding as at 31-03-2008. The Petitioner continued to follow up for payment of such over dues.

62. It is unfortunate that instead of appreciating the continued forbearance of the Petitioner in the face of flagrant violations of the PPA by the Respondent, the Respondent is raising an issue as to why the Petitioner exhibited restraint and did not raise a dispute.

63. The PPA is structured to ensure that the Respondent first pays the dues in full and then disputes. The spirit and structure of the PPA therefore contemplates that for recovery of dues, it is the Respondent who would raise disputes and litigate and not the Petitioner.

64. In view of all of the above, it would have been imprudent for the Petitioner to raise a dispute. As the Respondent's conduct continued to be arbitrary with utter disrespect and disregard for the PPA, the Petitioner was driven to approach this Commission.

65. It is unfortunate that the Respondent not only is recalcitrant and wilfully contravenes the provisions of the PPA but also dares the Petitioner to go into litigation, a very sad commentary on the mindset, attitude and conduct of the Respondent.

66. The Petitioner after exercising utmost restraint, only approached this Commission when a cause of action was thrust on the Petitioner, viz., the Respondent's letter dated 16-05-2009, stating that the Petitioner is due Rs.31.12 crores, when in fact the Respondent was due nearly Rs.190 crores to the Petitioner.

67. Hence, it would be clear that the Petitioner has filed the present claim at the earliest opportunity and the claim of the Respondent to the contrary is untenable.

**Order II Rule 2 of the Civil Procedure Code:-**

68. An argument was made that the claim would be barred by the provisions of Order II Rule 2 of the CPC since the Petitioner failed to include the claims, subject matter of the present proceedings, in its earlier claim relating to Specified taxes. Such an argument is entirely without basis for the following reasons:

69. Only those provisions of the CPC as have specifically been made applicable would apply to proceedings before this Commission. Order II Rule 2 is not such a provision.

70. In any event, the bar under Order II Rule 2 would apply only in cases where a party fails to make a claim that ought to have been part of the earlier claim. In determining such a question a Court would see if the same evidence is to be let in for both the claims. Admittedly, the evidence for the claim in relation to specified taxes is distinct and separate from the present claim and therefore the bar would not apply. In this regard in (***Kunjan Nair Sivaraman Nair v. Narayanan Nair (2004) 3 SCC 277***) the Supreme Court has held as follows:-

*At para 8,*

*“8. A mere look at the provisions shows that once the plaintiff comes to a court of law for getting any redress basing his case on an existing cause of action, he must include in his suit the whole claim pertaining to that cause of action. But if he gives up a part of the claim based on the said cause of action or omits to sue in connection with the same, then he cannot subsequently resurrect the said claim based on the same cause of action. So far as sub-rule (3) is concerned, before the second suit of the plaintiff can be held to be barred by the same, it must be shown that the second suit is based on the same cause of action on which the earlier suit was based and if the cause of action is the same in both the suits and if in the earlier suit the plaintiff had not sued for any of the reliefs available to it on the basis of that cause of action, the reliefs which it had failed to press into service in that suit cannot be subsequently prayed for*

*except with the leave of the court. It must, therefore, be shown by the defendants for supporting their plea of bar of Order II Rule 2 sub-rule (3) that the second suit of the plaintiff filed is based on the same cause of action on which its earlier suit was based and that because it had not prayed for any relief and it had not obtained leave of the court in that connection, it cannot sue for that relief in the present second suit.”*

*At para 18,*

*“18. As observed by the Privy Council in Payana Reena Saminathan v. Pana Lana Palaniappa<sup>4</sup> the rule is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transaction. One great criterion is, when the question arises as to whether the cause of action in the subsequent suit is identical with that in the first suit whether the same evidence will maintain both actions. (Mohd. Khalil Khan v. Mahbub Ali Mian.)”*

71. The right to sue and the cause of action in respect to Specified taxes had already arisen since there was a refusal to pay in that regard at that time. While in the case of the present claim, there was no refusal to pay and it was only when despite repeated requests to pay went unheeded, and the Respondent resorted to its time tested subterfuge of stating without any basis that the Petitioner was due Rs 31.12 crores to the Respondent, which constituted the cause of action, the present claim was made.

72. The claim in respect of Specified taxes is by way of a separate quarterly Invoice as opposed to the monthly Invoices raised for the present claim that culminated in annual Invoices after providing for adjustments. At the time of raising the annual Invoices, it was specifically pointed out that the annual Invoices did not include the claim towards specified taxes which was being separately dealt with.

73. The bar under Order II Rule 2 cannot therefore apply where the causes of action are separate and distinct and relate to separate categories of invoices, where the issues involved are different and where the evidence would not be identical.

**Right of the Respondent to dispute Invoices :-**

74. Article 10.2 (e) of the PPA reads *“In the event of any dispute as to all or any portion of an Invoice, TNEB shall nevertheless pay the full amount of the disputed charges when due and may serve a notice on the Company that the amount of an Invoice is in dispute, in which event the provisions of Article 16 shall be applicable...”*

75. It therefore, follows that the Respondent can only dispute an Invoice if the following conditions co-exist:

- The Respondent pays the Invoice fully;
- When due; and
- Serves a notice of dispute in terms of the PPA within a period of one year from the Due Date of an Invoice.

76. The Respondent has never raised any dispute, in terms of the provisions of the PPA, on any Invoice raised by the

Petitioner. The Respondent has never paid any Invoice fully since inception. Hence, none of the Invoices covered by this petition can be disputed by the Respondent and have to be paid fully.

**REBATE-The Respondent is disentitled from claiming any rebate since it failed to make any payment in full when due : -**

77. The claim of the Respondent is that Section 59 of the Indian Contract Act, 1872 states *“Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.”* Hence, all payments from 01-04-2005, which followed a pattern, should be set off against the Invoices raised immediately prior to such payment.

78. The above position of the Respondent is untenable for the following reasons:

The illustration under Section 59 states *“(a) A owes B, among other debts, 1,000 rupees upon a promissory note which falls due on the first June. He owes B no other debt of that amount. On the first June A pays to B 1,000 rupees. The payment is to be applied to the discharge of the promissory note. (b) A owes to B, among other debts, the sum of 567 rupees. B writes to A and demands payment of this sum. A sends*

*to B 567 rupees. This payment is to be applied to the discharge of the debt of which B had demanded payment.”*

79. None of the payments made, ever corresponded to the value of the Invoice submitted, even after setting off the alleged claim of 2.5% rebate and set off of the Station Service Transformer (“SST”) consumption (power drawn from the Respondent when the Petitioner’s plant is shutdown). Hence, the examples (a) and (b) in Section 59 of the Indian Contract Act, 1872 cannot be applied to any of the payments from the Respondent.

80. More than one payment may have been received between two Invoices submitted by the Petitioner, no combination of which would tie up with any Invoice submitted.

81. The Petitioner had on several occasions communicated that the payments were being set off on a FIFO basis. This was never refuted by the Respondent.

82. Alternatively, without prejudice to the other submissions:

*Article 10.2 (a) provides that “In the event that TNEB pays the Invoice, directly or through a Letter of Credit, within five (5) business Days from the presentation of the Invoice, then TNEB shall be entitled to a 2.5% reduction of the Invoice amount ...”*

83. Article 10.2 (a) therefore clearly contemplates that the Invoice (meaning the full Invoice value) is paid within 5 business Days for being eligible for the 2.5% rebate.

84. Admittedly, the Respondent has never made payment of any Invoice in full, within Due Date.

85. The feeble attempt to state that from 01-04-2005, the Respondent had been making payments in full in respect of Invoices submitted is completely untenable and the statements filed by the Respondent itself falsifies such claim, inasmuch as, no payment matches the full value of the Invoice.

86. Rebate is not recompense for interest of early payment, but an incentive to ensure early payment and hence cash flows to the project.

87. Hence, so long as the Respondent makes even a marginal unauthorised deduction, he is not entitled to any rebate. The primary principle is to ensure that cash flows are protected in full and no deductions are made from Invoices submitted, save for eligible rebates, SST power and any authorised deductions.

88. The PPA also contemplates recovery of dues through either the L/C or the Escrow Account, in that order, if the Respondent does not pay any part or whole of an Invoice. It is not possible to conceive of the Petitioner having to draw upon an L/C to ensure full payment, following the Respondent's default in payment and the Respondent being eligible for rebate for the part payment made, if any. In such event, there is no question of a rebate of 2.5%. There would be no case for the rebate to be applicable for the part payment made by the Respondent.

89. In view of the above, there is absolutely no case for the Respondent being eligible for any rebate on any of its payments, except as admitted by the Petitioner in the petition.

**Annual Invoice is an Invoice within the meaning of the PPA :-**

90. Invoice is defined in the PPA as having the meaning in Article 10.2 (a).

*Article 10.2 (a) states “The company shall submit to TNEB after the first Day of each Month that commences after the Commercial Operation Date an Invoice (“Invoice”) for all amounts accrued in the preceding Month under the Tariff and other applicable Sections in this Agreement for the estimated FCC, VFC and Incentive Charge which will become due during such Month. Each Invoice shall show the due date (“Due Date”) of the Invoice to be the date that is thirty (3) days after delivery of the Invoice by the Company.”*

As per the PPA, FCC is Fixed Capacity Charge and VFC is Variable Fuel Charge.

*Article 10.2 (b) (ii) reads “Annual Invoice: As soon as possible after the end of each Year, the Company shall submit to TNEB an annual Invoice setting forth all amounts owed under the Tariff and a reconciliation of the actual amounts receivable from TNEB for the prior Year against the sum of monthly estimated payment made by TNEB. If such Invoice shows net payment due to the Company by TNEB, the stated amount shall be paid by the Due Date. If such Invoice shows net payment due to TNEB by the Company, the stated amount shall be*

*paid to TNEB by the date that is thirty (30) days after the Invoice is rendered.”*

91. Article 10.2 (b) (ii) states “annual Invoice” and “Invoice” throughout this Article. As Invoice is capitalised, it follows that it is an Invoice as defined in Article 10.2 (a).

92. Article 10.2 (e) reads *“In the event of any dispute as to all or any portion of an Invoice, TNEB shall nevertheless pay the full amount of the disputed charges when due and may serve a notice on the Company that the amount of an Invoice is in dispute, ... TNEB shall not have the right to dispute any Invoice after a period of one year from the Due Date of such Invoice.”*

93. The definition of Invoice covers all FCC, VFC and Incentive Charge for amounts accrued under the Tariff and other applicable Sections. Clearly, the annual Invoice squarely falls within this definition. Article 10.2 (a) does not specifically exclude any other claims in terms of the PPA from the definition of an Invoice and in fact specifically includes claims *“... under the Tariff and other applicable Sections in this Agreement ...”* Hence, claims under the annual Invoice would also accordingly be an Invoice within the meaning of the PPA.

94. It is evident from the above that an annual Invoice is also an Invoice. The references to Invoice in Article 10.2 (b) is a capitalised term. Hence, any Invoice raised under Article 10.2 (b) (ii) would also be an Invoice for all purposes and intents of the PPA.

95. In the case of the annual Invoice also the Due Date is 30 days from the date of submission of the Invoice as in the case of Invoices submitted pursuant to Article 10.2 (a). The principles of submission and Due Dates thereon are identical to Invoices raised under Article 10.2 (a) as to annual Invoices under Article 10.2 (b) (ii). It would lead to an absurd conclusion if one were to state that an annual Invoice is not an Invoice within the meaning of the PPA, when the principles of raising a claim and settlement thereof are identical in both for raising a claim as well as for settlement of such a claim. Similar are the principles relating to Late Payment interest thereon.

96 Further, in DRP No.7 of 2008 filed by this Petitioner before this Commission in respect of Specified Taxes, both this Commission as well as the Hon'ble Appellate Tribunal for Electricity held that an Invoice raised for Specified Taxes under Article 10.1 (d) would fall within the definition of an Invoice. The same principles would equally apply to an Invoice raised under Article 10.2 (b) (ii) as an annual Invoice.

97. All Provisions of the PPA, and in particular Article 10.2 (e) and 10.6 of the PPA, shall equally apply to annual Invoices raised in terms of Article 10.2 (b) (ii).

**Delay in Submission of Annual Invoice :-**

98. It was never the Respondent's case that annual Invoices could be raised without any details being provided by them. Despite over 80 letters sent in this regard by the Petitioner, the Respondent never once stated that no details were required to be given by it to the Petitioner for raising the annual Invoice. On the contrary, the Respondent

communicated to the Petitioner to go over to its office and make note of the details like other IPPs, a clear admission that details were indeed required to be provided to the Petitioner. The Petitioner's consistent plea was that it would not do so as there would be no sanctity to such an exercise and insisted upon the Respondent communicating such details to it. If the Respondent had even once communicated to the Petitioner that the PPA does not mandate details being given, the Petitioner could have taken necessary corrective action right at the outset. It was self-serving for the Respondent not to provide information, whilst by conduct the Respondent had clearly admitted that such details were indeed required to be given.

99. The first time that the Respondent has raised the bogie of details not being required under the PPA is in its second counter affidavit and not even in its first counter affidavit. Hence, this is a clear afterthought and only a ploy to wriggle out of an earlier accepted position between the parties.

100. During arguments, the Respondent stated that their letter dated 22-08-2005 sought the Petitioner to send year-end adjustments for the period 2001-05 to 2004-05. The Petitioner replied on 23-08-2005 inter alia that "... is unable to raise its Annual Invoices ... and would once again solicit your co-operation by providing forthwith a statement of account to the company of all transactions since inception."

101. If the Respondent's case were that no details were to be provided for finalising annual Invoices, where was the need for the Respondent to provide such details on 13-04-2007 and a more

detailed document on 25-05-2009, (which was also submitted to the TNERC by the Respondent on 10-03-2010), three days after the filing of this petition.

102. The provisions of the PPA, as analysed below would further bolster the agreed position amongst the parties as delineated above:

- (a) Article 10.2 (ii) of the PPA provides “... *As soon as possible after the end of each Year, the Company shall submit to TNEB an annual Invoice setting forth all amounts owed under the Tariff and a reconciliation of the actual amounts receivable from TNEB for the prior Year against the sum of monthly estimated payment made by TNEB.*”
- (b) The PPA has simplified this process on the premise that all Invoices submitted by the Petitioner under the PPA would be paid in full by Due Date. It did not envisage a situation where the Respondent would deliberately and wilfully disregard the provisions of the PPA, especially with respect to payments.
- (c) The annual Invoice can only be raised once under the PPA. There is no provision in the PPA for supplementary annual Invoices. Hence, all parameters required for raising an annual Invoice should be frozen with neither dispute nor confusion remaining unresolved at the time of making the annual Invoice.
- (d) The Petitioner submits Invoices as per the provisions of the PPA, for (i) Monthly Billing; (ii) Specified Taxes; and (iii) Foreign Exchange Rate Variation (“FERV”). Cheques issued

by the Respondent do not provide any details of the Invoice against which it is paid nor the components within an Invoice against which it is paid. This must be viewed in the context of the Respondent making payments that did not even cover the VFC. In the absence of the same, it would be impossible for the Petitioner to carry out a reconciliation and submit the annual Invoice.

103. The annual Invoice requires the following adjustments to be made in respect of FCC estimates submitted to the Respondent prior to the beginning of a Tariff Year:

- i. Actual long-term interest outflows (Debt Payment) at the end of the year as against the estimates made at in February each year and claimed in the Monthly Tariff Invoices for the following financial year. Such variations would arise primarily from interest rate variations during the year. Such interest rate variations would occur in respect of variable interest loans as well as during periods of negotiated interest changes.
- ii. Wholesale Price Index and Consumer Price Index for escalation of Operation & Maintenance expenses (forming part of Tariff) – these are estimated in end-Feb each year, when only data as of the previous November is available and is adjusted for actual indices as at April 1, each year.

- iii. FERV on Return on Equity (“ROE”) – this has to be claimed on the basis of the Current Exchange Rate prevalent on the date of payment of ROE (a component of FCC).
- iv. Incentive – based on the Plant Load Factor (“PLF”) (excluding therefrom any Deemed Generation attributable to backing down under naphtha).
- v. Interest on Working Capital – Receivables is determined as a normative 2 months of the previous year’s billing for sale of electricity (excluding Specified Taxes). Except in the case of the Stub Year and first year of operations, this figure would constantly change based on each of the factors in (e) (i) to (e) (iv) above.

104. Hence, Tariff would continuously fluctuate till all other components of the annual Invoice are finalised. In order to finalise the annual Invoice, the following minima are required:

- i. Full payment of Invoices: In the absence of such a situation, at least clear-cut information of payments against Invoices, with particular reference to the specific components of such an Invoice, e.g., when part payments are made, whether payment is made in part or in full of the ROE component of the Invoice to determine the applicable Rate of Exchange for computation of FERV on ROE. It may be highlighted that the Respondent was making payments which did not even cover a month’s VFC. A payment received from the Respondent can be set off against VFC, any of the six components of FCC, FERV on Debt or FERV on ROE.

