KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM

PRESENT

Shri. T.M.Manoharan, Chairman
Shri. P. Parameswaran, Member
Shri. Mathew George, Member

OP No. 30/2011, IA Nos. 3/12,4/12 & 5/12

In the matter of
Adjudication of the Dispute between M/s KPCL and KSEB, Arising out of the Power Purchase Agreement dated 12.8.1998

1st November 2013

Petitioner : Kasaragod Power Corporation Ltd.
Respondent : Kerala State Electricity Board.

ORDER

INTRODUCTION

1. M/s.Kasaragod Power Corporation Ltd. (*hereinafter referred to as the Petitioner/KPCL*) had set up a thermal power plant as an independent power producer (IPP) with a capacity of 21.178 MW at Mylatty in Kasaragod District, which commenced its commercial operation on 14.5.2001.

2. The Petitioner had executed a power purchase agreement (PPA) with Kerala State Electricity Board (hereinafter referred to as the Respondent/KSEB) on 12.8.1998 to operate the plant on despatchable basis with certain guaranteed capacity. The said PPA contained several conditions to be fulfilled by both the parties and the essential condition was that the Respondent would pay to the Petitioner the tariff as agreed to in the PPA for the electricity supplied by the

Petitioner to the Respondent. The project cost and the financial package at the time of financial closure happened to be different from those as per PPA. In accordance with the condition of PPA the actual cost at the time of financial closure is to be reckoned for calculation of fixed charges. The Petitioner alleged that the Respondent has not considered the actual project cost for the purpose of calculating the fixed charges and has started making arbitrary deductions at a rate of about 30% of the bill amount from December 2006 onwards unilaterally even out of the fixed charges calculated based on the project cost as envisaged in the PPA. On account of this, huge amounts have been withheld by the Respondent affecting the cash flow of the Petitioner very adversely. In addition, the Petitioner had raised a number of issues with KSEB claiming additional reimbursement/compensation.

3. The Petitioner had addressed the Respondent for arriving at a mutually negotiated settlement on all these pending issues as per Article 17.1 of PPA. Though KSEB held several meetings with the representatives of the Petitioner on the outstanding issues, most of them remained unsettled. Under such circumstances the Petitioner initiated action to settle the disputes through the dispute resolution mechanism as provided in the PPA. Article 17.2 of the PPA states as follows:

> *"in the event of such differences or disputes between the parties are not settled through mutual discussions within 90 days of such disputes, any party may issue written notice of 30 day to the other party requesting for appointing a sole arbitrator to be decided mutually by the parties and in the case of disagreement to be decided by the Chairman of the Central Electricity Authority".*

In pursuance of the above clause in the PPA, a panel of names was sent by the Petitioner to the Respondent with a request to agree to any one of the names suggested. This was turned down by the Respondent, on the plea that the appointment of an arbitrator was premature and requested the Petitioner to furnish authenticated documents in support of the claims for settling the issues through mutual negotiations as per Article 17.1 of PPA. Even after discussions at various levels, a consensus on the disputed issues could not be reached and the Petitioner decided to proceed further as per provisions of Article 17.2 of the PPA

and moved the Central Electricity Authority (CEA), for appointment of a sole arbitrator as per PPA. The Chairperson, CEA vide Order No. CEA/8/2/2010-Legal/1201 dated 30.11.2010 appointed Mr. M.L.Sharma, the Sole Arbitrator for adjudication of disputes and differences arising between KPCL and KSEB, which was agreed to by the Respondent. After preliminary hearing, the Respondent, vide its submission dated 4.6.2011 filed a preliminary objection in the matter on the jurisdiction of the Sole Arbitrator under Section 16(2) of the Arbitration and Conciliation Act1996, for adjudication of the disputes, in the light of the Judgment reported in 2008 (4) SCC 755 in Gujarat Urja Vikash Nigam Ltd Vs Essar Power Ltd on 13.03.2008, by the Supreme Court of India. Since the enactment of the Electricity Act, 2003 (hereinafter referred to as the Act) which came into force with effect from 10.06.2003, the State Electricity Regulatory Commission or an arbitrator nominated by it, only has the power to adjudicate and arbitrate upon the disputes between the licensees and generating companies in terms of Section 86(1)(f) of the Act. After hearing oral submissions, the Arbitral Tribunal passed its order dated 23.7.2011 discontinuing the arbitral proceedings. In view of this, the Petitioner filed the present petition on 17.10.2011 in terms of section 86(1) (f) of the Electricity Act, 2003 and as per Regulation 24,25 & 26 of the KSERC (Conduct of Business)Regulations, 2003.