- (ii) No dispute or confusion relating to any of the parameters required for finalising the annual Invoice.

A look at the Minutes of the Meeting held at the Respondent's office on 22-01-2005 would make it abundantly clear that there were at least 11 issues that required to be addressed and corrected by the Respondent. The last of the issues relating to Capacity thereto was only resolved by the Respondent on 31-05-2006. Sketchy details with errors and inaccuracies were finally provided by the Respondent on 13-04-2007 after constant follow up and over 100 reminders. Hence, the Petitioner could not have raised an annual Invoice as contemplated by the PPA prior to resolution of issues in para 'g' above and receipt of data from the Respondent as detailed in para 'h' above. The annual Invoice submitted to the Respondent on 18-07-2007, takes into account issues finalised under paras 'g & h' above by deleting the claim in respect of the additional capital cost.

**Effect, if any, of delay in submission of annual Invoices :-**

105. There is no time limit prescribed by the PPA for submission of annual Invoice. The PPA only states that the annual Invoice should be raised as soon as possible. The liability of the Respondent to pay Invoices on or by Due Date is an independent obligation cast on the Respondent and cannot be linked to the submission or otherwise of the annual Invoice. The Petitioner cannot gain by delaying submission of an annual Invoice, as it only delays the Due Date for any dues to it under the annual Invoice.

106. If the case of the Respondent were that the annual Invoices were higher than they should have been and the annual Invoice would thus be lowered, it is for the Respondent to first pay in full by Due Date and thereafter raise a dispute. Any excess billing would then be payable by the Petitioner with Late Payment interest. In any event, the Petitioner has based his claim only on the annual Invoices updated for the annual Invoices. Hence, the Respondent cannot be worse off. Therefore, nothing stands on this issue, which is only a bogey raised by the Respondent to deflect from the main issue and is without any merits.

**Disallowances :-**

107. It is evident from the PPA that the Respondent has no right to disallow any amounts from the Invoices submitted to it as it mandates the Respondent to make payment in full by the Due Date and then raise disputes. The correctness of the Invoice would be adjudicated through the Dispute Resolution mechanism. If such resolution results in an excess claim being determined, the Petitioner is bound to refund the same to the Respondent, with interest. Any authority arrogated to itself by the Respondent to unilaterally deduct sums from Invoices is a very slippery slope.

108. The Respondent has merrily and wrongfully arrogated to itself the right to make ad hoc disallowances from the Invoices submitted. It is precisely this unilateral arrogation by the Respondent that has been deprecated by this Hon'ble Commission in D.R.P No.10 of 2008 in the case of GMR Power Corporation Limited Vs. TNEB, where the Hon'ble

Commission has observed *“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.”*

**Capacity Determination:-**

109. Notification of the GOTN under sections 18-A & 44 of the Electricity Supply Act, 1948 was issued for 330.5 MW. The PPA requires the plant to be operated in the frequency range of 47.5 Hz to 51 Hz. Hence, the tender document inviting international competitive bidding provided for a capacity of 330.5 MW as per the approval of the Respondent and GOTN. The manufacturer designed a nameplate capacity of 347.712 MW to enable the plant to operate as per the approval at 330.5 MW under various operating conditions of the grid, including at site conditions. Some of the parameters were:

Ambient temperature - 31.67 deg C

Relative humidity - 60%

Seawater temperature - 28 deg C

Frequency 50 Hz

**110 Acceptance Test:-**

- i. As per the PPA, the acceptance test has to be certified by an independent engineer approved by the Respondent. National Thermal Power Corporation (NTPC) was the independent engineer approved by the Respondent for the two acceptance tests conducted by the Petitioner.
- ii. The first acceptance test was done from 23-4-2001 to 26-4-2001. Hourly readings for 72 hours were taken.
- iii. The Respondent in July 2001, notified the acceptance of Commercial Operation Date with a Capacity of 321.45 MW, being the minimum Capacity achieved during the Acceptance Test.
- iv. The PPA provides for 15 acceptance tests within a period of 24 months from COD to prove the Capacity.
- v. The revised acceptance test was done from 18-11-2002 to 21-11-2002 and capacities certified by NTPC and the Respondent were:

Minimum Capacity	336.769 MW
Maximum Capacity	348.129 MW
Average Capacity	336.769 MW

- vi. The Respondent in its letter dated 9-12-2002 informed the Petitioner of acceptance of 330.5 MW as the Capacity as per Article 2.3 of the PPA and sought confirmation from the Petitioner. It may be noted that the Capacity determined by the Respondent is less than even the minimum Capacity achieved during the revised Acceptance Test. This is due to the provision of the PPA that if the Capacity achieved were less than 105% of the Capacity (being 330.5 MW), no adjustment to the Capacity

would be made. If it were more than 105%, the Capacity would be restated and if the Capacity is less than 95%, the plant would be rejected (Article 2.3 of the PPA).

vii. The letter of acceptance sent to the Respondent dated 16-12-2002 captures the essence of this, by confirming the Capacity as 330.5 MW and informed the Respondent that FCC claims would be revised as follows:

(i) From COD till 21-11-2002 – Tested Capacity- 321 MW (Capacity- 330.5 MW). From 21-11-2002 – Tested Capacity and the Capacity - 330.5 MW.

(ii) Accordingly, the Petitioner was computing FCC on the basis of adjusted capital cost as 321/330.5 from COD till 21-11-2002 and as 330.5/330.5 from 21-11-2002.

(iii) The Respondent, however merrily computed adjusted capital cost as follows without even informing the company:

From COD to 22-11-2002 : 321/347.712

From 22-11-2002 : 330.5/347.712

(iv) Only during discussion in January 2005, for the first time, the Respondent mentioned the above computation and the Petitioner categorically rejected the same (Minutes of the meeting held on 22-01-2005). The Respondent, in communication dated 31-05-2006, approved as follows:

- The Capacity of the plant is 330.5 MW and this would be the capacity for despatch.

(v) The capital cost and the FCC would be on the basis of capital cost as given below:

- From COD till 21-11-2002: 336.299/347.712
- From 21-11-2002 onwards: 343.969/347.712

(vi) In order to close this issue, the Petitioner compromised by agreeing for the same (the disallowance being just about 1%).

To state that:

- The Respondent permitted the Petitioner to conduct an acceptance test in 2005 is factually incorrect.
- The statement by the Respondent's counsel that he does not understand how the Respondent permitted another acceptance is also mischievous and fraught with mala fides.

viii. The Petitioner had the right for revised test upto 15 times and the revised acceptance test was done in November 2002 accordingly.

ix. The Respondent had unauthorisedly withheld payments relating to capital cost and Capacity and without notice of such withholding, as in the case of all other arbitrary deductions. This is also evident from para II of the Respondent's communication dated 31-05-2006, which states, "The capacity charge was hitherto regulated ..."

x. The Respondent's letter dated 31-05-2006 communicating the capacity approval for the two periods from 26-4-2001 to 21-11-2002 and from 21-11-2002 onwards was with retrospective effect. The Respondent during the course of the hearing, as an afterthought, alleged that the Petitioner had been raising Invoices for higher capacity from

26-4-2001 until 31<sup>st</sup> March 2007 resulting in excess billing. It may be recalled that the Petitioner had communicated vide letter dated 16-12-2002 (Annexure 6 - Page No.48 of this submissions.) to the Respondent the capacities used in the monthly billing which was never contested by the Respondent ever. Further, the Petitioner, soon after receiving the letter dated 31-05-2006 approving the revised capacity, corrected the monthly Invoices upto March 2007 at the next available opportunity as part of annual Invoices submitted upto 2006-07.

- xi. The Respondent's letter dated 31-05-2006 approving the revised capacity clearly established the fact that whatever the Respondent has been disallowing in the monthly Invoices during the period upto 31-03-2007 were erroneous.

**Moving Capital Cost:-**

111. Movement of Capital Cost (actuals) for Tariff purposes since inception and reasons therefor. The Capital cost for the year 2001-02 was Rs.1386 crores. The Capital cost revised to Rs.1452 crores for the year 2002-03, to include additional capital cost claim of Rs.66 crores towards Gas Boosting and Compressing Station (GBCS) under the head "Approved Modifications" (awaiting approval from the Respondent). The Petitioner secured low-pressure gas from Onshore Cauvery fields from the Ministry of Petroleum & Natural Gas ("MoPNG") on fall back basis, to reduce cost of generation for the Respondent. The Respondent and the GOTN had recommended to the MoPNG that the gas from the onshore Cauvery fields be allocated to the Petitioner. To utilise such low pressure Gas, the Petitioner

had to set up GBCS at a cost of Rs.66 crores. This was not originally envisaged as the project had anticipated receipt of Gas from PY-1 (an Offshore Cauvery Gas field from which gas supplies were originally expected and from which gas supplies have commenced only in end-Nov 2009) at the required pressure. In the background of the recommendation to the MoPNG by the Respondent and the GOTN and the fact that the lower cost of fuel would benefit only the Respondent and not the Petitioner, the Petitioner had bona fide included the cost of the GBCS in the Capital Cost. The Capital cost was revised to Rs.1379.25 crores from Rs.1452 crores from 2006-07, as well as in the annual Invoices from 2001-02 to 2006-07, excluding the claim of Rs.66 crores for Approved Modifications, which awaits the Respondent's approval, pursuant to the Respondent's communication dated 17-12-2005. Whilst the only beneficiary of this investment was the Respondent, the Petitioner additionally suffered significantly on account of auxiliary consumption by the GBCS, which took the auxiliary consumption to well over the 3% norm for reimbursement. Thus, the Petitioner not only lost on account of FCC not being paid on the GBCS capital cost, but also lost on the excess auxiliary consumption. Incidentally, the savings to the Respondent on account of usage of gas from 2002-03 to 2008-09 aggregates Rs.535.16 crores as in the table below, after considering the gas transmission charges. Clearly, this is a case of unjust and undue enrichment by the Respondent to the detriment of the Petitioner.

<b>S No</b>	<b>Financial Year</b>	<b>Savings (Rs. Crores)</b>
1	2002-03	72.55
2	2003-04	56.96
3	2006-07	89.44

4	2007-08	285.97
5	2008-09	21.27
6	2009-10 *	8.97
	<b>Total</b>	<b>535.16</b>

\* Limited to the period of low-pressure gas supplies when GBCS was operated

112. Gas was received on “fall back” basis by the Petitioner. Gas was received from 2006-07 on account of the plant of the Respondent not operating. During this period, the Respondent was obliged to make payment under the “Take or Pay” clause, to GAIL (India) Limited, the gas supplier, under their gas supply contract. On account of the Petitioner having utilised such gas, the Respondent was relieved of its obligations to make such “Take or Pay” payments, effecting further savings of significant sums of money for the Respondent. The above savings in the VFC by the Respondent, which constitutes undue and unjust enrichment, is entirely to the detriment of the Petitioner. This establishes the mindset and mala fides of the Respondent. It may be noted that the entire claim (since COD) under this petition is based on Rs.1379.25 crores. Hence, the moving capital cost values stated in the counter of the Respondent is irrelevant for the purposes of this petition.

**Interest on Debt (IOD) :-**

113. In the Running bill analysis statement submitted to the Hon’ble Commission on 03-03-2010 by the Respondent, the disallowances under Fixed Cost (Due to IOD) are stated as under:

<b>Financial Year</b>	<b>Rs. crores</b>
2006-07	6.14
2007-08	0.18
2008-09	2.93

*No basis was provided by the Respondent for such disallowances in the Running bill analysis statement. The Respondent never communicated to the Petitioner the amounts or the basis of disallowance. Also, the disallowance is not within the right of the Respondent to do so.* In paragraph 12 of the Respondent's Counter dated 21-07-2009, the Respondent covers disallowances towards Interest on Debt for the years 2001-02 to 2005-06, on account of interest rate reductions, as well as undrawn portions of loans. No deduction on account of IOD account is evidenced in the Running bill analysis statement for the period 2001-02 to 2005-06 submitted to the Hon'ble Commission by the Respondent. For the year 2001-02, FCC estimates were submitted based on anticipated drawal of loans during the year. However, drawals were not as anticipated and actual interest paid at the end of the year was lower. This could only be adjusted through an annual Invoice in terms of the provisions of the PPA. Claims were made from 2002-03 on the basis of a Capital Cost which included the GBCS. However, no deduction on this account is reflected in the Respondent's statement for the period. In any event, this claim was given up later by the Petitioner and the annual Invoice addresses this issue. Importantly, the Respondent continues to deduct "IOD" during 2006-07 thru 2008-09, although there is no such claim by the Respondent in para 12 of the Counter dated 21-07-2001. It is possible that 2008-09 relates only to Industrial Investment Bank of India ("IIBI"). There is no denial by the Respondent of the Petitioner's rejoinder to the Respondent's Counter in respect of revised FCC claim being submitted. The

Petitioner denied the allegations in its rejoinder and quoted the relevant provisions of the PPA in para 26 justifying the Petitioner's position. The Petitioner's rejoinder also provided the cases where interest rates have gone up during the year and where claims were not made mid-year and only made in the annual Invoice. The Respondent admits that it had disallowed interest on loans where interest rates had been lowered during the course of the year. However, when interest rates went up during the year, the Respondent did not reckon such increases, a clear testimony to the mala fide intentions and mindset of the Respondent. It is another matter that the Respondent had no right or authority under the PPA to disallow any sums from the Invoices submitted. The Respondent in its Counter dated 21-07-2009, stated that IIBI loan (high cost debt) was swapped, but the Petitioner continued to claim at higher interest rate and that the Respondent had written to the Petitioner on 27-03-2008 itself to revise the interest claim. The Respondent stated in its counter that the Petitioner replied in its letter dated 03-04-2008 that "... *The IIBI loan swap occurred subsequent to the filing of the FCC in February 29, 2008 and as such has to be deleted ...*". The words "and as such has to be deleted" have been added by the Respondent in the said letter to mislead this Commission, thus illegally and objectionably tampering with the communication sent in by the Petitioner. These inserted words by the Respondent are apparently the basis of the right to disallow portions of the Invoice. This is a deliberate misstatement with intent to mislead this Commission. The FCC estimates had been submitted on 28-02-2008 and there is no provision in the PPA to revise the FCC estimates during the year. The annual Invoice would make the final claim of IOD for settlement. These

have been stated specifically in the Petitioner's response dated 03-04-2008. Apart from IOD, several other claims are also made, such as FERV on ROE, Operation and Maintenance (O&M) claim and other components of FCC could also vary. All these are only settled through the annual Invoice. Importantly, the Respondent admits this position in Para 21 of its reply to the Petitioner's rejoinder.

**Retention of 15 paise per kWh:-**

114. This arrangement of deduction of Rs.0.15 per kWh was for a short period, from 12-06-2001 to 04-09-2003, at the specific verbal request of the Respondent during discussions. In fact, first payment was received after COD, only when such a letter was issued. The letter submitted by the Petitioner only states that "... *As suggested by you, you may withhold Rs. 0.15 per kWh, pending approval of the Capital Cost of the project by Central Electricity Authority. The amounts withheld would be provisional and subject to adjustment/payment by TNEB, in terms of the provisions of the PPA, upon approval of the Capital Cost...*" Clearly, the Petitioner had not given any concessions in relation to either the 2.5% (or 1% as the case may be) reduction from the Invoice for such a withholding by the Respondent, nor its right to receive interest on such a sum under Article 10.6 of the PPA. All these actions did was to ensure that such withholding did not result in a Respondent's Event of Default for non-payment of Rs. 0.15 per kWh during the period from 12-6-2001 to 4-9-2003. Accordingly, application by the Petitioner of Dispute Resolution mechanism would stand in abeyance to this extent for the limited period referred herein. The Respondent did not even pay the balance due after adjustment of Rs.0.15 kWh. The Respondent

in its letter dated 17-12-2005 had clarified that the completed capital cost is Rs.1379.25 crores and in letter dated 29-07-2006 informed that the Respondent would continue to pay FCC payment in the Monthly Tariff Invoices as had been done hitherto without any change, pending finalisation of capital cost. Annual Invoices submitted in July 2007 is based on the capital cost of Rs.1379.25 crores as adjusted for Capacity, pursuant to the Respondent's communication dated 31-05-2006. The plea of right to deduct Rs.0.15 per kWh is only an afterthought and does not find part of Respondent's pleadings, clearly predicated by their conviction that such a right does not subsist for the reasons provided below:

115. The Respondent on its own released the entire 15 paise retention on 19-9-2003. Thus, Respondent gave up its right to deduct 15 paise per kWh thereafter and so there was no occasion for the Petitioner to withdraw the authorisation to deduct 15 paise per kWh. Hence, the Respondent cannot seek to deduct 15 paise thereafter without any confirmation from or intimation to the Petitioner.

116. After having paid Rs.55.60 crores withheld by it, the Respondent cannot thereafter unilaterally seek to recover the payment at its whims and fancies nor state that they had not given up that right after making the Petitioner believe by their communication that they had indeed forsaken that right by refunding retention on that account.

117. The Respondent's Running bill analysis statement itself shows that the 15 paise retention ended from December 2004, which conflicts with the release made in September 2003. The release of the 15 paise retention in September 2003, and in any event, the admission

of the Respondent that the same ended in December 2004, is a clear voluntary relinquishment of the Respondent's right to the 15 paise retention and hence this right ceased to subsist from the said dates.

118. The Respondent has found every excuse not to finalise the Capital Cost as this is self-serving. As per the PPA, the Petitioner has to submit the Capital Cost (actuals) within 3 months of COD, which was done. The Respondent could choose not to finalise the Capital Cost forever. In fact, the Petitioner filed a Writ of Mandamus before the Hon'ble High Court of Madras in October 2007, specifically seeking a direction to the Respondent to finalise the Capital Cost forthwith. The Hon'ble TNERC informed the Petitioner in May 2008 that the Respondent had filed a petition before them for finalisation of capital cost - clearly a consequence of the Petitioner's Writ of Mandamus. Hence, in the event that the Respondent had requested Petitioner to consent to deduct 15 paise per kWh beyond September 2003, the Petitioner would certainly have refused to provide its consent again.

119. The Respondent wrongly averred that payments made were in excess of the value of Invoice less 15 paise retention. The futility of this argument is clearly seen from the statement submitted by the Respondent, where the disallowances exceeded the so called right to retain 15 paise per kWh, as tabulated below:

Period	Cases where disallowance exceeded the so called right of retain 15 paise per kWh
COD to year 2004-05	All Invoices
2005-2006 (being the first year of full payment according to the Respondent)	All Invoices except Invoice dated 13.6.2005

2006-2007	Six instances wherein the disallowance is more than the 15 paise
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This submission is without prejudice to the Petitioner's contentions that no rebate is allowable even relating to Invoices covered by the table above.

120. The Respondent vide its letter dated 29-07-2006 confirmed that *"TNEB would continue to pay FCC payment to you in the monthly tariff invoices as has been done hitherto without any change as requested by you, pending finalisation of capital cost."* This is a clear admission of the Respondent that he has no right to retain 15 paise per kWh.

121. The Respondent has omitted several Invoices fully without any reasons upto 31-03-2007 in the statement submitted during arguments before this Commission. Apparently, the Respondent omitted these Invoices, as it had no defence on the 15 paise retention front in these cases.

122. Incidentally, some of the omitted Invoices relate to FERV. Whilst credit notes given for FERV have been promptly set off by the Respondent, some of the claims raised have been disallowed / omitted. This clearly establishes the Respondent's mala fides. The Petitioner is setting out the same in the table below:

<b>Claims of the Petitioner completely missing in the Respondent's Running Bill Analysis Statement</b>		
<b>Invoice No. &amp; Date</b>	<b>Invoice Amount</b>	<b>Description</b>
011/2001-2002 dated 02-01-2002	19,349,592	FERV Invoice
016/2001-2002 dated 15-03-2002	26,974,649	FERV Invoice
003/2002-2003 dated 26-04-2002	16,479,402	Incentive

009/2002-2003 dated 07-10-2002	29,710,973	FERV Invoice
002/2003-2004 dated 13-05-2003	324,634,170	Regular Invoice
010/2004-2005 dated 24-11-2004	14,779,656	FERV Invoice
009/2006-2007 dated 11-09-2006	15,909,165	FERV Invoice
018/2006-2007 dated 07-03-2007	2,624,663	FERV Invoice
<b>Total</b>	<b>450,462,270</b>	

123. The feeble attempt of the Respondent as an afterthought to now state that Rs.0.15 deduction per unit would tantamount to Rs.189 crores and hence no interest is payable, fails on the following counts:

- (a) The Petitioner's letter PPN/TNEB/161 dated 12-06-2001, clearly stated that the withholding of Rs.0.15 per kWh is subject to the terms of the provisions of the PPA. Hence, Late Payment interest would certainly apply even to these deductions.
- (b) When specifically queried by the Commission as to what period this amount of Rs.189 crores withheld under the category "right to retain at Rs.0.15 per unit" pertains to, the Counsel for the Respondent admitted that this was from COD till Invoice dated 13-01-2010. It should be noted that the claim under the petition is only in respect of Invoices submitted till 19-03-2009. Hence, even on this count, it is clearly established that this claim is only an afterthought to tie into the overdue claim of the Petitioner of Rs.189 crores.
- (c) By this averment, the Respondent admits that it has withheld Rs.189 crores from Invoices raised. Hence, the Respondent may be directed to

pay this amount forthwith, alongwith Late Payment interest in terms of Article 10.6 of the PPA.

**Determination of Capital Cost: -**

124. This claim of the Respondent only contradicts its position elsewhere in the counter and arguments that there has been a delay in the submission of the annual Invoices. The Respondent has never once raised a dispute on the submission of the annual Invoice and hence, this is clearly an afterthought. Upon the finalisation of the Capital Cost, the differential amounts would be settled as an adjustment through a credit or a debit note. Therefore, the above, the Respondent's position that Invoices are not final and they are only provisional is untenable.

**Deductions and disallowances:-**

125. Since inception, only about half a dozen cheques had been collected by the Vice President (Technical) of the Petitioner and all other cheques were collected by Accounts Department staff of the Petitioner. The Petitioner's staff of the accounts department collects payment cheques from the office of the Respondent and signs the register maintained by the Respondent. If the Respondent produces the register of payments acknowledgment, the falsehood of this statement would be exposed. The Petitioner was never provided with any details of deduction made by the Respondent. The Petitioner's accounts department personnel were handed over cheques upon signing the register maintained by the Respondent. Invariably, cheques are handed over very late in the evening,

well after office hours. Invariably, only the signatories in the payment section would be available for signing and handing over the cheque. Neither the signatories of the cheques nor the personnel collecting the cheques understood anything about the provisions of the PPA under which the Invoices were raised by the Petitioner. Hence, the question of details of deductions being made available to the Petitioner does not arise. It is being suggested that the Petitioner was fully aware of the deductions. The falsity of the allegation is clearly established in view of the letter of the Respondent to the Petitioner dated 05-04-2004 stating that the Petitioner may depute personnel to note down the necessary details for reconciliation of accounts, to which the Petitioner replied on 08-04-2004, expressing its inability to do so for reasons adduced therein and once again requesting the Respondent to provide the details. Hence, this is yet another false claim of the Respondent with deliberate intent to mislead the Hon'ble Commission. The Petitioner has filed an affidavit specifically denying the claim of the Respondent and a reading of the said affidavit would reveal the absurdity and falsity of the Respondent's claim in this regard.

**INTEREST ON LATE PAYMENTS:-**

126. Article 10.6 of the PPA provides that "*Late Payments shall bear interest accrued from the Due Date they became overdue at a rate equal to the rate charged from time to time on cash credits extended to the Party to whom such payment is due plus one half percent (0.5%) per annum, to the extent permitted by law or if such facilities are not available at the cash credit rate offered by State Bank of India for comparable Independent power producers plus one half percent (0.5%).*" The claim in the

petition is based on the annual Invoices updated for the annual Invoices. Strictly going by the terms of the PPA, interest should have been computed on the basis of the monthly Invoices. However, in the interest of equity, as a one-time measure, without precedent and without prejudice, the Petitioner is staking its interest claim on the basis of monthly Invoices upto March 19, 2009 updated for annual Invoices. For the sake of convenience, the following statements have been filed:

- (a) Late Payment interest upto 26-07-2010 strictly as per the terms of the PPA for Invoices raised up to March 19, 2009 ;
- (b) Late Payment Interest upto 26-07-2010 as suggested in para 13.ii above for Invoices raised up to March 19, 2009 ; and
- (c) Late Payment Interest upto 26-07-2010 on Invoices raised post March 19, 2009 till 26-07-2010, to facilitate the determination of Late Payment Interest for the period beyond March 19, 2009, which forms the second part of our prayer.

**Continuing hearing – Quorum :-**

127. At the final hearing held on 01-07-2010 and 02-07-2010 for replies by the Petitioner to the Respondent's arguments that concluded on 10-03-2010, the Petitioner mentioned on 01-07-2010 that one member who had heard the arguments of both sides till 10-03-2010 had since demitted office and the hearing on 01-07-2010 was continued before the remaining two members, who continued to constitute quorum under the TNERC. The counsel for the Respondent stated that he had no objection to the Petitioner's above proposal. On 02-07-2010, when the hearing was continued, counsel for the Respondent relied upon the judgment of the

Hon'ble Supreme Court in *UOI Vs. R.Gandhi*, in relation to the National Company Law Tribunal to contend that a judicial member was a pre-requisite. However he conceded that the provisions under the two enactments were different and that the constitution of a tribunal could not, in law, be raised before that very tribunal.

**Revision of FCC estimates after Capacity determination :-**

128. This is another feeble defence put up by the Respondent to deflect attention from the main issue. The Respondent's plea appears to be that on account of the FCC revision not having been made by the Petitioner, it had the right to disallow such excess and make payment of only the allowed amounts. This plea fails at the threshold, as the Respondent cannot arrogate to himself such a right. His only right under the PPA, as has been stated elsewhere is to first pay the Invoice in full by Due Date and then raise a dispute. If the dispute resolution results in the Petitioner having to refund any sums, such refund would be along with penal interest. Hence, taking law into its own hands and disallowing sums from Invoices submitted at its whim is just not permitted by the PPA. The Petitioner had been under the impression that the FCC cannot be revised during the year and any adjustments could only be through an annual Invoice. The PPA provides that the FCC estimates have to be submitted by the Petitioner 30 days prior to the commencement of a financial Year. The Respondent, for the first time wrote to the Petitioner seeking the revision only on 29-01-2007. Importantly, this was a routine request of the Respondent as in the case of revisions that they had sought mid-year for interest reduction, etc and not with reference to any of the provisions of the PPA. The Petitioner responded on 02-02-2007

stating, inter alia, “....PPA provides for submission of an annual invoice and reconciliation at the end of each year. There is no provision for revising the FCC otherwise. In this connection we invite your attention to various communications and reminders numbering over eighty five (at the last count) seeking details for remittances made by TNEB since COD.” The Respondent never raised a dispute thereafter in the matter. In any event, the entire claim under the petition is on the basis of the annual Invoices and not on the annual Invoices. Hence, nothing stands on this issue.

**Contention of the Respondent :-**

**Contention of the Respondent in the counter affidavit and additional counter affidavit :-**

129. The relief claimed in the I.A. as well as in the main petition being one and the same the interim relief cannot be granted.

130. Finalization of capital cost in respect of the Petitioner’s generation station is still pending disposal before the Commission. The fixed cost components are bound to vary depending upon the fixation of the capital cost by the Commission. Hence the claims made by the Petitioner through invoice under various heads are not final and conclusive. Therefore the question of entertaining the claim of the Petitioner does not arise for consideration.

131. Article 16.1 of PPA contemplates an informal dispute resolution between the parties in the first instance and Article 16.2 contemplates arbitration only when the informal dispute resolution fails.

Most of the claims made by the Petitioner are time-barred and they are not in accordance with the PPA dated 03-01-1997.

132. Interest charges on two months receivables loaded upfront in the tariff is being returned in the form of rebate if payment is released within five business days and at 1% if the payment is released within 30 days and belated payment surcharge is levied if payment is made after 60 days. The rebate availed by TNEB is on the allotted amount and not on the bill amount which clearly indicates that the amount already built in the tariff upfront is only recovered as they are not eligible for the same if payment is made within five business days.

133. The concept of stabilization period and allowing further liberalized norms has been withdrawn. As such the one time reduction of 2.5% rebate on the infirm energy charges does not put the generator at a loss and is not a major issue as projected by the Petitioner.

134. Letter dated 23-04-2007 of the TNEB would establish that TNEB had furnished details of disallowed / withheld amounts to the Petitioner. The details of the disallowed amount are always informed to the company only as and when the company evinced interest in knowing the details.

135. The annual invoices for the period from 2001–02 to 2006–07 totalling Rs.4043,99,22,474/- were sent by the Petitioner belatedly only on 18-07-2007.

136. The Petitioner had been claiming excess interest on the debt for the period from the COD – Operation i.e. from 26-4-2001 to 2005-06 on the Loan drawn from LIC II in their Tariff Invoice. Up to

the year 2005–06 the company also claimed interest for the Loans which were not actually drawn amounting to Rs.28.99 crores was recovered from the payment of their Invoice for the energy supplied to TNEB during September 2005. This issue came to the light at the time of resetting of high cost loan. Even after the swapping of loans by obtaining fresh loans from the Bank of India, the existing loans such as loans availed from the Indian Bank, HDFC Bank, ING Vysya Bank, Canara Bank with a higher rate of interest was shown in the regular monthly invoices.

137. In letter dated 29-01-2007, the Petitioner was requested to furnish the revised FCC for the revised Capacity.

138. The time limit of one year as per Article 10.2 ( e ) cannot be applied for the claims of the Petitioner as the same were not made with complete details. The time limit of one year will not be applicable for improper claims. The Respondent board in its letter dated 22-08-2005 has requested the Petitioner to submit the annual invoices for the period from 2001–2002 to 2004–2005 as per Article 10.2 (b) (ii) even before re-setting of the plant capacity. But the Petitioner has not submitted the annual invoices from the first tariff year 2001–02 to 2006–07. Hence there is no justification to blame the Respondent for not furnishing details. The Respondent board addressed the Petitioner to come for reconciliation of the amounts so as to arrive at a consensus on various issues with an objective of resolving the same.

139. A sum of Rs.31.12 crores receivable from the Petitioner, has been arrived at by the board as per the provisions of PPA. The Board availed rebate on the payments made by it as per PPA which

contemplates release of full payment if the amount claimed is in conformity with PPA.

140. The letter dated 27-7-2004 issued by the Board is only with reference to the letter dated 12-7-2004 of the Petitioner requesting the Board to issue such a declaration in order to avoid arbitration proceedings by the minority share holders of the Petitioner. The letter issued is only limited to the settlement of the issues pertaining to the minority shareholders and it is not a blanket letter for all the future payments since the Petitioner has been in the habit of making excessive and unreasonable claims from time to time.

141. The Petitioner vide its letter dated 12-6-2001 addressed to Chief Financial Controller / TNEB has conveyed its acceptance to withhold Rs.0.15 per kWhr, provisionally pending approval of the Capital Cost of the Project by the Central Electricity Authority and further stated that the Capital Cost is yet to be finalized and therefore the amounts withheld would be provisional and subject to adjustment/payment by TNEB in terms of the provisions of PPA upon approval of the Capital Cost.

142. The admitted amount with respect to the monthly invoices as per cycle is arrived at after deduction the (i) Rs.0.15 per unit due to non-finalization of the capital cost (ii) amount towards cost of energy drawn from TNEB grid; and (iii) cost of consumption in quarters. The disallowances in respect of the Capacity admission were made from the COD to 2006–07. The company was claiming full Fixed Capacity Charges from the date of Commercial Operation to 2006–07 even though the capacity during

performance test was proved to be less than the contracted capacity viz., 321.45 MW as against 330.5 MW.

143. The company avails supply for the quarters through the unit transformer of the station and indicating the consumption in quarters separately. As consumption in quarters does not form part of auxiliary consumption in the normal parlance, this Respondent deducts the charges for this consumption from the gross generation measured at generator terminals.

144. The fixed charges payable was revised during 2006–07 based on a ratio of 336.299/347.712 MW from the date of Commercial Operation to 21-11-2002 and at 343.969 / 347.712 MW from 21-11-2002 onwards.

145. The excess claim towards Interest on Debt, Gas Cost, excess auxiliary consumption and for the difference in the PLF as per the Respondent and the Petitioner were disallowed and the balance amount paid.

146. The Petitioner's claim of Rs.178.72 crores does not arise since the payment made by TNEB was adjusted in FIFO basis i.e. adjusting the payment received from the Respondent against the claim made by the Petitioner which includes the excess claim during the respective period due to which the payment made by TNEB would not match the claim made by the Petitioner. Upon submission of the Annual Invoices by the Petitioner, the Respondent has finalized the claim of the Annual Invoices and only few issues such as the interest rate to be adopted for working capital, the dispute in respect of calculation of auxiliary consumption etc., are under

dispute and as of today the Respondent has to recover an amount of Rs.31.12 crores from the Petitioner which the Respondent has not done till date and have requested the Petitioner vide its letter dated 25-5-2009 to come for a Joint Reconciliation and for a meeting so that the disputed items can be resolved. Had the Petitioner made its claim in the tariff invoice without any excess claim, then the Respondent board would have admitted the bills in full and made the payment also in full after deducting the rebate at 2.5%. The Interlocutory Application No.13 of 2009 is barred by Limitation. The Respondent has already filed a detailed counter in the main petition. The Petitioner is not entitled to seek amendment under the pretext of errors so as to amend para no.20 of the main petition and the prayer in the main petition.