4. The petition was admitted as OP 30/2011. The claims raised by the Petitioner are as follows:-

Sl. No	Particulars	Amount in Rupees
i	Payment of the balance due under the invoices a) Balance fixed monthly charges b) Balance Payment for the Lubricating oil	 11,45,86,745 2,01,26,847
ii	Reimbursement of Income Tax/MAT paid by the Petitioner	2,43,30,634
iii	Payment of Operation and Maintenance Adj. charges	1,18,43,165
iv	Balance payment towards the sale of infirm power	57,49,394
v	Incentive for delivering energy in excess	43,36,193

	of 80% PLF	
vi	Loss on account of excess consumption of HFHSD due to frequent start-ups and stoppages of engines	11,20,87,016
vii	For fulfilment of conditions in Article 9 of PPA	
viii	Interest a) Delayed Payments b) On Claims	21,86,43,591
ix	Costs	
	Total Claim	51,17,03,585

5. The Commission held the first hearing of the case on 16.1.2012. On the day of the first hearing itself Commission asked the parties whether they would like to get the disputes arbitrated by appointment of an arbitrator or adjudicated by the Commission, in view of the choices available under section 86(1)(f) of the Act. Both the Petitioner and the Respondent opted for adjudication by the Commission. The Petitioner also submitted that in the meantime they will seek an amicable settlement of the disputes through direct negotiations and the Commission directed them to resolve issues through bilateral discussions and report the results to the Commission in the next sitting. The case was posted for further hearing on 7.2.2012 when the Petitioner submitted that no progress could be made on mutual discussions and that they were in a very critical financial position and was unable to run the plant, due to non-payment of dues and arbitrary deductions by the Respondent, which in turn forced the Petitioner to breach their commitments of payment to their fuel suppliers. As per Article 9.4 (c) of PPA, the Respondent has the obligations for payment of all dues on account of tariff/supplementary invoices, and also to open an irrevocable, unconditional, transferable, confirmed, direct payment revolving Letter of Credit (LC) in favour of the Petitioner. The Respondent has taken a frivolous stand by withholding payments illegally, in breach of the terms in the Article 9.4(c) of the PPA. On 3.2.2012, the Petitioner had filed three Interlocutory Applications to obtain interim orders for:

    (i) restraining the Respondent from imposing any penalties on the Petitioner in connection with supply of uninterrupted power

(ii) directing the Respondent to pay an adhoc amount of Rs.15 Crore to the Petitioner as an interim payment in order to avoid closure of the plant and

(iii) for restraining the Respondent from deducting any amounts on the monthly tariff bills/ supplementary invoices submitted by the Petitioner, pending disposal of the OP No.30/11 by the Commission and pass such orders as deemed fit and proper in the interest of justice. These petitions were admitted as IA No.3/12, 4/12 and 5/12 and heard along with this petition on 7.2.2012. The Commission did not allow the pleas in the IAs and the case was adjourned for further hearing. The petitioner filed further rejoinder petition on 28.3.2012.

6. Next hearing was held on 9.7.2012 and reviewed the progress of mutual discussions. The Commission has resolved to adjudicate the dispute by themselves without referring to arbitration. In order to assist the Commission, a three member internal committee with the following members was appointed as per Order dated 22.8.2012, to conduct a detailed analysis of various issues involved in the case.

Adv. George James, Consultant (Legal) , Convenor,
Sri. C.K. Jayachandran, Consultant (Tariff) and
Sri. J. Sasidharan Pillai, Consultant (Regulatory Affairs).

The Consultant Chartered Accountant of the Commission was also co-opted to assist this internal committee. The committee submitted its report on 2.1.2013. The copy of the report of committee was sent to both the parties to offer their views. The Commission asked the Respondent vide letter on 8.1.2013 to examine the claims and to submit their views with regard to the request of the Petitioner for interim relief. The Respondent submitted their report on 22.3.2013, on which the remarks of the Petitioner was obtained.

7. Next hearing was held on 14.3.2013 & both the parties were directed to furnish their detailed statements in the light of the observations of the committee.

8. In the next hearing held on 30.5.2013, the arguments of both the parties on each claims were heard. It was decided during the arguments, inter-alia, to depute a technical committee to examine the use of the fuel HFHSD (Heavy Flash High

Speed Diesel) during the start/stop operations of the DG sets of the Petitioner. Accordingly, a committee was constituted on 14.6.2013, with Sri P.S. Rajagopal , Cons. (Engg), KSERC as Convenor, Sri. Bibin Joseph, Dy. Chief Engineer from KSEB and Sri. N.Bharath Kumar, Group Operations Head, KPCL, as members. The committee was directed to submit a report to the Commission on the following points:

(i) Whether the technical manuals and operating instructions of the manufacturers of the Engine specify that HFHSD has to be used for starting and stopping of the Engines?

(ii) If HFHSD has actually been used in the plant for starting / stopping the actual average quantity of HFHSD used for each start up and stop operation and time for which it is used after observing working of the plant for the required period and verifying the log books and other records in the plant?

The committee visited the plant at Mylatty, Kasaragod on 19.6.2013 and 20.6.2013 and carried out tests and submitted report to the Commission.

9. Final hearing was held on 7.8.2013 to facilitate both the parties to present their arguments and allowed 2 weeks time to file any further remarks by both the parties. The Petitioner furnished their final submission on 20.8.13 and the Respondent on 23.8.2013.The details of the arguments and related views presented during the above hearings and comments on each claim of the petitioner and those on the reports of the committees are narrated below.