**Contention of the Respondent in written submission:-**

**Jurisdiction :-**

147. The jurisdiction of the Commission to entertain this dispute is being asserted by the claimant under Section 86 (1) (f) of the Electricity Act, 2003 as interpreted by the Hon'ble Supreme Court in the case of Gujarat Urja Vikas Nigam Limited -Vs- Essar Power Limited. Section 86 (1) (f) of the Electricity Act, 2003 deals with the functions of the State Commission and includes "adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration". In the case of Gujarat Urja Vikas Nigam Limited -Vs- Essar Power Limited, the Hon'ble Supreme Court was concerned with whether the order and judgment of the Gujarat High Court dated 15-06-2006 appointing an Arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 to resolve a dispute between Board and Essar Group regarding the allocation of the generated

electricity. The Board took up the matter to the Hon'ble Supreme Court and contended that all disputes between licensee (Board) and Generating Company fell within the exclusive jurisdiction of the Commission and neither the High Court nor the Supreme Court can appoint an Arbitrator under Sec.11. This contention was accepted and while so doing at para-27, the Hon'ble Supreme Court had ruled that the word "and" between the words "generating companies" and the words "refer any dispute" means "or" otherwise it would lead an anomalous situation because Commission cannot both decide the dispute itself and also refer it to Arbitration. Having so held, the Apex Court finally ruled at paras 60 and 61 that it is either the Commission which will itself decide the dispute or an Arbitrator appointed by the Commission.

148. The Apex Court further ruled that as regards to the procedure to be followed by the State Commission (or the Arbitrator nominated by it) and other matters in relation to Arbitration (other than the appointments of Arbitrator), the Arbitration and Conciliation Act, 1996 will apply (except if there is a conflicting provision in the Electricity Act, 2003).

149. This is a fit case where the matter ought to have been referred by the Commission to Arbitration, an expert body comprising of persons well versed in law and accountancy since the dispute is purely of a civil nature involving reconciliation of accounts with only a remote and indirect implication from the technical side.

150. The present dispute primarily raises highly complex legal questions involving limitation, contract law, accounting principles as well as legal interpretation of the clauses contained in the Power

Purchase Agreement dated: 03-01-1997. The Supreme Court contemplated in Para-31 of the above judgment that there may be certain disputes involving highly “technical” point which the State Commission may not have the expertise and in such an event, it ought to refer the same to the expert. This is a fit case falling within the examples given above. Quite apart from the overburdened work of the Commission which is primarily intended for deciding the tariff related issues including finalization of Capital Cost of Independent Power Producers which are pending even in respect of the present claimant, if the Capital Cost fixation is taken up, dispute such as the present one involving reconciliation of accounts, will not even arise.

151. The above submission of the Board ought to have found the acceptance of the Commission as otherwise Section 86 (1) (f) of the Electricity Act, 2003 is itself likely to be held unconstitutional in view of the latest judgment of the Constitution Bench of the Supreme Court of India in the case of Union of India – Vs- R. Gandhi, President, Madras Bar Association reported in 2010 (3) CTC 517. In the aforesaid case, the Constitutional Bench of the Supreme Court declared Parts (1) (b) and 1 (c) of the Companies (Second Amendment) Act, 2002 to be unconstitutional. By the impugned amendment Act, the entire power of deciding of disputes relating to companies was sought to be transferred to a National Company Law Tribunal and National Company Law Appellate Tribunal. The challenge to the Legislation was that the qualification prescribed for the membership of the Tribunal did not include any person with sufficient judicial experience. The Hon'ble Constitution Bench of the Apex Court has held that since the judiciary's role (Civil Court) is sought to be excluded by a substituted body,

such a tribunal if it ousts the existing jurisdiction of courts should also be a judicial tribunal having members of the rank, status and capacity of the court which it supplants. At Para 49, the Supreme Court has expressly ruled that when civil court's jurisdiction is being ousted, it cannot be done by allowing administrative authorities to do the judicial work. The Apex Court recognized the important role played by the Administrative Members / Technical Members drawn from the services, but mandatorily the present rank or qualification of a Judge of the High Court etc, ought to be engaged in such judicial work. Accordingly, Parts (1) (b) and 1 (c) of the Amended Act was declared as unconstitutional.

152. Somewhat in line with the conclusions arrived at by the Constitutional Bench of the Supreme Court in the case of Union of India Vs. R Gandhi, President, Madras Bar Association, referred above with regard to the need to have a judicial adjudication of disputes particularly where the jurisdiction of courts are being ousted, the apex court has recently in yet another case reported in N Radhakrishnan v Maestro Engineer reported in 2010 Volume 1 SCC 72 held that even in cases where there is an arbitration clause for reference of disputes, relegation of matters to be dealt with by a civil court is not ruled out. Indeed the apex court held that even where parties had agreed for arbitration, if the disputes raised therein involved complex issues requiring detailed investigation and production of elaborate evidence, it would be open for the arbitrators to refer the parties to agitate the matter before a civil court. In the instant case, since the matter involves elaborate evidence (both documentary and oral) as well as interpretation of intricate points of law, following the above dictum, the parties

ought to be referred to a civil court despite the provision for arbitration or at best an arbitration of legal experts as elaborated earlier.

**Limitation, Delay and laches; and inapplicability of FIFO :-**

153. The supreme court itself indicated in Gujarat Urja at Para 61 that Section 86(1) (f) is only restricted to the authority which is to adjudicate or arbitrate and that “procedural and other matters relating to such proceedings will of course be governed by the Arbitration and Conciliation Act, 1996, unless there is a conflicting provision in the Act of 2003. There is nothing conflicting in the Act of 2003 with the Arbitration and Conciliation Act, 1996 particularly with reference to Limitation. In this regard, the non reference to any period of limitation in Act of 2003 is not a conflict with the Arbitration and conciliation Act, 1996 or Limitation Act. The Apex Court in the case of Kishorebhai Khamanachand Vs State of Gujarat, AIR 2004 SC 1006, has laid down the criteria as to what constitutes conflict of laws.

154. With reference to the above, it may be stated that for the field of supply and distribution of electricity and related issues, the Act of 2003 is the special act and all other laws will be general. For the purpose of limitation, the Limitation Act is the special act and unless there is something repugnant in the Act of 2003, the law of limitation shall apply.

155. The Supreme Court has repeatedly held that even if no limitation is prescribed in a special statute, reasonable time has to be implied for all actions. The Apex Court has laid down the said principle in 1992 1 SCC 355 and in (2007) 5 CTC 392.

156. One of the contentions urged by the claimant is that the Hon'ble Commission is a quasi judicial authority and hence no period of limitation is prescribed. In this regard, it is submitted that whether the Hon'ble Commission is a quasi judicial authority when acting under Section 86(1)(f) adjudicating disputes between two parties is itself a moot question. Going by the observations in Gujarat Urja referred supra, the Commission may actually be an adjudicator/arbitrator and not a quasi judicial authority. At any event, assuming without admitting that the Commission is one, as referred above, reasonable time will have to be inferred even when its jurisdiction is invoked.

157. The plea of the claimant is that there has been acknowledgment of debt by the Board and that accordingly the claim is not barred by limitation is already legally and factually unsustainable. Factually, the first letter relied upon by the claimant viz., the letters dated 10-9-2001 can at best extend the limitation period till 9-9-2004. The second letter dated 27-7-2004 is not an acknowledgment of any debt at all. Indeed, the said letter expressly states that it is issued without prejudice to Board's rights. Even otherwise, the said letter can at best push the period of limitation to 26-7-2007, whereas the claim has been lodged only in May, 2009. Consequently viewed from any stand point of view, claims anterior to May, 2006 stand extinguished and this Commission can only look into invoices after that date assuming that the 3 year limitation under Article 15 which provides for insisting recovery proceedings within 3 years for the recovery of price goods sold.

158. The claim is barred by law of limitation since a suit for recovery of money under Section 3 is liable to be dismissed if instituted beyond the period of limitation prescribed. The period set out in the Schedule is three years. Article 15 deals with claims for price of goods sold and delivered to be paid after the expiry of a fixed period of credit. The time of three years would lead when the period of credit expires. In the instant case, the claim has been lodged with the Commission in May 2009 and the claim can if at all be restricted only to such bills which fell due after the expiry of credit within three years of the debt which means after 23<sup>rd</sup> May 2006.

159. The Commission is screeched of the Electricity Act, 2003 in view of the Gujarat Urja Vikas Nigam Limited -Vs- Essar Power Limited judgment referred above in the present case acts only as Adjudicator / Arbitrator and under Section 43 of the Arbitration and Conciliation Act, 1996 the Limitation Act, 1963 shall apply to arbitrations as it applies to the proceedings in court. It may be however relevantly stated here that by Sub-Section 4 of Section 2, the Provision of Part I (Sections 2 to Section 43) other than Sections 40, 41 and 43 were made applicable to all arbitrations under any other enactment. The above exception of Section 43 to other statutory arbitrations cannot be taken to be a omnibus bar of limitation. The above provision is provided only because if there is a compulsory arbitration in some other legislation and that legislation provides much own period of limitation, for different period of limitation for making any claims the statutory arbitrator therein would be bound by that period of limitation and not the general law of limitation. In the instant case the Electricity Act, 2003 does not contain any

period of limitation whatsoever. In such a case, the general law of limitation will have to apply which is three years.

160. Assuming without admitting that there is no period of limitation and the Limitation Act is held to be not applicable to the Commission, reasonable time is always the norm in jurisprudence. What is a reasonable period would depend on the facts of that case. In the present instance where the claimant seeks to exclude any right of the Respondent Board to raise and dispute beyond one year, proportionately the Commission should rule that any claims by the licensee against the Board should likewise be fallen within a period of one year. Otherwise inequalities and injustice would be perpetuated.

161. Another reason on the Limitation Act ought to apply to the Commission is because where the parties to the agreement choose to refer the matter to the Arbitrators voluntarily without seeking appointment of Arbitrator by a court under Section 11, it would not amount to statutory arbitration, but only a contractual one. Such an Arbitrator would be bound by limitation under Section 43. Likewise if the Commission refers the dispute to the Arbitrator, he would still be an Arbitrator only Arbitration and Conciliation Act, 1996 according to Gujarat Urja Vikas Nigam Limited and not the statutory Arbitrator. He too would be bound by limitation. The net effect is that the Commission is then given a discretion either to decide the dispute or refer to arbitration and case limitation would apply and not another it would not. This would clearly violate Article 14 and otherwise exactly the contention which was advanced before the Supreme Court in Gujarat Urja Vikas Nigam

Ltd case. Their Lordship at Para 30 of the judgment rejected it by saying that some leave has to be given in such a matter and at Para-31, Their Lordships held that there may be various other considerations for which the Commission may also refer the dispute to other Arbitrator. Such considerations shall have nothing to do with the limitation. Any other interpretation would imply that a time barred claim can be presented before the Commission and if the Commission decides the matter there would be no limitation, but if it refers to Arbitrator, the claim may be dismissed on the ground of limitation.

162. Any other contrary interpretation given either on the jurisdiction or the limitation contentions raised above would also imply that the judgment in Gujrat Urja Vikas Nigam Ltd Vs. Essar Power Ltd itself would require reconsideration and indeed it may be contended that the Constitution Bench who decided the Union of India Vs R. Gandhi's case may be held to have impliedly over ruled the Gujarat Urja Vikas Nigam Lid – Vs- Essar Power Ltd in so far as it is dealt with the interpretation of Section 86 (1) (f) by giving power to a non-judicial forum to substitute a Civil Court.

163. In order to get over the plea of limitation raised by the Respondent Board, the claimants have pleaded that they have applied the principle of FIFO implying that as and when payments have been effected by the Respondent Board they have been applied the same against the earliest debts which became due. Consequently, it has been pleaded that even payments received after 2006 have not been appropriated against the bills for which payments were made but have been appropriated against the older

outstanding. This contention has been raised on the premise that the claimants have the right under Section 60 of the Contract Act, 1872 which deals with appropriation of payments. The above contention is neither factually nor legally sustainable. The applicability of Section 60 is only where the debtor has omitted to intimate or there are no other circumstances express or implied indicating the payment of the debt against the debt for which it is made. It is only in the said circumstance alone the creditor may use his discretion of FIFO. Section 59 on the other hand stipulates where a debtor, owing several distinct debts to one person, makes a payment either with express intimation "or under circumstances implying that the payment is to be applied to the discharge of some particular debt", the payment when accepted must be applied accordingly. Therefore Section 59 is to be ruled out before 60 is to apply.

164. The facts of the present case as established before the Commission would demonstrate that the Respondent Board has made payments only as against the respective bills. It is only the adhoc payments which have been released in respect of certain earlier unresolved disputes, resolved thereafter that the payments are made against the older bills. It has been demonstrated before the Commission during the hearing that bill by bill comparison with the dates of payments would clearly indicate the intention of the Respondent Board to make payments only as against the particular bills within five day period (in most cases) in order to avail 2.5% rebate before 31-03-2005 and after 1-4-2005 every bill has been paid within five days of its presentation under clear circumstances implying that the payment was only to be appropriated against that bill. The tabular statements furnished before the

Commission would amply demonstrate this matter. Consequently the claim of applying FIFO is wholly unacceptable and the mere fact that the claimant has written on few occasions to the Respondent Board expressing his intention to apply FIFO will not be sufficient to invoke Section 60 because the first option is only to the payer under Section 59. It is only if the payer does not exercise that option directly or by implication that borrower can apply FIFO.

**Order II Rule 2 of the Civil Procedure Code :-**

165. Another important facet of the Commission's discretion in the manner of deciding to adjudicate the dispute by itself or refer the same to arbitration is the point of remedy. If the Commission is construed to be a quasi judicial body under 86(1)(f) then the remedy is only an appeal to APTEL under Section 111. Whereas if it is deemed to be an arbitrator, the award is only liable to be challenged under Section 34 of the Arbitration and Conciliation Act, 1996. The scope and jurisdiction of both the above remedies as well as the forum are completely distinct and separate. This is yet another reason why there has to be a consistency in the manner of dispute adjudication by the Commission as otherwise, violation of Art 14 of the Constitution of India regarding Right to equality as well as arbitrariness will result. The Commission cannot decide the nature of appellate remedy or the applicability of limitation for claims by deciding whether to decide a dispute by itself or to refer it to arbitration.

166. The Claimant has already made a claim against the Respondent Board against the alleged denial of reimbursement of

the Minimum Alternate Tax (MAT) which formed part of the tariff. The said matter has been decided by this Commission and the same is currently pending before the Supreme Court of India. The Claimant thus having agitated a part of his money claim arising out of the same transaction and having failed to make the present claim along with that is now barred from seeking any remedy under Order II Rule 2 of the Code of Civil Procedure.

167. The bar for a fresh claim under Order II Rule 2 is like the bar on res judicata under section 10 CPC. Both are wholesome principles of general law which are applicable to all proceedings including even writ petition under Article 226 of the Constitution of India or Arbitration proceedings. Inasmuch as this Commission is substituted for adjudication of disputes between the parties, the bar of Order II Rule 2 applies equally to proceedings before it.

168. The framing of the claim itself has been defective. The claimant has taken contradictory view inasmuch as the claim has been structured as if it is a case of reconciliation of accounts. In this regard, the claimant has made out a case, as if it is a simple case of totalling of monthly bills of the claimant from the date of commencement of production till 13-3-2009 and then deducts the payment made by the Respondent Board up to 31-3-2009 and claiming the differences as due. However, the entire arguments have been advanced, as if the case is one of the Respondent Board having illegally availed of the 2.5% rebate even though the same is allegedly not available to it. Even when the total rebates taken by the Board are deducted, the Claimant's figure and the Respondent Board's figure do not match.

169. The Petitioner while filing DRP No.7 of 2008 for claiming reimbursement of Specified Taxes (MAT), ought to have raised the present relief that are now raised in DRP.No.12 of 2009. Having omitted to claim the same while filing the earlier DRP No.7 of 2008 relating to Specified Taxes, the present D.R.P cannot be maintained. For the purpose of raising a dispute the Petitioner contended in DRP.No.7 of 2008 that Specified Taxes as a component of invoice. If that is to be accepted, the other components of invoice that are now being claimed by the Petitioner in the present DRP.No.12 of 2009 forming part of the component of invoice should have been raised in DRP.No.7 of 2008 itself.

170. The Respondent Board disallowed the claims made in excess after restricting it to the Capacity of the project i.e. from the COD i.e. 26-4-2001 to 21-11-2002 @ 321.45/347.712 MW and from 21-11-2002 onwards @ 330.5/347.712 MW and restricted the FCC in 2006-07 @ 343.969/347.712 MW.

171. From 1-4-2005 onwards TNEB started making the monthly tariff invoices in full on the fifth business day disallowing the excess claim towards the Interest on Debt (to the extent of proof received from the Petitioner) and allowing the Fixed Capacity Charges for the Capacity proportioned at 330.5/347.712 MW until finalisation of the Capacity reset at 343.969/347.712 MW. However, the invoices for the above period were revised by the Petitioner himself at this level while submitting the Annual Invoices on 18-7-2007 and started adopting this Capacity only from the monthly invoices for

the period starting from April 2007 i.e. from the financial year 2007-08. The correction of the invoices by the Petitioner in the Annual Invoices justifies the action already taken by the Respondent.

172. TNEB vide letter dated 10-9-2001 has communicated that due to financial strain TNEB is making part payment. The part payment of monthly tariff invoices based on Rs.2.25 /Rs.2.50 per unit were made up to 31-3-2005 after deduction of 2.5% rebate and for the Petitioner's consumption from Respondent's grid during plant shut down. From 1-4-2005 onwards the admitted claim of tariff invoice was made on the 5<sup>th</sup> business day to avail 2.5% rebate. The letter dated 10-9-2001 cited by the Petitioner for alleged acknowledgement of liability by the Respondent Board was given only without prejudice to Respondent's rights. The same is clear from the contents of the letter which states that "Your invoices have been accepted for payment in full by Tamil Nadu Electricity Board. 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 confirming to the terms and conditions of the PPA, the residual portion of the said invoices being now outstanding. Tamil Nadu Electricity Board herewith accepts liability to pay the outstanding and reconfirms its commitment to meet all of its contractual obligation under the PPA". The Respondent's letter dated 27-7-2004 admitting liability was issued only on the request of the Petitioner's letter dated 12-7-2004 only to resolve the shareholders' issue and there is no admittance of the liability by the Board.

173. The details of disallowances were already submitted month wise/year wise to the Commission and the reason for such disallowance was also submitted during the course of hearing. Each monthly invoice should be handled as a separate cause and the claim made by the Petitioner for the above Petition, i.e. Rs.189 crores as such taking the total of the claim raised by the Petitioner and adjusting the total payment received by the Petitioner and stating that they have adjusted the payment received on FIFO basis stating the reason as “due to non-availability of the communication of the payment details we are adjusting the payment received on FIFO basis”.

174 Like Interest on Debt the other claims of Fixed Capacity Charges was also claimed in excess adopting higher capital cost.

Financial Year	Capital Cost adopted by M/s. PPN in the regular monthly invoices (without any restriction) (Rs. in crores)	Effective Capital Cost adopted by M/s. PPN in the Annual Invoices after Capacity Restriction (Rs. in crores)
2001-02	1386.26	1333.98
2002-03	1452	Rs.1333.98 crs.(upto 21.11.2002 and Rs.1364.40 crs from 21.11.2002 onwards)
2003-04	1452	1364.40
2004-05	1452	1364.40
2005-06	1452	1364.40
2006-07	1379.25	1364.40

**Rebate :-**

175. The arguments regarding the Board having wrongly availed the rebate of 2.5% has been raised only in the oral submissions and does not form part of the claim statement which was filed originally as if the claim is based on reconciliation of accounts which actually never took place, the claimant having refused to participate in the reconciliation meeting called by the Board even around the time of the filing of the claim.

176. The rebate of 2.5% given as a part of 10.2(a) is actually nothing more than the generating company foregoing the 2.5% given to them as part of the interest on receivables which is a component of the working capital as per the recommendation of the K.P. Rao Committee. The contention of the Board is that the intention behind the PPA is that if the generating company gets its bill settled immediately, it is not entitled to the 2.5% interest on receivable which it is getting as part of its working capital. The only question is that the Board should make the payment within 5 business days of submission of the bill. The argument that every paisa of the bill is to be settled to get the rebate is not correct so long as the bill has been settled substantially if not almost entirely and the rebate is to be given as otherwise the generating company would be benefiting twice over, once by the 2.5% on receivables and the other by having received almost the entire bill within 5 business days.

177. In the instant case, as has been demonstrated during the oral arguments, there are several months during the disputed period, when the so called “unauthorized deductions” were far less

than the quantum of rebate availed. If the arguments of the claimant were to be accepted in entirety, an absurd situation would arise where theoretically, for the “unauthorized deduction” of a sum of say Rs.10,000, the Board would forfeit a rebate of Rs 1 Crore. Such an argument would defeat the very provision of the PPA rather than give it life. This is also the reason why, full settlement of the bill is mentioned in sub clause (b) dealing with payment and not in sub clause (a) which provides for rebate.

178. For the availment of rebate, the Commission ought to go bill by bill and month by month to reconcile payments made against bills received. The Respondent Board has submitted a complete chart demonstrating that the bills have been sought to be settled within 5 business days by the Board at least definitely after 1-4-2005 when the issue of ad hoc payments and part payments came to be resolved (when the payments were being restricted to Rs 2.25 /Rs.2.50 per unit). The Board is legitimately entitled to defend this hugely extortionary claim by relying upon the claimant’s own acceptance in 12-6-2001 itself for the retention of 15 paisa per unit until finalization of Capital Cost. The claimant cannot argue today to defeat the Board’s right for claiming rebate that such a deduction had infact not been done at all. All that the Commission needs to ascertain is whether by the inclusion of the 15 paisa reduction, the bill of the claimant got settled by the payments made by the Board within 5 business days. If it did, the rebate would follow automatically whether or not physically such a deduction was made. In this regard, reference may be made to the similar case of demand by the another IPP, namely M/s GMR Power Corporation Pvt. Ltd. where the Hon’ble Commission itself directed the claimant to rework

their demand after deducting the 15 paisa per unit till finalization of their Capital Cost which in their case was finalized in February 2001 itself. The fact that it is still not done in this case even after almost 10 years of commencement of production is not to be put against the Board which has a contractual right to deduct the same whenever it so desires. It desires to do so, in the instant case as the claimant would otherwise be receiving a bounty or a windfall profit at the expense of the Board. The relevance of the 15 paisa retention is because the claimant is currently working his bills on an estimated Capital Cost of Rs.1379.25 Crore, whereas the Board is contesting it as only Rs.1251.37 Crore. In the event of any downscaling of the Capital Cost as argued by the Board, huge amounts by way of refunds would be due to the Board and hence the parties had agreed to this deduction. Therefore, adjusting this against the monthly bill for the justification of the rebate is just and reasonable. The Respondent Board is entitled to claim rebate of 2.5% for the payment made within the 5 business working days. For the payment made within the due date, i.e. within 30 days from the date of invoice, the Respondent Board is entitled to claim 1% rebate on the invoice amount.

179. The Petitioner contends that the Respondent Board is not eligible to claim the rebate against the monthly invoices raised by it on the alleged ground that the Respondent Board had not made the full payment. The availing of rebate by the Respondent Board has not been qualified by the words "on full Payment" in the Article 10.2 (a) of the PPA as found in the GMR PPA. The arguments that every paisa of the bill is to be settled to get the rebate is not correct so long as the bill has been settled substantially. The object of extending the rebate to the Respondent

Board for making the payment within the 5 business working days or within the due date is only pursuant to the report of the K.P.Rao Committee and the notification dated 30-3-1992 issued by the Government of India. The tariff structure in which the interest charges on 2 months receivable (one of the working capital components) is already loaded upfront and when payment is made within the due date, the same is being returned in the form of rebate. From the date of COD till 2005 the Respondent Board is entitled to rebate for whatever amount paid within the 5 business working days or with in due date of 30 days to the Petitioner. From April, 2005 onwards the Respondent Board is entitled to rebate of 2.5% as they have released payment matching almost the entire amount of invoice well within the 5 business days from the date of submission of the monthly invoice.

180. The Respondent herein would not have disallowed any amount if there is no excess billing. Only in view of the excess billing the Respondent Board was constrained to disallow the excess claim being a public body involving public exchequer. The Respondent Board is liable to answer Internal Audit and audit by the Accountant General. By making alleged FIFO adjustments the Petitioner is projecting a case as if the Respondent Board is not entitled to any rebate at all.

181. The decisions relevant to the present case are:-

1. 1992(1) SCC Page 335
2. 2007(5) CTC Page 392
3. AIR 2004 SC Page 1006
4. AIR 1990 SC Page 53

5. 2010 (1) SCC Page 723
6. 2010 (3) CTC Page 517 – R.Gandhi, Madras Bar Association Vs Union of India.

The various citations as submitted by the Petitioner, namely, 2004 (3) SCC Page 277 ; 1994(3) SCC Page 324 : AIR 1927 Privy Council Page 50 ; AIR 1962 Mysore Page 190 ; 2004(3) SCC Page 277 are not applicable to the present facts of the case.

**Interpretation of the clauses of the Power Purchase Agreement :-**

182. TNEB has requested the Petitioner to submit the Annual Invoice for the period from 2001-02 to 2004-05 vide letter dated 22-8-2005. As per the terms of the PPA submissions of Annual Invoice by the Petitioner is very much material and significant. Clause 10.2 (b) (ii) of the PPA provides for furnishing of Annual Invoices by the claimant. The above clause has been grossly breached by the claimant who had failed to file Annual Invoices for the first six years. The first set of Annual Invoices were altogether filed on 18<sup>th</sup> July 2007, there has been consequently a complete breach by the claimant.

183. The claimant has mischievously attempted to make out a case as if the inability to furnish Annual Invoice was caused because of the Respondent Board's failure to provide information which have been asked for by the claimant periodically. Series of letters asking for the information have been filed with the Commission and the Board's non response to the same has been sought to be relied upon for adverse inference. The Board as a statutory body is not obligated to reply to every letter of the Claimant. The only point is whether the Board was required to furnish any

information under the contract to enable the claimant to prepare Annual Invoice. No such obligation is cast on the Respondent Board.

184. The failure to furnish Annual Invoices has been a material breach by the claimant and that failure renders the present claim not maintainable and justifies the Respondent Board in having made deductions on the monthly bills which were intentionally inflated by the Claimant. The delay in filing Annual Invoices is only to overcome the problem of inflated billing. The final Annual Invoices for the 6 years together when reconciled resulted in a rejection of over Rs.132.11 crores which was the extent of over billing done during the period by the Claimant. Annual Invoices still not been filed for the years 2007-2008 and 2008-09 (part). For this period, either the claims have to be dismissed for this breach or the claims are automatically premature unless and until it prepares and furnishes the Annual Invoice, it cannot sustain the claim at all. It is the duty of the company to submit its Annual Invoices under clause 10.2(b) (ii) "as soon as possible after the end of each year". This requirement is because the one year time given to the Board under sub clause (e) thereof to raise any dispute in respect of any invoice is from the due date of such invoice. A conjoint reading of all clauses would require that the claimant ought to have submitted the Annual Invoices within a few weeks ( as soon as possible ) after the end of each year so that the Board can either accept the same or raise a dispute within a few more weeks thereafter which will still be within 1 year of the first bill of the previous month falling due. The delay in submission of the Annual Invoices was willful, wanton and completely malafide because the claimant was fully aware that submission of the same would mean revealing a huge excess billing that had been done by

them through the period particularly in the area of Capacity Fixation, Capital Cost and Interest and Debt.

185. The PPA does not provide for any manner of raising dispute. Consequently the moment the Respondent Board seeks clarification from the claimant on the contents of Annual Invoices, they are deemed to have put the Annual Invoices in the category of disputed invoices and the claimant cannot plead the 1 year limitation. Though the capacity fixation actually took place and finalized only in May 2006, nothing prevented the claimant from raising the Annual Invoices based on the agreed Capacity. What the claimant has achieved by delaying the Annual Invoices by several years is that he has ensured that the claim on the basis of the actual capacity fixation has been given a retrospective effect from 2001 while continuing to argue that the Board had lost its right to challenge the monthly bills by expiry of 1 year itself. It is pertinent to mention here that the claim of the Petitioner in DRP 12 of 2009 is to the tune of Rs.189 crores which the Respondent TNEB denies that the claim raised is not maintainable in the eye of law. The statement showing the reduction in Annual Invoice is reproduced as follows:

(Rs. In Crores)

Year	Annual Invoice	Original Claim of the Petitioner	Reduction in Annual Invoice.
2001-02	576.71	585.60	8.89
2002-03	930.41	953.71	23.31
2003-04	732.48	755.76	23.28
2004-05	508.76	539.66	30.90
2005-06	475.84	518.89	43.04
2006-07	819.79	822.49	2.69
<b>Total</b>	<b>4043.99</b>	<b>4176.11</b>	<b>132.11</b>

Even though the PPA provides for interest clause, being the exchequer (the Respondent), the Respondent cannot make payment of the invoices, which is not in accordance with the PPA.

**Delay in submission of Invoices:-**

186. The Petitioner has not complied with Clause 10.2(b)(ii) of PPA by not furnishing the annual invoice in time. Submission of Annual invoice by the Petitioner is a material and significant term as per the PPA. The annual invoices ought to have been submitted at the earliest time as soon as possible after the end of each year. The non-submission of annual invoice is a material breach of PPA by the Petitioner. The Respondent Board wrote to the Petitioner for submission of annual invoices i.e. 5 years before filing this DRP.No.12 of 2009 and 2 years before the actual submission of annual invoices. But the Petitioner submitted the annual invoices for the period from 2001 to 2007 only on 18-7-2007. The Annual Invoices should have been submitted by the Petitioner immediately after the end each year as shown below.

<b>Sl.No.</b>	<b>Period</b>	<b>Annual invoices should have been submitted during the year</b>
1.	2001-02	2002-03
2.	2002-03	2003-04
3.	2003-04	2004-05
4.	2004-05	2005-06
5.	2005-06	2006-07

The Petitioner cannot allege that the Respondent Board had committed breach of the various provisions of PPA. It is the Petitioner who had not complied with the vital provision of the PPA by not submitting the Annual

Invoices within a reasonable period. During the course of the argument the Petitioner had conceded that the Annual Invoices are the final invoices and further agreed that earlier monthly invoices are only provisional invoices. If the Petitioner had filed the Annual Invoices within the time frame as indicated above the Respondent Board would have got an opportunity to reconcile the accounts and to set right the issues immediately. The contention of the Petitioner that the Annual Invoices could not be filed as soon as possible at the end of each year due to the alleged reason that Respondent Board failed to give necessary details and particulars is totally misconceived. The Petitioner need not depend upon the Respondent for the particulars for the purpose of filing the Annual Invoices. The annual invoices have to be prepared by the Petitioner only with available data and particulars such as actual interest rate, actual amount paid to the bankers, FERV (Return on equity and interest of debt), other finance charges etc. This information is available with the Petitioner only and there is no role for the Respondent Board in furnishing such details. There is no provision available in the PPA requiring the Respondent Board to furnish any particulars to the Petitioner for the purpose of filing the annual invoices. There is no obligation on the part of the Respondent Board to give any information for the purpose of filing the Annual Invoice by the Petitioner.

187. As a matter of fact by letter dated 5-4-2004 the Respondent Board requested the Petitioner to inspect the accounts and to participate in the reconciliation process in the year 2004 itself ie. 5 years before the date of filing of DRP.No.12 of 2009. The Petitioner had not chosen

to come forward to participate in the reconciliation proceedings for the reasons best known to them. The Petitioner cannot legally attempt to project a picture that the delay in filling the annual invoices by the Petitioner had occasioned only due to the reasons attributable to the Respondent Board. As a consequence of non filing of the annual invoices by the Petitioner within the stipulated time, the accounts could not be reconciled bill by bill. Even the Petitioner had not co-operated for reconciliation even when called upon by the Board during 2009 also. As per the Annual Invoice submitted by the Petitioner in July, 2007 they mentioned a gross figure of Rs.4043.99 Crores. The gross figure of the respective invoices from COD to 2006-07 was Rs.4176.11 crores. Nearly Rs.132.11 Crores is the amount revised by the Petitioner himself. The non-submission of the Annual invoice within the time frame as provided in the PPA is only beneficial to the Petitioner due to the inflated monthly bills.