Claim 1 – Payment of the Balance Due under the invoices

1(a) Balance Fixed Monthly Charges:-

Version of the Petitioner:

10.The estimated project cost as per schedule 8 of the P.P.A. is Rs.68.23Crore But the actual project cost, as per the financial closure, issued by the bankers of the petitioner namely Andhra Bank is Rs.70.77 Crore. A comparative study of the detailed breakup of the project cost is given below:

Particulars	Amount as per in PPA (in Crore)	Amount as per Financial Closure (in Crore).
Plant & Machinery imported	33.82	24.96
Customs duty	7.44	5.59
EPC cost - Indigenous	16.50	29.57
Site development	0.35	0.53
Preliminary and pre - operative expenses	10.12	10.12
Total	68.23	70.77

11. The Petitioner has stated that the value of the plant and machinery in Indian Rupee has been arrived at by taking the value of the equipment in USD and converting the same into Netherland Guilders (Ng) at the then prevailing exchange rate of Rs.19.15/Ng. The Petitioner had contemplated at the time of the signing the PPA to import engines and associated equipments from Netherland. But later it was sourced from M/s Caterpillar from Germany. All the supporting documents to substantiate the project cost of Rs.70.77 Crore were submitted to the Respondent. The tariff table in Article 7.1 of the PPA was revised by the Petitioner and the claim of monthly fixed charges was based on the project cost of Rs.70.77 Crore.

12. The Petitioner submitted that the capital structure of the project cost as per Schedule 8 of PPA is as follows:

Sl. No	Particulars	Rate	Amount Rs. in lakhs
i	Equity	33.33%	2274.47
ii	IFI Loan	15.37 %	1048.93
iii	Foreign Loan	51.30 %	3500.00
iv	Total	100.00 %	6823.40
v	IFI loan for 8 years	18.5% interest	
vi	Foreign Loan for 7 years	10% interest	
vii	Working capital	20% Interest	
viii	RoE at PLF of 80%	16%	

13. The Petitioner had requested the Respondent to finalise the tariff based on any one of the three following options.

Option 1. Rs.0.971144/KWH. It is as per the revised project cost of Rs.70.84 Crore arrived at based on the actual value of the Ng @ Rs.20.30 prevailed on the date of financial closure, i.e. 03.01.2001.

Option 2. Rs.1.00168/KWH. Worked out by considering the revised project cost of Rs.70.77 Crore and financial package as per the financial closure made by the bankers of the petitioner.

Option 3. Rs.1.002768/KWH. This option is worked out based on the project cost as per Option 1 and financial package as per Option 2.

But the respondent had not responded to the proposal and insisted for the terms as per PPA.

14. Regarding the financial package, the petitioner states that the financial package contemplated in the PPA and that as per the actuals are as follows:

Particulars	As per PPA - Rs. in lakhs	*Actuals - Rs. in lakhs*
Equity	2274.47 (33.33% of 6823.40)	2377
IFI Loan	1048.93 (15.37% of 6823.40)	4700
Foreign loan	3500	Nil
Total	6823.40	7077

15. The Petitioner has been submitting invoices to the Respondent taking Rs.70.77 Crore as the project cost. The Respondent has been making unilateral deductions from the invoices. The Petitioner has claimed a total sum of Rs.148.53Crore towards fixed charges. The Respondent has made payments of Rs.137.07 Crore only to the Petitioner. According to the Petitioner, an amount of Rs.11.46 Crore is due to them on this account.

<u>Arguments in the Counter Affidavit filed by the Respondent:</u>

16. The Respondent submitted that tariff norms allowed to the Petitioner as per the PPA was much better than the tariff norms allowed by the CERC and other Regulators. Since the interest rate allowed as per the PPA had subsequently reduced significantly, the Petitioner was requested to swap the high cost loan and pass the benefit to the Respondent, which the Petitioner has not done.

17. The Respondent has paid Rs.142.75 Crore as fixed charge based on the capital cost of Rs.68.23 Crore during the 11 years from the COD of the plant. Besides, Rs.11.89 lakhs has been paid towards variation in O&M charges on account of inflation for the Financial Year 01-02 to Financial Year 08-09. Though the Respondent could not schedule the plant on a regular basis due to excessive variable cost, full fixed charges and all the due variable charges have been paid. As a government owned public sector power utility, the Respondent could not admit claims which are against the provisions of the PPA and without any supporting documents.

18. The Respondent admits that the Art. 7.2 of the PPA could have been revised based on the capital cost and financial package at the time of financial closure and also the table in Article 7.1 accordingly. As the Petitioner has not provided any documentary proof for supporting their claim, the Respondent has never accepted the claim for revised project cost of the Petitioner. The Petitioner has not produced authenticated records to support their claim, in spite of the request made by the Respondent vide Annexure R2(a), R2(b), R2(c) and R2(d). The Petitioner has made varying claims as regards capital cost on various occasions. The Petitioner, vide letter dated 24.1.2001, has unilaterally intimated that financial closure was achieved on 3.1.2001 and the project cost has been enhanced to Rs.70.8483 Crore due to increase in the exchange rate of Netherland Guilders to Rs.20.30/Ng and specific proof from their bankers, UCO Bank would be furnished in due course. The total project cost mentioned in the letter of SBI dated 19.2.01 addressed to the Petitioner was Rs.70.6276 Crore with debt Rs. 47.085 Crore and equity Rs.23.543 Crore As per the common loan agreement dt.20.11.2000 between the Petitioner and the Consortium of Banks, the total project cost was Rs.70.6276 Crore (Exhibit C. 42 Page 90) The total project cost as per letter dated 20.7.2000 of the Industrial Finance Branch of Andhra Bank was Rs.70.2026 Crore (Exhibit C.42 Page 47). The Industrial Finance Branch of Andhra Bank informed the Respondent vide letter dt.25.9. 2001 that

the company had achieved financial closure on 3.1.2001 with project cost as Rs.70.77 Crore. (Exhibit C.42 Page 47)