**Capacity Determination :-**

188. In the year 2006 the Petitioner agreed with the Respondent for the plant capacity of 343.969 MW but the Petitioner continued to raise the monthly invoices at 347.712 MW till 31-3-2007. The Petitioner restricted its claim for the revised capacity only when it submitted its delayed Annual Invoices during July 2007. The Petitioner originally claimed the Invoices calculating the fixed capacity charges based on the higher capital cost which is given below:

Financial Year	Capital cost considered by M/s. PPN for calculating FCC in the monthly invoices (Rs. in crores)	Capital cost considered by TNEB while admitting the original invoices (Rs. in crores)	Capital Cost adopted as per the Capacity Reset approval communicated by TNEB and accepted by M/s. PPN (Rs. in crores)
2001-02	1386.26	1386.26	1333.98
2002-03	1452.00	1386.26	1344.87
2003-04	1452.00	1386.26	1364.40
2004-05	1452.00	1386.26	1364.40
Financial Year	Capital cost considered by M/s. PPN for calculating FCC in the monthly invoices (Rs. in crores)	Capital cost considered by TNEB while admitting the original invoices (Rs. in crores)	Capital Cost adopted as per the Capacity Reset approval communicated by TNEB and accepted by M/s. PPN (Rs. in crores)
2005-06	1452.00	1386.26	1364.40
2006-07	1379.25	1379.25 **	1364.40
2007-08	1364.40	1364.40	1364.40
2008-09	1364.40	1364.40	1364.40

\*\* Rs.1379.25 crores – before capacity restriction

$$1379.25 * 343.969/347.712 = 1364.40 \text{ Crs}$$

This capacity restriction was also accepted by the Petitioner on 1.6.2006.

189. As per Schedule A, Tariff, 2(b) "Within thirty (30 ) Days after the Commercial Operation Date, the Company shall estimate those amounts which comprise the FCC for the remainder of that Year in accordance with Section 3 of this Schedule A, Tariff 2(b). The Company shall re-compute the FCC

- (i) at least thirty (30) Days prior to the beginning of each Year thereafter, effective as of the beginning of such Year; and

- (ii) within thirty (30) Days after there is any change to the Capital Cost effective as of the date the change was effected or as otherwise to be agreed by the Parties; and
- (iii) within thirty (30) Days after any resetting of Capacity in pursuant to Article 2.1.

As per the above Schedule A of the PPA, the Company has to recompute the Fixed Capacity Charges within thirty (30) Days after giving the acknowledgement of the revised Capacity to TNEB (Petitioner's letter dated 1-6-2006) . The Petitioner should have revised Fixed Capacity Charges for the financial year 2006-07 before 31<sup>st</sup> July 2006 and should have also submitted the Annual Invoices immediately for the earlier financial years. Whereas, after a lapse of 412 days the Company gave the Annual Invoice for the period from 2001-02 to 2006-07 only on 18-7-2007.

190. The Techno Economic Clearance was issued by CEA on 24-11-1995 with the capacity of the plant as 330.5 MW with mixed fuel firing of 70% Naphtha & 30% Natural Gas. The gross capacity of the plant under combined cycle mode given by M/s. Marubeni was 347.712MW. After declaring Commercial Operation on 26-04-01, the company was requested to conduct Capacity Acceptance Test as per Article 2.3 of the PPA ,which is given below:

**“Tested Capacity”:-**

Before the Commercial Operation Date, the output of the project will be measured in the Acceptance Test conducted in

accordance with the procedures set forth in section 4.7 hereof, which test shall measure the temperature and maximum continuous rating in accordance with the equipment manufacturer's recommendation, on the test date, If such measured maximum continuous rating in accordance with the equipment manufacturer's recommendation, is less than the Temperature Adjusted Capacity, then the applicable tariff shall be recalculated using a revised Capital cost. The revised Capital cost shall be the Capital cost multiplied by the ratio of the lower output divided by the Temperature Adjusted Capacity; provided, however, that if within 24 months from the Commercial Operation Date , the company demonstrates to TNEB during continuous generation for 72 hours that it has corrected some or all of the deficiency in gross generating capacity , such deemed reduction in the Capital Costs shall be nullified to the extent of the correction , from the date on which such correction has been made. During the acceptance Test if full capacity of the Project temperature adjusted to 31.67 degree Celsius is more than 105% of the capacity then such tested full capacity temperature adjusted to 31.67 degree Celsius shall be taken as capacity". Further, as per the approved Performance Test procedure, the plant shall operate to produce at least 90% corrected load for a period of 72 hours.

**First Capacity Test:**

191. The capacity acceptance test was conducted from 23-04-2001 to 26-04-2001. During this test, the demonstrated capacity was only 321.45 MW with applicable correction factors for temperature and other correction (without frequency correction as the PPA is silent on that) which is 97% of the contracted capacity of 330.5 MW and 92%

of the name plate rating of 347.712 MW. As per the Performance Test Procedure, if the demonstrated capacity is above 90%, then the machine is to be accepted at the demonstrated capacity and as per Article 2.3 of the PPA, the promoter can be given further opportunity to carry out modifications to prove the designed capacity within a period of 2 years from the date of synchronization. Hence, the machine was accepted and the capacity charge was restricted in the ratio of the demonstrated capacity to the name plate rating of the plant as approved by Board in its 845<sup>th</sup> meeting held on 24-06-2001. (i.e. 321.45/347.712 MW)

**Second Capacity Test:-**

192. The company after carrying out certain modifications again carried out the capacity acceptance test for the second time from 18-11-2002 to 21-11-2002. During the 72 hours continuous running of the plant, the capacity of the plant was demonstrated between 336 to 348 MW without applying any correction. These capacities when adjusted for temperature and other corrections as provided for in the PPA work out between 336.769MW and 348.129 MW.

193. As per Article 2.3 of PPA, the demonstrated maximum continuous rating will be the capacity of the plant. Since the corrected tested capacity was between 100 & 105% , the capacity was limited to 100% and arrived as 330.5MW. This was informed to the company vide letter dated 9-12-2002 and the company accepted the same in their letter dated 16-12-2002. As this capacity of 330.5 MW is again below the name plate rating of the machine , the fixed capacity charge was to be allowed on

proportionate basis, i.e. in the ratio of tested capacity (330.5 MW) to the name plate rating (347.712 MW). The Board in its 862<sup>nd</sup> meeting held on 25-01-2003, has taken note of the above facts including the demonstrated capacity as 330.5 MW. Accordingly, the payment of capacity charge in the ratio of 330.5/ 347.712 MW was made.

194. Aggrieved by this decision of the Board, M/s. PPN has represented in the minutes of the Meeting dated 22-1-2005 to release the full capacity charge as per the PPA as the machine is capable of giving an output of 347.712 MW as per name plate rating if frequency is maintained at 50Hz during the testing period. As such, the company contended that the proportionate payment of fixed capacity charges is not correct and the full capacity charge has to be released.

195. A five member technical sub committee was formed to analyse the issue and the sub committee furnished their report on 26-05-2006 as follows and the same was approved by 892<sup>nd</sup> Board Meeting held on 27-05-2006.

- (i) The capacity of the plant shall be retained as 330.5 MW as already communicated by the Board by letter dated 9-12-2002 and accepted by the company by letter dated 16-12-2002. The dispatch instruction shall be based on this capacity indicated in the Techno-Economic Clearance given by CEA. The PPA has to be amended accordingly.
- (ii) The capacity charges may be regulated as follows:
  - (a) The FCC charges may be computed in the ratio of 336.299/ 347.712 for the period from 26-04-2001 to 21-11-2002.

- (b) The FCC charges may be computed in the ratio of 343.969 / 347.712 from 21-11-2002 onwards.
- (c) The FCC charges already paid may be regulated as above.
- (d) The above recommendation is without prejudice to the finalization of the capital cost of this project as per PPA and to be approved by CEA.
- (iii) The same was communicated to M/s. PPN from this office on 31-05-2006 and it was acknowledged by M/s. PPN on 01-06-2006.
- (iv) Article 2.1 defines the term capacity.
- (v) Article 2.3 defines tested capacity.
- (vi) Article I defines capital cost.
- (vii) Schedule-S of the PPA.
- (viii) The Petitioner has been claiming fixed cost based on the higher capacity contrary to the tested capacity.
- (ix) The Schedule A deals with the tariff. As per clause 2(ii) of the Schedule A, within thirty days after any resetting of capacity they need to recalculate and submit the fixed capacity charges. In the instant case the Petitioner committed a breach by not complying with the provisions contained in Schedule-A only with an intention to enjoy higher fixed charges for a longer period.

**Moving Capital Cost :-**

196. In the case of the Petitioner Final Capital Cost has not yet been determined by this Hon'ble Commission. The Petitioner has claimed Capital Cost at Rs. 1379.25 Crores. The Respondent Board has admitted only upto Rs. 1251.37 Crores. There is nearly a sum of Rs. 127.8

Crores in dispute. Since final capital cost has not been determined, any variation (decrease/ increase) in the final capital cost will have a cascading effect on the Fixed Capacity Charges (Interest on Debt, Return on Equity, O & M Expenses, Interest on Working Capital, Depreciation), FERV on Return on equity and interest on debt, Incentive and Specified Taxes. The Cascading effect on finalization of the Capital Cost will be for a period of 30 years from the date of COD as the term of the PPA is for 30 years. Only on final determination of Capital Cost the respective amount to be adjusted on either side can be ascertained. Till such time all the invoices and payments right from the COD are only provisional. The final reconciliation of accounts after the determination of capital cost alone would throw light on any outstanding on either side. After fixation of Capital Cost by this Hon'ble Commission the entire bills have to be reworked right from COD. There is no provision in the PPA for reimbursing the excess/short in the capital cost with interest to either of the parties. As the capital cost now claimed by the Petitioner is in excess by Rs.127.8Cr as per the Respondent Board, considering the claim of the Petitioner now by this Commission would put the Respondent Board at great loss. Therefore it is submitted that the claim of Rs.189 crores made by the Petitioner is pre-mature and not maintainable at this stage. The amendment application in I.A.No 11 of 2009 is devoid of merits as there is no justification or acceptable reason in the eye of law and the said application is not sustainable both on law and facts. The Respondent Board had been paying Rs.2.25 per unit till 2005 which was accepted by the Petitioner only in view of the precarious financial position of the Board. This retention amount was also

later released on adhoc basis to the Petitioner and there is no arrears. The Petitioner did not raise objection for deduction of rebate.

**Interest on Debt :-**

197. During 2005-06, the Petitioner swapped the high cost Rupee Term loans relating to the banks viz. Indian Bank, ING Vysya Bank, HDFC Bank, Canara Bank with the loans from Bank of India, and reset of the Rupee Term Loan obtained from the following banks LIC I & II and IDBI I & II at lower rate of interest. During the swapping of the above loans, it came to the light that the Petitioner had claimed the interest for the quantum of loans, which were not obtained from the above banks. The interest on debt claimed in excess in respect of the above loans was recovered during September 2005 (2005-06) amounts to Rs.28.99 crores (Rs.10.73 +16.73+1.53). The Respondent Board had been disallowing certain portions from the invoices between 2005– 06 to 2008-09 due to wrong claims made under FCC relating to interest of debt. Further, the Respondent recovered the excess interest claimed by the Petitioner from 2001-02 to 2005-06. The Respondent Board permitted the Petitioner to swap loan from IIBI to Federal Bank. The Respondent Board had paid the upfront pre payment premium. Even for the high cost Rupee Term loan swapped in respect of the IIBI Term Loan also the approval of the Respondent was communicated to the Petitioner and the Petitioner has submitted the estimated Fixed Capacity Charges for the financial year 2008-09 on 28-2-2008. The Respondent on 21-3-2008 has addressed the Petitioner to revise the estimated FCC for the year 2008-09 and in response to this letter

dated 21-3-2008, the Petitioner had replied in letter dated 3-4-2008 in respect of IIBI as follows "The IIBI loan swap occurred subsequent to the filing of the FCC on 29-2-2008 and has further as follows" As has been stated repeatedly, the company is unable to revise the FCC once submitted, as the PPA does not provide for the same". As per Petitioner's contention, the Petitioner has not submitted their Annual Invoice from the year 2007-08 onwards. Hence, revision of that excess claim as stated by the Petitioner has not occurred till date i.e. even on 7-8-2010. The rate of interest claimed under Interest on Debt in respect of IIBI is a claim that does not exist at all during 2008-09. The IIBI loan (@18%) was swapped with the loan availed from the Federal Bank of India (@ 11.5%). This shows the attitude of the Petitioner to claim the Invoices generally higher and this can also be seen from the statement submitted by the Petitioner during the course of hearing. Actual loan availed by the Petitioner for working capital facility has not been disclosed in respect of Interest on Working Capital. Only the sanctioned amount with rate of interest alone was submitted upon request by the Respondent Board while finalizing the Annual Invoices.

**Retention of Rs.0.15 per kWhr :-**

198. By letter dated 12-6-2001, the Petitioner had accepted for deduction of 15 paise per unit from the monthly invoice until the finalization of Capital Cost. The 15 paise per unit was deducted by the Respondent Board from the monthly invoices from 6/2001 till 13-11-2004 to 13-12-2004 invoice. Even this retention of 15 paise per unit were released to the Petitioner in order to enable the Petitioner to meet out its debt obligations.

The 15 paise per unit deduction would come around to a sum of Rs.191Crores which had not been done by the Respondent Board. The Petitioner has not been put to any hardship by this Respondent by the retention of 15 paise per unit from 13-12-2004 to 13-1-2005 invoice onwards even though the Petitioner has given concurrence for deduction of 15 paise per unit until finalization of Capital Cost. Though the company started its Commercial Operation on 26-4-2001 the finalisation of Capital Cost is not yet completed. Until finalisation of the Capital Cost, the claim made by the Petitioner and the amount admitted and paid by the Respondent is only provisional in respect of the Fixed Capacity Charges, Incentive, and Foreign Exchange Rate Variation & Specified Taxes. The claim of Fixed Capacity Charges, Incentive, and FERV is bound to vary depending on the finalisation of the Capital Cost of the Petitioner. The finalisation of the Capital Cost of the Petitioner is still pending before this Commission. In such circumstances, the various claims made by the Petitioner under various heads from the date of Commercial Operation are not final and conclusive invoices. Therefore the question of entertaining the claim of the Petitioner in DRP No. 12 of 2009 does not arise for consideration. Till the finalisation of the capital cost this issue cannot be entertained. As per letter dated 12-6-2001, the Petitioner has accepted for reduction of 15 paise per unit generated and initially TNEB was making payment at Rs.2.25/- per unit for the energy generated by the project. During September 2001 TNEB intimated its position with respect to its financial position and stated that the Respondent would make part payment and will pay the adhoc amounts as and when requested to pay its lenders.

199. The contention of the Petitioner that the Respondent Board had not provided with details of the payment at the time of making the payment is totally incorrect and misleading. The Petitioner's representative while receiving the payment would note down the various disallowances made by the Respondent Board. The Respondent Board has also filed an affidavit in this connection during the course of hearing. On various occasions when the Respondent Board made disallowances the Petitioner has addressed the Respondent Board then and there and got it resolved. The Petitioner alone is the only independent power producer alleging that no details were furnished by the Respondent Board while making the payment. The Petitioner has projected the picture as if the Respondent has not paid the monthly invoice in time so as to claim rebate by allegedly making FIFO adjustments which is not permissible in the eye of law. The timely payments made by the Board within 5 business Days against each monthly invoice (even when the adhoc payment and part payments were made up to March 2005) cannot be adjusted against the short payment made in the earlier bill. When every bill is short paid, it should raise an instinct in the mind of the Petitioner that its bills are not in accordance with the provisions of the PPA. Simply by adjusting the amount on FIFO basis when it is clearly known by the conduct of the Respondent that the payments are made against the monthly invoices only is not correct in the eye of law. The Respondent has been making the payment of monthly invoice amount within five business Days from the date of submission of invoice by the Petitioner only in order to claim rebate of 2.5%. The representative of the Petitioner also correctly made himself available on the 5<sup>th</sup> business Day to collect the cheque from the

Respondent Board. The monthly payment made by the Respondent Board has to be appropriated only as against the monthly bills and not towards any other account on FIFO basis as contended by the Petitioner.

200. By allegedly making FIFO adjustments the Petitioner is contending that the Respondent is not at all entitled to rebate of 2.5% although the Respondent has paid the monthly invoices within the stipulated day only in order to claim the rebate for making full payment within the 5<sup>th</sup> business Day. It is submitted that in the MOM dated 22-1-2005, the Petitioner Company and the Chairman, TNEB have discussed the issues which were disallowed by TNEB in the tariff invoices submitted by the Petitioner. The issues were resolved during 2005-06 and payments were made. The Petitioner in their letter no.PPN/TNEB/787, dt.20-4-2007 has requested TNEB to furnish details relating to the admission of tariff invoices for the billing period 13-3-2007 to 31-3-2007 and 1-4-2007 to 13-4-2007. The queries of the Petitioner in letter dated 20-4-2007 were replied by the Respondent's letter dated 23-4-2007. The Petitioner in their letter dated 20-11-2006, has stated that "we understand that TNEB has disallowed the claim for stock of fuel in excess of 10 days and this has been recovered with effect from 1-4-2006. Such deduction amounts to about Rs.4 crores". The above issue was attended by the Respondent Board and the payment of Rs.3.84 crores in respect of the above issue was made on 23-11-2006. The Petitioner is well aware of the admission and payment made by the Respondent Board relating to the tariff invoices. Hence, the Petitioner's claim in this DRP that as the payment details were not received from the Respondent, it had been adjusting the payments received from the

Respondent on FIFO basis against its claims is entirely unlawful and found to be false based on the above letters which are highlighted under SI. No.7 & 8 and as per MOM dated 22-1-2005.

**Analysis of the Commission:-**

**Jurisdiction:-**

201 The Respondent has questioned the jurisdiction of the Commission in adjudicating upon the present dispute. We refer to para 60 of the Supreme Court judgement in 2008 (4) SCC 755 extracted below:

*“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 10-6-2003, after this date all adjudications of disputes between Licensees and Generating Companies can only be done by the State Commission or the Arbitrator (Arbitrators) appointed by it. After 10-6-2003 there can be no adjudication of dispute between Licensees and Generating Companies by any one other than the State Commission or the Arbitrator (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.”*

Section 86 (1)(f) of Electricity Act 2003 entrusts adjudication of disputes between a licensee and a generating company to State Commissions. The Electricity Act 2003 being a special Act overrides any other Act in regard to adjudication of disputes between a licensee and a generating company.

202. The Respondent contends that this dispute should be referred by the Commission for arbitration. We would like

to observe that as stipulated in Section 86(1)(f) of the Electricity Act 2003 and reiterated by the Supreme Court in the above judgement, it is the discretion of the Commission either to adjudicate upon the dispute or to refer it for arbitration. The Commission decides to adjudicate the present dispute and therefore the question of arbitration does not arise.

203. The Respondent further cites the judgement of the Supreme Court in Union of India Vs. R.Gandhi, President, Madras Bar Association reported in 2010 (3) CTC 517 to question the competence of the Commission to adjudicate the case. The Commission cannot pronounce on its own competence. It is for the Respondent to agitate the matter before an appropriate Forum.

**Limitation, delay and laches:-**

204. The Respondent quotes Section 43 of the Arbitration and Conciliation Act 1996 to argue that limitation would apply to arbitration proceedings but eventually he gave it up in view of Section 2(4) of the said Act, which makes Section 43 inapplicable. But in any case since the Commission has decided to adjudicate the dispute, the limitation prescribed in Arbitration and Conciliation Act 1996 would not apply.

205. The Commission has ruled in DRP No.10 of 2008 GMR Power Corporation Ltd., Vs.TNEB, in DRP.No18 of 2008 TCP Vs.TNEB and in DRP No27 of 2009 CPCL Vs. TNEB that Limitation Act 1963 would not apply to proceedings before the Commission but delay and laches would count. This ruling of the Commission has been upheld by the Appellate Tribunal for Electricity. That is to say that relief should be sought at

the earliest opportunity relying upon the facts and circumstances of each case.

206. The Petitioner has referred to Lr.No.Sr.VP/IPP/EE/PP4/A2/D.752/2001 dated 10-9-2001 of the letter of Chairman, TNEB addressed to the Petitioner which is extracted below:

*“Sirs,*

*Sub: Payment of Tariff invoices – reg.*

*Please refer to the discussions TNEB had with your promoters on 21<sup>st</sup> 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 projects requirements and payments to lenders on due dates.”*

207. The second letter of Chairman, TNEB, Lr.No.CEIPP/AEE1/F.PPN/D.605/04 dated 27-7-2004 is extracted below:

*“Sir,*

*Sub: Payment of Tariff Invoice – reg*

*Ref: Your Lr.No.PPN/TNEB/529 dated 12-7-2004*

*Please refer to the discussions TNEB had with your representatives. In response to your letter cited, the following is furnished.*

*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.*

*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 projects requirements and payments to lenders on due dates.*

*This letter is issued without prejudice to Board's rights".*

The Petitioner argues that the first letter of Chairman, TNEB extends the limitation to 9-9-2004. The second letter pushes the limitation period upto 26-7-2007.

208. The Petitioner further submits that the invoices were never paid in full since 2001 by the TNEB and therefore they are entitled to adjust the receipts against outstanding invoices in terms of Section 60 of the Contract Act 1872.

*"Where the debtor has omitted to intimate and there are no other circumstances, indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits."*

209. The Respondent, on the other hand, submits that Section 59 of the Indian Contract Act 1872 should apply to him.

The section is extracted below.

***59. Application of payment where debt to be discharged is indicated:-*** *Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying, that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.*

There has been no express intimation from the Respondent to the Petitioner on payment against each invoice. The Respondent, further, contends that by implication his payment was directed against each monthly invoice.

210. The moot point here is that the Respondent, by his own admission, has not made full payment against monthly invoices and therefore the Petitioner is entitled to adjust the receipts against outstandings of previous monthly invoices. We, as a result, hold that Section 60 would apply rather than Section 59.

211. The Respondent submits that they are precluded from raising disputes on monthly invoices in terms of the PPA beyond the period of one year. The Respondent argues that the same limitation period of one year should be applied to the Petitioner also in the interest of justice and fairness. The Commission would like to observe that the Respondent is bound by the terms of the PPA which binds him down to a period of one year for raising disputes on monthly invoices. The Respondent was at liberty to draw up the PPA in such a way that he receives equal treatment as that of the Petitioner. But the Respondent never did so. The Commission cannot go beyond the PPA and rule in favour of the Respondent. The Commission has repeatedly ruled that limitation would not apply to proceedings before the Commission but delay and laches would apply. But as regards the Petitioner and the Respondent the contract between them would bind them. While the bilateral contract between the two parties would govern the limitation period for raising of dispute between themselves, the parties are at liberty to raise disputes before the Commission justifying delay and laches irrespective of the limitation period set forth in the Limitation Act 1963.

212. The TNEB does not deny that the payments were not paid in full but justified the deductions on various counts.

The Petitioner raised the dispute in May 2009 and the quantum of dispute is Rs.190 crore. The Petitioner argues that the claim is equivalent to four monthly invoices. The Petitioner, therefore, claims that he is well within the limitation period. The Respondent objects that even if limitation is extended to 26-7-2007 there is no justification for raising the dispute in May 2009 almost two years later. This argument is met by the logic of the Petitioner of adjustment under Section 60 of the Contract Act 1872.

213. The Commission rules that delay and laches would not be attracted in the present case in view of the application of Section 60 of the Contract Act 1872 and the letters of Chairman, TNEB dated 10-9-2001 and 27-7-2004.

**Estoppel:-**

214. The Respondent submits that the Petitioner in DRP No.7 of 2008 claimed Specified Taxes. The present petition covers other claims. The Petitioner having failed to raise a consolidated claim in DRP No.7 of 2008 should be estopped from raising the present claim in terms of Order II Rule 2 of the Code of Civil Procedure 1908.

215. The Petitioner cites the judgement of the Supreme Court in Kunjan Nair Vs.Narayanan Nair (2004) 3 SCC 277 and the judgement of the Privy Council in Payana Reena Saminathan Vs. Pana Lana Palaniappan to support his contention that the cause of action must be the same.

216. Clause 10.1 (d) reads as follows:

*“(d) Specified Taxes on Income will not form part of regular billing. However, any advance tax payable for the Project in any month supported by a certificate of a Chartered Accountant approved by TNEB will be reimbursed in the succeeding Month. After the tax*

*assessment is completed for any Year and the liability therefore is determined by the taxation authorities in India, the excess or shortfall in the tax liability so determined will be adjusted in the Invoice for the month next following. The company shall take reasonable steps to ensure that its liability on income tax in respect of its income from the Project is minimized by obtaining, by suitable arrangement, all permissible benefits, rebates, concessions and the like, in accordance with law.”*

The import of this clause is that Specified Taxes do not form part of monthly invoices. Advance Tax paid by the Petitioner is reimbursed in the following month. Similarly excess or shortfall in the tax liability will be adjusted in the following monthly invoice. Advance Tax is due every quarter and therefore the Petitioner is required to submit claim for reimbursement in the succeeding month. It is therefore clear that Specified Taxes on Income are not part of monthly invoices. Monthly invoice and invoice for Specified Taxes are distinct. Dispute on monthly invoice is distinct from dispute on invoices on Specific Taxes. The Commission, therefore, rules that cause of action arising from monthly invoice is different from the cause of action arising from invoices on Specified Taxes. Order II Rule 2 would not therefore apply.

**15 paise deduction in monthly invoices:-**

217. The Petitioner informed the Respondent on 12-6-2001 that he consents to the deduction of 15 paise per unit till the approval of the capital cost by the Central Electricity Authority. In accordance with this letter, the Respondent deducted 15 paise per unit from the invoice of June 2001 till the invoice relating to the period from 13-11-2004 to 12-12-2004. As a matter of fact, the Respondent in his letter dated 19-9-2003 consented to release the arrears of 15 paise deduction upto 31-8-2003 amounting to Rs.55.60 crores. Thereafter, the Respondent continued to retain 15 paise per unit till 12-12-2004.

218. We would like to refer para 8 of the 865<sup>th</sup> Board Meeting of the Tamil Nadu Electricity Board held on 30-8-2003.

*“The amount withheld due to non finalisation of capital cost has been accumulating. The IPPs have given their concurrence for withholding of 15 paise per unit for this purpose. Already two to four years have lapsed and the capital cost is yet to be finalised. It may take some more time to finalise the capital cost and get it approved by the competent authority i.e. Board / Government of Tamil Nadu / CEA. It is suggested that the Board may consider releasing the withheld amount of 15 paise per unit accumulated upto 21-8-2003 to the tune of Rs.184.01 crores in three months time subject to availability of funds and obtaining financial assistance from the Government of Tamil Nadu duly availing 2.5 % rebate on such payment. In case any adjustment / deduction is to be made on account of capital cost, the same may be made in future payment to be made subsequent to approval of capital cost. The retention of 15 paise per unit may be continued while the accumulated amount as on 21-8-2003 is being settled, until the capital cost is finalised.”*

219. Para 12 of the 877<sup>th</sup> Board meeting of the TNEB held on 8-1-2005 is extracted below:

*“12. In order to meet out the debt service obligations of the IPPs, and any adhoc payment, the retained admitted claim is released inclusive of money retained towards 15 paise per unit. Hence, the outstanding pending payment is much less and does not represent the unit generated multiplied by 15 paise per unit. Hence, the apportionment of 15 paise per unit from the retained admitted balance hitherto adopted may be dispensed with.”*

Para 12 was approved by the Board.

220. We have referred to the Board notes in DRP.No.10 of 2008 GMR Vs.TNEB in para F(13). It is clear that the Respondent discontinued retention of 15 paise per unit beyond 12-12-2004 in accordance with the decision of the 877<sup>th</sup> Board meeting.

221. The Respondent submits that he is entitled to retain 15 paise per unit till the date of finalisation of capital cost, which has not taken place yet. This argument is in direct contravention of the

decision of the 877<sup>th</sup> Board meeting held on 8-1-2005. It is perplexing that the Respondent has taken a stand contravening the Board decision.

222. This voluntary relinquishment of the Respondent despite the fact that the Petitioner consented for deduction upto the date of determination of capital cost cannot be held against the Petitioner. Therefore, the Commission would take into account the deduction of 15 paise per unit for the period from June 2001 to 12-12-2004. The plea of the Respondent that he is entitled to deduct 15 paise per unit till the date of determination of capital cost, which is yet to be done, is an afterthought and untenable in the face of voluntary relinquishment.

**Enhancement of capital cost by the Petitioner:-**

223. The Petitioner claimed a capital cost of Rs.1386 crores for the period from 26-4-2001, the date of commissioning, till 31-3-2002. This claim was admitted by the Respondent.

224. The Petitioner installed a gas booster compressor at a cost of Rs.66 crores during 2002-03, on account of which he claimed a capital cost of Rs.1452 crores for the period from 2002-03 onwards till 2005-2006. The Respondent did not approve the installation of gas booster which approval was mandatory as per the PPA. The Respondent admitted a capital cost of Rs.1386 crores from 2002-03 till 2005-06. The Petitioner had to revert to the capital cost of Rs.1386 crores from April 2006 onwards.

225. As the Respondent did not approve the installation of gas booster, the Petitioner is directed to revise the monthly invoices from 2002-03 to 2005-06 to the capital cost of Rs.1386 crores.

226. The Petitioner claimed a capital cost of Rs.1379 crores in April 2006 on the basis of figures submitted to the Central Electricity Authority. This claim was admitted by the Respondent. The Petitioner, further, agreed to revise the capital cost downwards to Rs.1379 crores as against Rs.1386 crores from 26-4-2001, the date of commissioning. The Respondent acquiesced in this suggestion. Accordingly, the Petitioner redrew the annual invoices from the year 2001-02 till 2005-06 on the basis of capital cost of Rs.1379 crores.

227. The Petitioner is, therefore, directed to redraw the monthly invoices from April 2001 till March 2006 incorporating the capital cost of Rs.1379 crores.

**Capacity reset:-**

228. The first test conducted on 26-4-2001 indicated a capacity of 321 MW. The second test conducted on 21-11-2002 indicated a capacity of 330.5 MW. The Respondent notified on 9-12-2002 to the Petitioner that 330.5 MW would be the rated capacity. The Petitioner confirmed to the Respondent on 16-12-2002 that 321 MW is the rated capacity from 26-4-2001 and 330.5 MW is the rated capacity from 21-11-2002. The Petitioner raised invoices from 26-4-2001 for a capacity of 321 MW divided by the capacity of 330.5 MW. After the confirmation by the second test on 21-11-2002 of capacity of 330.5 MW the Petitioner raised invoices of 330.5 MW divided by 330.5 MW from 21-11-2002 onwards.

229. On 31-5-2006 the Respondent revised the capacity of the Petitioner to 336.299 MW with effect from 26-4-2001 and 343.969 MW from 21-11-2002. The capacity of the plant was fixed as 347.712 MW for the purpose of fixed cost recovery.

230. The revision of capacity by the TNEB on 31-5-2006 implied that the Petitioner is entitled to invoice the Respondent at the rate of 336.299 MW divided by 347.712 MW from 26-4-2001 upto 21-11-2002 and at the rate of 343.969 MW divided by 347.712 MW from 21-11-2002 onwards. Therefore, the invoices of the Petitioner from 26-4-2001 upto 21-11-2002 need to be redrawn in the ratio of 336.299 MW divided by 347.712 MW and in the ratio of 343.969 MW divided by 347.712 MW from 21-11-2002 onwards as against the ratios of 321/330.5 and 330.5/330.5 adopted by the Petitioner for the respective periods.

**Monthly Invoices:-**

231. Clause 10.2 of the PPA on invoices is extracted below:

**(a) Billing** *The Company shall submit to TNEB after the first Day of each month that commences after the commercial operation date an invoice ("Invoice") for all amounts accrued in the preceding month under the tariff and other applicable Sections in this Agreement for the estimated FCC, VFC and incentive charge which will come due during such month. Each invoice shall show the due date ("Due Date") of the invoice to be the date that is thirty (30) days after delivery of the invoice by the company. In the event that TNEB pays the Invoice, directly or through a Letter of Credit, within five (5) business days from the presentation of the invoice, then TNEB shall be entitled to a 2.5% reduction of the invoice amount and if the payment is made after five days but within the due date, TNEB shall be entitled to a one percent (1%) reduction of the invoice amount. The Company shall include a copy of the certificate issued to the company by the SREB regarding the amount of deemed generation to which the company is entitled from the preceding month or if the certificate has not been issued a reasonable estimate of deemed generation as approved by TNEB. TNEB shall have*

*access to all relevant information and records of the Company to confirm the accuracy of any invoice.*

**b) Payment** (i) Monthly payments *On the due date of an invoice, TNEB shall pay the company for the full amount stated in the invoice. In the event that TNEB fails to pay the company on the due date, the company may immediately draw upon the standby Letter of credit issued to TNEB pursuant to Section 10.3 by presenting to the issuing bank a certificate from an officer of the company stating the amount of the applicable invoice. If the invoiced amount exceeds TNEB's payment, the company may draw on the Letter of credit to the extent of the unpaid portion of the invoice.*

**(e) Disputes** *In the event of any dispute as to all or any portion of an invoice, TNEB shall nevertheless pay the full amount of the disputed charges when due and may serve a notice on the Company that the amount of an invoice is in dispute, in which event the provisions of Article 16 shall be applicable. If the resolution of any invoice dispute requires the company to reimburse TNEB, the company will pay TNEB interest on the amount to be reimbursed at a rate equal to the annual rate being charged from time to time on cash credit rate of the company or in the event no such facility is in place, the rate for cash credits extended by State Bank of India to comparable independent power companies plus one half percent (0.5%) per annum to the extent permitted by law. TNEB shall not have the right to dispute any invoice after a period of one year from the due date of such invoice.*

232. The deterrent against the Petitioner inflating a monthly invoice is reflected in Clause 10.2(e) of the PPA, which obliges the Petitioner to refund the excess claim at an interest rate of 0.5% more than the cash credit rate of the Petitioner. The burden of song of the Respondent is that the Petitioner could inflate monthly invoices and therefore he has to disallow a portion of the invoice. In other words, the Respondent wants to exercise the role of an adjudicator in deciding what component of an invoice is to be admitted and what component is to be disallowed. This is a dangerous proposition to which we have drawn the attention of the Respondent in DRP No.10 of 2008 GMR Vs.TNEB.