19. The Respondent initiated many steps to resolve the disputes with the Petitioner. The Petitioner was asked to furnish all the details required by the Respondent to finalise the tariff, project cost and financial package (Annexure R3). The Petitioner was requested to furnish satisfactory explanation /documentary proof for the difference noticed in the milestone of payment, in the copy of EPC contract furnished during Jan. 2002 and Sept. 2003(Annexure R3 b). The Petitioner has been raising the monthly fixed charges based on the capital cost of Rs.70.77 Crore, but the Respondent has been making payment as per Art. 7 of the PPA with capital cost as Rs.68.23 Crore in the absence of supporting documents.

20. The Petitioner has unilaterally and without the prior consent of the Respondent modified the financial package. Instead of the foreign loan of Rs.35 Crore at an interest rate of 10% as per Schedule 8 of the PPA, the Petitioner met the entire debt from Indian Financial Institutions. The monthly fixed charge payments made by the Respondent, includes exchange rate variation for the foreign debt. The Petitioner has not produced any documentary proof for the actual foreign debt service payments {(Annexure R2(b) and R4(a) to R4(g)}. The Respondent retained from 12/2006 an amount equal to 10 % of the monthly fixed charges calculated as per PPA, in the absence of proof of foreign debt service. The Respondent paid Rs.10.08 Crore towards foreign exchange variation and subsequently retained Rs.5.27 Crore and hence an amount of Rs.4.81 Crore is refundable to the Respondent. The change in the equity component from Rs.2274.47 lakhs as per the PPA to Rs.2377 lakhs is without the consent of the Respondent. 51 % of the revised equity was contributed by Indian promoters while 49 % was contributed by M/s. Caterpillar. As per Exhibit C.42 (P.113) 49 % of the share holding of M/s. Caterpillar comes to Rs.700 lakhs. So the equity component could not be the amount claimed by the Petitioner.

21. The three options suggested by the Petitioner have no backing of the PPA and hence the Respondent has not approved them. The Respondent submitted that the entire claim of Rs. 11,45,86,745/- on account of fixed charges is rejected and instead made the demand for refunding Rs. 4,81,20,996/- the excess payment made by the Respondent.

Arguments in the Rejoinder filed by the Petitioner:

22. The Petitioner submitted that they are not bound to restructure the interest rates as per the PPA and their bankers were not ready to restructure the loans unless LC/Escrow was opened as per the PPA. The argument of the Respondent that the changes in engine configuration and in the capital cost were done without their concurrence is not correct. The proposed changes in the financial package and change in the engine configuration were intimated to the Respondent (Exhibit C. 66 & C.67) and the Respondent had accepted the same vide Exhibit C 68. It was made clear to the Respondent that there will be no foreign debt component through letter dt.12.11.1999 (Exhibit C.69). The Respondent was informed (Exhibit C.70) that the Petitioner had already submitted the copies of Equipment Supply Contract for the project along with amendments thereto to them. The project cost went up due to delays which were beyond the control of the Petitioner. The Petitioner has denied the allegations that they have claimed different capital cost on different occasions and have not produced documentary proof of the project cost. Though they have incurred more than Rs.70.77 Crore the claim was limited to only Rs.70.77 Crore as on the date of financial closure. The Petitioner had submitted all the documents required by the Respondent on 4.1.2002. The Petitioner submitted that the Respondent had accepted the changes through Exhibit C.68 letter. The deductions made by the Petitioner from the monthly bills are against Articles 19.4, 19.4(c) and 17.6 of the PPA.

Views Expressed in the Report of the Committee

23. The committee constituted by the Commission reported after their study as follows:

(1) The capital cost claimed by the Petitioner is Rs.70.77 Crore against the project cost as per the PPA fixed at Rs.68.23 Crore. The Respondent had been requesting the Petitioner to produce documentary evidence to substantiate the project cost of Rs.70.77 Crore The Petitioner had produced before the Respondent only the Certificate of Financial Closure from different banks. Again it is a fact that project cost as per the Financial Closures issued by different banks differ. It differs even from the Certificate issued by the Chartered Accountant of the Petitioner.

(2)In these circumstances it is the duty of the Respondent to verify the documents of the project cost. Though the Respondent has been demanding the same, it was not made available by the Petitioner. The Respondent is answerable to the consumers who have to bear the cost ultimately. The admitted claim should be supported by necessary convincing documents.. The copies of loans sanctioned by the banks cannot be considered equivalent to bills and invoices. There are no documents to evidence indigenous payments and hence the claim of the petitioner that the project cost is Rs.70.77 Crore cannot be admitted as such even with the support of documents provided in Exhibit C.42.

(3) The Petitioner had submitted three options for capital cost as per which the fixed charges is to be is to be arrived. These three options are outside the purview of the PPA. The Schedule 8 of the PPA clearly specifies the capital cost of the project. It also specifies that capital cost and financial package will be that at the time of financial closure. As the PPA has such specific terms, there is no need to consider other options.