233. The Petitioner is directed to submit re-drawn monthly invoices to the Respondent. If it transpires that the payment

made by the Respondent during those months fall short of the quantum of the re-drawn invoices, the Petitioner is entitled to interest from the due date of the invoice to the actual date of payment by the Respondent in terms of Clause 10.6 of the PPA.

234. The scheme of the PPA is that the Respondent has to make full payment of monthly invoices and raise a dispute within a period of one year. There is no escape for the Respondent from this stringent obligation.

**Rebate:-**

235. The scheme of the PPA is that if payment of invoice is made by the Respondent within five business days, he shall be entitled to 2.5% reduction of the invoice amount and if payment is made after 5 days but within the due date he shall be entitled to 1% reduction of the invoice amount. Reading together Clause 10.2. (a), 10.2 (b)(i) and 10.2 (e), it is clear that the Respondent is obliged to pay the full amount of the invoice on the due date to be eligible for reduction of 2.5% or 1% as the case may be. Wherever the payment made by the Respondent falls short of the full amount he is not eligible for rebate or reduction of the invoice amount. The Respondent argued that an absurd situation would arise where theoretically for deduction of a sum of Rs.10,000/- , the Respondent would forfeit a rebate of Rs.one crore. The Commission would like to point out the inverse of such argument is that if by paying up Rs.10,000/-, the Respondent was eligible for rebate of Rs.one crore, he could have done so.

236. The Respondent further argues that the rebate of 2.5% contemplated in the PPA is nothing more than the

Petitioner forgoing the 2.5% benefit conferred on them as part of the interest on receivables which is a component of the working capital as per the recommendations of the K.P.Rao Committee. The limited point the Commission would like to make in this context is that regardless of the recommendations of the K.P.Rao Committee, the contract between the two parties would decide the conditions and quantum of rebate. The Respondent argues that he is eligible for rebate so long as the bill has been settled substantially if not almost entirely. The Commission would like to observe that this is a fallacious argument which contradicts the PPA, which mandates that entire payment should be made to be eligible for rebate.

**Interest on debt:-**

237. The Petitioner was permitted to swap high cost loans with cheaper loans on 14-7-2005, 19-9-2005 and 3-3-2008. The Respondent bore the cost of prepayment premium for the swaps, as he was the beneficiary of such a transaction.

238. On 14-7-2005, the Petitioner converted the IDBI loan-1 carrying interest rate of 17.07% to 8.5%. On 19-9-2005, the Petitioner converted four high cost interest loans of ING Vysya Bank, Indian Bank, Canara Bank and HDFC bank with interest rate ranging from 12% to 15.25% to cheaper loan of Bank of India carrying interest rate of 9.5%. On 3-3-2008 the Petitioner converted the term loan of IDBI carrying interest rate of 18% to a loan from the Federal Bank carrying interest rate of 11.5%.

239. Apart from the above conversion, the floating rate of loans which could be higher some time and lower at other times was not reflected in the monthly invoices. It was reflected only in the annual invoices due at the end of the year. The Respondent did not give credit to the Petitioner for higher floating rate of interest; instead he disallowed from the monthly invoices, when the rate was lower. If the estimated rate of interest was lower than the floating rate, the Respondent took advantage of falling interest rate but did not give credit to the Petitioner, when the floating rate shot up. The Petitioner submitted the estimates of FCC on 28-2-2008 for the year 2008-09 which included the cost on interest on debt. The next day higher interest bearing loans were swapped for lower interest bearing loans by the Petitioner. But, he did not revise the estimates for the following year.

240. The Respondent drew the attention of the Petitioner on 21-3-2008 seeking downward revision of interest rate for the following year but the Petitioner refused to revise the estimates for 2008-09. The Petitioner contends that once the estimate is submitted, he is not obliged to revise it as per the PPA. We do not support the contention of the Petitioner. We extract the relevant clause of the PPA in this regard:

*“Schedule-A – Tariff - 2(b) Within thirty (30) days after the Commercial Operation Date, the Company shall estimate those amounts which comprise the FCC for the remainder of that year in accordance with Section 3 of this Schedule A. The Company shall recompute the FCC.*

*(i)at least thirty (30) day prior to the beginning of each year thereafter, effective as of the beginning of such year”*

All that the PPA says is that 30 days prior to beginning of each year the estimates of FCC should be submitted. There is no embargo as per the PPA,

on downward revision of FCC charges in case of fall in interest rate prior to the beginning of the financial year.

241. Therefore, we direct the Petitioner to redraw the monthly invoices of 2008-09 on the basis of lower interest rates. The delay of the Petitioner in submitting the annual invoices deprived the Respondent from the gains of lower interest rates. We presume that the annual invoices submitted by the Petitioner in July 2007 for the years of 2001-02, 2002-03, 2003-04, 2004-05, 2005-06 and 2006-07 captures the gains to the Respondent on account of lower interest rate and gains to the Petitioner on account of higher floating rate. If the annual invoices have not been drawn up in that way, the Petitioner is directed to redraw the annual invoices capturing the lower interest rates and higher floating rates.

**Annual invoices:-**

242. Clause 10.2(b)(ii) of the PPA stipulates as follows:-

*“As soon as possible after the end of each Year, the Company shall submit to TNEB an annual Invoice setting forth all amounts owed under the Tariff and a reconciliation of the actual amounts receivable from TNEB for the prior Year against the sum of monthly estimated payment made by TNEB. If such Invoice shows net payment due to the Company by TNEB, the stated amount shall be paid by the Due Date. If such Invoice shows net payment due to TNEB by the Company, the stated amount shall be paid to TNEB by the date that is thirty (30) days after the Invoice is rendered”*

243. The Petitioner contends that the PPA does not prescribe a time limit for submission of annual invoices. The Petitioner submitted all the annual invoices for the years of 2001-02, 2002-03, 2003-04, 2004-05, 2005-06 and 2006-07 at a time in July 2007. The

Petitioner defends his inordinate delay in raising annual invoices on the ground that he awaited information from the Respondent covering long term interest outflows, wholesale price index and consumer price index for the purpose of computing operation and maintenance expenses, foreign exchange rate variation on return on equity, incentive based on plant load factor and interest on working capital. His further defense is that the monthly invoices were not paid by the Respondent in full and details of deduction were not available to him. The Petitioner contends that he could not have raised the annual invoices without the above data, which he awaited from the Respondent.

244. The Respondent submits that delayed submission of annual invoices is a material breach of the PPA. The Respondent contends that the Petitioner need not depend upon information from him for the purpose of filing annual invoices and that annual invoices have to be prepared by the Petitioner with the data available with him such as actual interest rates, actual amount paid to the bankers, FERV, return on equity and interest on debt and other financial charges etc. The Respondent contends that this information is available with the Petitioner and there is no role for the Respondent in furnishing such details. The PPA according to the Respondent, has not cast any obligation on the Respondent to furnish information for the purpose of filing annual invoices.

245. The Commission considers that the Petitioner should have filed the annual invoices on the basis of information available with him. As regards the dead line for filing annual invoices the Commission is unable to accept the plea of the Petitioner that the PPA does

not provide any time limit for submission of annual invoices. The PPA states that annual invoices are to be submitted as soon as possible at the end of each year. The Petitioner is entitled for reasonable time for submission of annual invoices but it cannot be the case that he would take five years to submit annual invoices. The spirit of the PPA has to be observed. While there is a definite time limit for submission of monthly invoices by the Petitioner, the PPA has been liberal in granting a reasonable time for submission of annual invoices. But this privilege should not be abused by the Petitioner for inordinately delaying annual invoices. The audited account and income tax returns of the Petitioner are ready by 30<sup>th</sup> Sept each year and therefore it would be reasonable to assume that annual invoices should be filed by 30<sup>th</sup> Sept of each year.

246. Accordingly, we direct the Petitioner to redraw the annual invoices of each year as on 30<sup>th</sup> of Sept of each year based on the data available for the previous financial year, except capacity reset which was effected by the Respondent on 31-5-2006. The ratio of 336.299 MW divided by 347.712 MW would be applicable for the period from 26-4-2001 to 21-11-2002 and thereafter 343.969 MW divided by 347.712 MW, as against the ratios of 321/330.5 and 330.5/330.5 adopted by the Petitioner for the respective periods.

247. This would result either in payment to the Petitioner or payment to the Respondent. Either party will make payment to the other of the principal amount. The annual invoice of 2001-02 would be due by Sept 2002. The annual invoice of 2002-03 would be due by Sept 2003. The annual invoice of 2003-04 would be due by Sept 2004. The annual

invoice of 2004-05 would be due by Sept 2005. The annual invoice of 2005-06 would be due by Sept 2006. The annual invoice of 2006-07 would be due by Sept 2007.

248. The Respondent has submitted the following figures of refund due from the Petitioner year-wise for the annual invoices after taking into account the capacity reset.

<b>Year</b>	<b>Annual Invoice</b>	<b>Original claim of the Petitioner</b>	<b>Excess claim of Petitioner</b>
2001-02	576.71	585.60	8.89
2002-03	930.41	953.71	23.31
2003-04	732.48	755.76	23.28
2004-05	508.76	539.66	30.90
2005-06	475.84	518.89	43.04
2006-07	819.79	822.49	2.69
<b>Total:</b>	<b>4043.99</b>	<b>4176.11</b>	<b>132.11</b>

The statement shows that the Petitioner has to refund to the Respondent Rs.8.89 crores for 2001-02, Rs.23.31 crores for 2002-03, Rs.23.28 crores for 2003-04, Rs.30.90 crores for 2004-05, Rs.43.04 crores for 2005-06 and Rs.2.69 crores for 2006-07. The total is Rs.132.11 crores. The Petitioner may verify the figures.

249. The Petitioner is liable to pay interest on refund as per Clause 10.6 of the PPA for the period from November 2002, November 2003, November 2004, November 2005, November 2006 and November 2007 on account of delayed submission of annual invoices, on the understanding that annual invoice for 2001-02 is due by Sept 2002, annual invoice of 2002-03 is due by Sept 2003, annual invoice of 2003-04 is due by Sept 2004, annual invoice of 2004-05 is due by Sept 2005, annual invoice of 2005-06 is due by Sept 2006 and annual invoice of 2006-07 is due by Sept

2007. On the other hand, if it transpires that the Respondent owes money to the Petitioner, he is liable to pay interest as per Clause 10.6 of the PPA.

250. The Respondent contends that the delay in submission of annual invoices by the Petitioner deprived him of the right to raise disputes on monthly invoices. According to the Respondent, if the annual invoices had been submitted in time in the following April or May, he would have been in a position to raise disputes on the monthly invoices based on the reconciliation of annual invoices and the monthly invoices of the previous year. This is a theoretical argument. By his own admission, the Respondent never made full payment against monthly invoices and therefore the condition for raising a dispute was not fulfilled by the Respondent. The Respondent justifies that he is entitled to prune the claim of the Petitioner, which makes it clear that he never made full payment against invoices. Therefore, for the Respondent to argue that he would have been in a position to raise disputes on monthly invoices, if the Petitioner had submitted annual invoices in time is theoretical. This plea of the Respondent has to be dismissed.

**Determination of capital cost:-**

251. The Petitioner submitted the proposal for determination of capital cost to the Central Electricity Authority on 20-7-2001. The Authority conducted several meetings with the Petitioner and Respondent but returned the papers on 22-11-2005 with the direction that both parties approach the Tamil Nadu Electricity Regulatory Commission for determination of capital cost.

252. The Respondent took another 2 years to file the petition with the Commission for determination of capital cost in M.A.P.No.1 of 2007. The Petitioner challenged the authority of the Commission to determine the capital cost before the High Court of Madras in W.P.No.34130 of 2007. The Petitioner, later, withdrew the writ petition from the High court and submitted himself to the jurisdiction of the Commission on 24-9-2008. He filed a petition M.A.P.No.2 of 2008 for determination of capital cost.

253. The Commission appointed its Secretary to scrutinise the petitions of the Petitioner and the Respondent. He submitted his report on 11-5-2009 which was forwarded to the Petitioner and the Respondent on 8-7-2009. The Commission took up the case in the sittings on 29-7-2009, 26-8-2009, 8-9-2010, 2-11-2010, 21-3-2011 and 22-3-2011. The Respondent sought adjournment thereafter on the ground that their counsel is being changed. In the meantime vacation of the High Court set in and at the request of the counsels of both parties, the hearing was adjourned. The case will now be taken up after the vacation.

254. The plea of the Respondent that adjudication of this case be deferred till finalisation of capital cost, does not merit consideration in view of the fact that both parties have consented for provisional capital cost in the PPA for the purpose of invoicing till the final capital cost is determined. As and when final capital cost is determined, adjustments between both the parties would take place in accordance with the PPA and therefore there is no case for deferring adjudication. We consider it as delay tactics of the Respondent.

**Summary of Ruling and Directions:-**

255 (a) The Commission is competent to adjudicate upon this dispute

(b) Limitation period prescribed in the Limitation Act 1963 would not apply to proceedings before the Commission; delay and laches would apply.

(c) Order II Rule 2 of the Code of Civil Procedure 1908 is not attracted in the present case.

(d) The Petitioner is directed to redraw monthly invoices for the period from June 2001 to 12-12-2004 after deducting 15 paise per unit.

(e) Monthly invoices are to be redrawn by the Petitioner between April 2002 and March 2006 after withdrawing the raise in capital cost of Rs.66 crores; further, monthly invoices from April 2001 to March 2006 are to be redrawn by the Petitioner with capital cost of Rs.1379 crores as against Rs.1386 crores.

(f) Monthly invoices have to be redrawn in the capacity ratio of 336.299 divided by 347.712 for the period from 26-4-2001 to 21-11-2002 and in the capacity ratio of 343.969 divided by 347.712 for the period from 21-11-2002 onwards.

(g) The Petitioner is directed to redraw the monthly invoices of the financial year 2008-09 on the basis of lower interest rates.

(h) If the actual payment by the Respondent against each monthly invoice falls short of the corresponding redrawn monthly invoice, the Respondent is liable to pay interest to the Petitioner in terms of clause 10.6 of the PPA till the date of payment by the Respondent. Conversely, if the Respondent has made excess payment against each monthly invoice compared to the corresponding redrawn monthly invoice, the Petitioner is liable to pay interest to the Respondent in terms of clause 10.6 of the PPA till the date of actual payment by the Petitioner.

(i) Rebate would be admissible to the Respondent, if the redrawn monthly invoices and the original payment made by the Respondent against the invoice of that month matches or if the Respondent has made excess payment.

(j) The Petitioner is directed to redraw the annual invoices for 2001-02, 2002-03, 2003-04, 2004-05, 2005-06 and 2006-07 as at September of respective years to capture the gains to the Respondent on account of lower interest rates and gains to the Petitioner on account of higher floating rate. The Petitioner is directed to redraw the annual invoices for 2001-02, 2002-03, 2003-04, 2004-05, 2005-06 and 2006-07 as at 30 Sept 2002, 30 Sept 2003, 30 Sept 2004, 30 Sept 2005, 30 Sept 2006 and 30 Sept 2007 respectively after taking into account the capacity reset. If the revised Annual invoices show refund to the Respondent, such refund shall be made with interest from November 2002, November 2003, November 2004, November 2005, November 2006 and November 2007 till the date of payment. If it transpires that the Respondent owes money to the Petitioner on

the basis of revised annual invoices, he will pay to the Petitioner with interest as per Clause 10.6 of the PPA till the date of payment.

(k) As and when final capital cost is determined by the Commission adjustment between both the parties will take place in accordance with the PPA.

(l) Settlement by either party after the Petitioner submits the redrawn invoices would take place within three months.

**Appeal:-**

256 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 forty five days.

With the above ruling and directions, the D.R.P. No.12 of 2009 and I.A. Nos. 12 & 13 of 2009 in D.R.P. No. 12 of 2009 are finally disposed of. There would be no cost.

(Sd.....)  
(K.Venugopal)  
Member

(Sd.....)  
(S.Kabilan)  
Chairman

/ True Copy /

Secretary  
Tamil Nadu Electricity  
Regulatory Commission