(4) The capital cost of the project cannot be fixed only on the basis of the certificate issued by the Chartered Accountant of the Petitioner. The Respondent cannot be blamed for requiring the documentary evidences, based on which the Chartered Accountant issued certificate, for their own verification. Hence the committee recommended that the Petitioner shall produce the details required by the Respondent within a time frame, based on which project cost can be finalised. If the Petitioner fails to do so, the capital cost as per PPA may be accepted.

(5) The Committee observed the deviations from the financial package from the PPA terms. It is evident that,

(i) the ratio in debt components between foreign debt and indigenous debt was changed by the Petitioner resulting in the increase in the capital cost of the project,

(ii) the Petitioner had intimated the change to the Respondent and the Respondent had advised the former to go by PPA, and that,

(iii) due to this there is savings on account of non-payment of exchange rate variation on debt portion.

Remarks of the Respondent on the Report of the Committee

24. The Respondent accepted the recommendations of the Committee. The Respondent submitted that the balance fixed charges to be paid by the Respondent depends inter alia on the capital cost of the project and the financial package. The Petitioner has not produced any documentary evidences to substantiate their claim. The three options suggested are outside the purview of the PPA. The Respondent accepted the stand that if the Petitioner fails to produce the desired documents, it should be presumed that they have no satisfactory proof for justifying their claim and the capital cost as per PPA may be accepted. Further, the Respondent submitted that the exchange rate variation is required to be paid only for actual foreign debt service payments. Since the Petitioner has not availed any foreign loan, the actual exchange rate variation is not applicable to the Petitioner.

Remarks of the Petitioner on the Report of the Committee.

25. Arguing that the Petitioner has produced all documents in time and that in the absence of any provision in the PPA, the Petitioner claimed that he is not liable to produce any bills etc to the satisfaction of the Respondent. However it is further submitted that the ownership of the company has changed since the past six years and the documents have been moved thrice to different premises and even after many attempts the Petitioner could not trace the complete set of documents. On account of this and not to delay settlement further, the view of the Committee for fixing the project cost at Rs.68.23 Crore and to follow the financing pattern shown in the PPA is acceptable to the Petitioner.

Final Submission of the Petitioner

26. It is submitted that the Petitioner has taken loan of Rs.47 Crore from Indian Banks only (i. e. Rs.12 Crore from UCO Bank, Rs.15 Crore from Andhra Bank & Rs.20 Crore from State Bank of India). There will be no foreign debt calculations or exchange fluctuation. A new levelised tariff is to be worked out with 16% Return on Equity (RoE) (equity 1/3 of Capital Cost of Rs.68.23 Crore) and balance two third with lending rates approximate 15.5% for indigenous loan, as per actual. The total amount payable to the Petitioner towards fixed charges will be Rs.178.38 Crore and the Petitioner has received Rs.146.74 Crore till June 2013. While working out the levelised tariff for the past and for the balance period of PPA, it is to be ensured that the total amount, including recovery of Rs.5.8 Crore

withheld since 12/2006 together with interest is paid by the end of the contract period.

Analysis and Decision of the Commission.

27. The estimated cost of the project as per PPA is Rs.68.23 Crore with debt/equity ratio to be maintained as per schedule 8 (equity 33.33%-Rs.22.7447 lakhs; Debt 67.67%-Rs 45.4893 lakhs). Out of Rs. 45.4893 Crore of debt Rs.10.4893 Crore is Indian loan (interest @18.5%) and Rs.35Crore is foreign debt (interest @10%). For the foreign debt one Dutch Guilder (NG) is taken as 19.15 Indian Rupees and for servicing the foreign debt the actual exchange rate prevailing on the billing date is to be taken. Actual foreign debt service claim is to be supported by documentary evidence. Other than debt servicing, depreciation, O&M and RoE are also part of fixed cost worked out according to the rates prescribed in the PPA. The tariff table gives the precise figures of fixed cost per unit of energy based on the capital cost of Rs.68.23 Crore.

28. Schedule 8 of PPA specifies that the fixed charge payment will be finalized based on capital cost and financial package at the time of financial closure. Before the actual financial closure, KPCL placed before KSEB three alternate financing proposals for consideration by the Board (letter dated 3.10.1999). The Board preferred the method as in PPA only (letter of KSEB dated 8.11.1999). Though KPCL once again wrote to KSEB about the alternatives there was no response from KSEB. In the end the actual financial closure is seen to be different from that preferred by KSEB. According to the letter dated 25.9.2001 from Andhra Bank the project cost is Rs.70.77 Crore with a debt component of Rs.47 Crore and equity of Rs.23.77 Crore. Though the debt /equity ratio remained almost the same, the entire debt is seen to be raised as Indian loan from three banks viz. SBI (Rs.20 Crore), Andhra Bank (Rs.15 Crore) and UCO Bank (Rs. 12 Crore). Also as per the financial closure 49% of the equity is foreign whereas as per PPA the entire equity was to be Indian. UCO Bank in their letter dated 9th February 2001 had confirmed that "KPCL has completed financial closure". State Bank of India as per their communication dated 10.10.2002 also certified that KPCL has achieved the financial closure with a capital cost of Rs.70.77 Crore; debt Rs.47 Crore and equity Rs.23.77 Crore. Letters from the banks approving the loan, copy of the common loan agreement dated 20.11.2000 and certificates of financial closure as mentioned above are available. Along with their final submission dated 20.08.2013 the Petitioner has

produced copies of actual financing documents like common loan agreement, deed of hypothecation, Form No.8 of the charge created by the Company and balance confirmation as on 2008 from all the three banks. State Bank of India, Industrial Finance Branch, Bangalore has also given it in writing vide their letter dated 16.08.2013 that Rs.20 Crore was disbursed to the Company which is fully repaid along with interest.

29. Under these circumstances it can be safely concluded that financial closure was achieved as defined in the PPA and that an amount of Rs.47 Crore was availed as Indian loan by the Petitioner to finance the project cost. The remaining question is whether the “financial closure” was on terms satisfactory the Board. Board had expressed their dissatisfaction to the Company on this financing pattern as per letter dated 15.3.2001 and also earlier vide their dated 8.11.1999. However since there is no written dissent by KSEB against the financial arrangement resorted to by M/s KPCL after the achievement of financial closure, in spite of the Company informing them about the revised arrangement, it will be unfair to take a view at this stage that the financial closure is invalid and only the PPA arrangement is to be followed. Moreover the PPA arrangement envisages foreign loan, foreign exchange rate variation etc. which cannot be assumed on a non-existent foreign loan. In fact if KSEB was serious of their objection they should have raised it as a dispute then and there and also they should not have settled the fixed charges claims without a proper “financial closure” as envisaged in the PPA.

30. Therefore in the interest of both the parties Commission is of the opinion that the fact of availing the entire debt as Indian loan is to be recognized. This is supported by the documents from the banks and also the general certification by the Company’s Chartered Accountants. From the documents available before the Commission it is difficult to arrive at the rate of interest the lending bankers have actually charged the Petitioner on the loan component. State Bank of India, Industrial Finance Branch, Bangalore has stated in their letter No.IFB-AMT-IV-897 dated 16.08.2013 addressed to the Commission that they had disbursed a term loan of Rs.20 Crore to the Company over a period of 11 years and an interest amount of Rs.11,30,87998 was levied charging them a floating rate of interest. The common loan agreement indicates a rate of 15.4% in the case of SBI for the Rs.20 Crore, 15.4% in the case of UCO Bank for the Rs. 12Crore and 15.5% in the case of Andhra Bank for the Rs. 15 Crore that they had agreed to lend. Though the PPA provided for 18.5% of interest for Indian loan the

Petitioner had claimed only 15.5% in their bills. Hence it is considered fair to go by the weighted average of the rates as provided in the common loan agreement.

31. Now the question is whether the Petitioner is under an obligation to swap the loans for gaining advantages in fall in interest rates. There is substance in the argument of the Petitioner that there is no express provision in the PPA for restructuring the interest rates. Moreover the Respondent failed in opening Letters of Credit and escrow account as provided in the PPA and hence it can be reasonably concluded that in such circumstances the bankers are not likely to accept requests for restructuring of outstanding loans.

32. The project cost is the most debated issue between the Petitioner and the Respondent. The Petitioner was claiming the fixed charge based on the actual project cost of Rs.70.77Crore with an Indian loan component of Rs.47 Crore at an annual interest of 15.5% whereas the Respondent was settling the claims based on original PPA cost of Rs. 68.23 Crore with foreign loan component, foreign exchange rate variation etc. The Respondent was persistently asking the Petitioner for documentary evidence in support of a non-existent foreign loan. The question is whether the figure of Rs.70.77 Crore claimed by the Petitioner as the actual project cost is acceptable. According to the Petitioner the bankers have indicated this amount in the financial closure, but there are certain differences among the banks as pointed out by the Respondent. Precise documentary evidences in support of payments to Engineering, Procurement and Construction (EPC) contractor were also not forthcoming. Though there are compelling reasons to believe that the actual project cost could have been higher than the estimated cost as in the PPA on account of delays in execution which according to the Petitioner were beyond his control, Commission is of the opinion that in the absence of better evidence the capital cost as per PPA can be accepted. The committee appointed by the Commission has also suggested this option in their report and the Respondent too as per submission dated 22.03.2013 before the Commission has expressly stated that "as the Petitioner has agreed to adopt the capital cost as per the provisions of the PPA, KSEB has no dispute on the issue."

33. Commission therefore orders that for calculation of fixed charges, the project cost may be taken as Rs. 68.23 Crore as provided in the PPA. The entire loan of Rs.47 Crore is to be treated as indigenous loan since there is documentary evidence of the Company availing this much loan from indigenous banks. The

weighted average of the interest rates as furnished in the common loan agreement with the banks may be taken for the calculation of fixed charges. The balance amount of the capital cost viz.Rs.21.23 Crore shall be taken as equity and the total fixed charges shall be worked out accordingly. All components which are based on the project cost such as O&M expenses, depreciation and RoE shall also be worked out on the above basis. The balance, if any, being the difference between the amount of fixed charges that has now become payable as per these orders and the amount of fixed charges already paid shall be reimbursed to the Petitioner. Excess payment of fixed charges, if any, received by the Petitioner from the Respondent shall be adjusted in the payments due to the Petitioner. Interest on belated payment/ excess payment shall be paid by either parties as per Article 9.4 of the PPA which is quoted hereunder.

> *9.4 Direct Payments: Disputed Payments*
>
> *(a) Notwithstanding the establishment of the Letter of Credit, the Board shall be entitled to make direct payments of any Tariff Invoice or any other Supplementary Invoice issued by the Company to the Board, by cheque and when such direct payment is made prior to or on the Due Date of Payment, the Company shall not present the same bill to the bank issuing the Letter of Credit.*
>
> *(b) Any payment made beyond the Due Date of Payment shall carry interest at the Contract Rate of Interest. Notwithstanding the foregoing this Section 9.4 does not give any right whatsoever to the Board to delay payment and accordingly is without prejudice to any other remedy the Company may have for late payment by the Board.*
>
> *(c) Where any dispute as to all or any portion of any amount due to Company on account of tariff/Supplementary Invoices arises, the Board shall nevertheless pay the full amount for the disputed charges when due and shall give written notice of the dispute to the Company as soon as reasonably possible after the Board discovers the same. Such notice shall identify the disputed bill, state the amount in dispute and set forth a full statement of the ground on which such dispute is based. Upon final adjustment, the refund, if any, together with interest at*

the Contract Rate of Interest on any overpayment made by the Board, shall be adjusted in the Tariff Invoice next submitted to the Board.

The terms "due date of payment" and the "contract rate of interest" have been defined in Article 1 of the PPA. The interest payable shall be worked out on the net payments of fixed charges due to the Petitioner or due to the Respondent from the due date of payment at the contract rate of interest.

Claim 1(b) Balance Paymentfor Lubricating Oil

Version of the Petitioner

34. The Schedule 8 of PPA envisages that the consumption of lubricating oil should be to the tune of 1.1 gm/unit of power generated and claimed accordingly. The Balance amount due to the Petitioner is Rs. 2,01,26,847/-.

Arguments in the Counter Affidavit By the Respondent: (Para 29-32 of the Counter Affidavit)

35. Art. 7.3(vii) of PPA stipulates that the Petitioner shall monitor the actual consumption of lubricating oil based on the monitoring mechanism as provided in the Art. 7.3(vi) of PPA, acceptable to both the parties. Payment shall be based on the above monitoring and the price actually paid by KPCL as per invoice. Consumption shall not exceed 1.1 gm per unit.
36. The Respondent has been requesting the Petitioner from 2001 onwards {Annexure R2(b) & R4(a)} to furnish the details of monitoring mechanism or any authentic data of guaranteed or tested values of lubricating oil consumption. As the Petitioner has not furnished the required details, the Respondent effected payment @ 0.825 gm/unit which is the 75% of the ceiling prescribed in Art. 7.3(vii) of PPA. Moreover the ceiling of 1.1 gm/unit was specified because the PPA contemplated installation of Wartsila engine. The Petitioner installed Caterpillar engine, the manual of which specifies average lubricating oil consumption of 0.6 gm/unit.
37. Pursuant to the directions in the meeting on 14.9.2009 {Annexure R3(b)}, the Petitioner produced relevant records relating to the actual consumption of lubricating oil. The details of the actual purchase of lubricating oil during 2001-02 to 2010– 11 (Annexure R6, R7} shows average consumption @0.75577

gm/Unit, as against 0.825 gm/unit for which payment has been made. Hence the Petitioner shall refund to the Respondent, the excess amount of Rs. 1.07 Crore on account of this.

Argument in the Rejoinder filed by the Petitioner: (Para 28-31 of the Rejoinder)

38. The Petitioner admitted that mutually accepted mechanism for monitoring the lubricating oil consumption has not been installed and it is submitted that the most accurate way of calculation is on the actual basis, subject to a ceiling of 1.1 gm/unit.

Views Expressed in the Report of the Committee

39. The Petitioner and the Respondent had intimated that they have come to an agreement on the issue of lubricating oil. As per the Committee report, "the most accurate method of arriving at the lubricating oil consumption was to go by the actual bills/consumption so far, subject to the upper limit of 1.1 gm/kWH . Based on this, the two parties came to a consensus for reimbursing an applicable amount of Rs.94 lakh. Hence the committee did not consider the issue.

Remarks of the Petitioner on the Report of the Committee

40. The Petitioner intimated the Commission that this is acceptable to them. However the lubricating oil consumption prior to COD is yet to be settled.

Analysis and Decision of the Commission.

41. The Petitioner and Respondent have reported that they have already arrived at a consensus on the settlement of the dispute relating to payments for lubricating oil and hence the Commission refrains from passing any award on this matter.

Claim 2 Reimbursement of IT/MAT Actually Paid

Version of the Petitioner:

42. Article 7.2(iii)(b) of PPA entitles the Petitioner to get reimbursement from the Respondent, the Income Tax paid on 16% of return on equity. As per Section80-IA of the Income Tax Act 1961, the entire profit made during the 10 year period after COD is eligible for exemption from Income Tax, i.e, there was a tax holiday from the Assessment Year 2002-03 to 2011-12, whereas as per Section115- J(B),

and the Petitioner is liable to pay the IT assessed in view of Section 80-IA or the Minimum Alternate Tax (MAT) whichever is higher. Hence the petitioner had to pay the MAT. The Petitioner has been demanding its reimbursement and the Respondent has neglected to pay the same. The amount due to the Petitioner on this account is Rs. 2,43,30,634/-.

Arguments in the Counter Affidavit filed by the Respondent: (Para 33 of the Counter Affidavit)

43. The Petitioner is entitled to claim reimbursement of the MAT paid with respect to the income from sale of power. They have claimed the reimbursement of the MAT for the entire book profit. Their claim for the Assessment Year 2002 -03 to 2006- 07 is Rs. 1,89,54,281/- and the MAT payable is only Rs.1,59,51,025/-. The Petitioner has not provided IT assessment orders from 2007-08 onwards and hence not entitled to claim reimbursement.

Argument in the Rejoinder of the Petitioner: (Para 32-34 of the Rejoinder)

44. In the Appeal no. 39/2010, Jaiprakash Hydro Power Ltd (JHPL) Vs. Himachal Pradesh State Electricity Regulatory Commission (HPSERC), the Appellate Tribunal for Electricity has categorically held that since Section 115 JB was introduced in the Income Tax Act, 1961, under which the MAT was made applicable to generating companies with effect from 1.4.2001, on a conjoint reading of Section 80-IA and Section 115-JB, it can be seen that the company is entitled for reimbursement of MAT. (Exhibit C-82)

45. The Petitioner has submitted the tax assessment orders from 2007-08 to 2009-10 on 7.3.2012 (Exhibit C-83). In view of the revised calculation of MAT, the Respondent is liable to pay Rs.2.01 Crore plus interest, totalling to Rs.2,43,30,634/-.

Views Expressed in the Report of the Committee:

46. The conditions of PPA in Art.7.2(iii)(b) insist on three facts:

(a) Income Tax on 16% RoE can be reimbursed subject to Government of
India policy/guidelines,

(b) in the tariff period, Income Tax is to be paid on income from

generation of electricity and

(c) the company shall use all reasonable endeavours to enjoy maximum advantage out of tax laws to minimize the liability *of the Board on this account.*

47. Both the Petitioner & Respondent have intimated the Commission that they have come to a consensus on MAT for the Assessment Year 2001-02 to 2006-07 and the Respondent agreed to pay Rs.1.595 Crore to the Petitioner. MAT payable for the period from 2007-08 to 2009-10, remained in dispute. According to the Respondent*, as per Income Tax orders for these years, the Company has no income from business for claiming tax, after availing benefits under Section 80-IA* and hence the Respondent is not liable to admit the MAT claim for these years. The Committee examined the assessment orders produced by the Petitioner (Exhibit C.83) for the period 2007-08 to 2009-10; which revealed that "the assessee claimed deduction under Section 80-IA and net income returned is NIL". The MAT assessed during these years are on "other income", which includes interest on deposits, other miscellaneous receipts, interest accrued on delayed payments, foreign exchange fluctuation difference etc. As the PPA clearly specifies that income tax on income which relates to generation of electricity only attracts MAT/IT, the Committee recommended for getting clarification of the Petitioner, whether "the other income" has any relation to generation of electricity.

Remarks of the Respondent on the Report of the Committee

48. The Respondent admitted that consensus on MAT for the period from 2001-02 to 2006-07 has been reached with the Petitioner. For the reimbursement related to the period from 2007-08 to 2009-10 the Respondent agrees with the recommendations in the report of the committee to get clarification on 'Other Income' from the Petitioner.

Remarks of the Petitioner on the Report of the Committee:

49. The view of the Committee that the MAT is reimbursable is acceptable to the Petitioner. It is already clarified that the MAT is claimed on income from generation only and not on any other income. The Petitioner objected that the stand of the Committee on reimbursement of IT, only after the assessment is done, is not acceptable to them. They are forced to pay the tax during the same

financial year and assessment comes up many years later. The Respondent should reimburse the amount of IT / MAT paid by the Petitioner in the same year in which payment of tax was made.

Remarks of the Respondent(in letter dated 22.3.2013)

50. The Respondent reiterated that the eligible amount towards MAT claim for Assessment Year 2001-02 to 2006-07 is Rs.1,59,51,025/- only. The claim of Petitioner for Assessment Year2007-08 to 2009-10 is 0.41 Crore, which can be admitted only based on the production of audited accounts of the company from 2007-08.

Reply of the Petitioner:

51. The Petitioner's enterprise was set up for power generation exclusively for KSEB and they do not have any other customer or any income unrelated to the core business of power generation. Hence the '*other income'* is termed so in accounting parlance & the same is directly connected to generation facility set up exclusively for KSEB. It is reiterated that the above heads of income under '*other income*' has a direct or indirect relation to the primary business of power generation exclusive for the Respondent & the entire MAT paid should be reimbursed.

Submission of the Petitioner (in letter dated 15.6.2013)

52. This claim is to be fully reimbursed on all income as a pass through item, subject to annual income limit of 16% on RoE (i.e. Rs.3.64 Crore/year). Total income of the Petitioner including '*other income'* has never crossed this limit. The total amount paid towards MAT during the financial years 2001-02 to 2009-10 is Rs.3.45 Crore

53 The Petitioner prayed that direction may be issued for reimbursing IT/MAT claims, as soon as they pay the amount to IT Department, without waiting for the final assessment.

Final submission of the Petitioner (in letter dated 7.8.2013)

54. In spite of the exemption under Section 80-IA available for 10 years, till 2012, the Petitioner had to pay MAT to the IT Department to the tune of Rs.3.45 Crore.

This amount is to be reimbursed to the Petitioner as the plant is set up solely for KSEB and any IT/MAT liability is a pass through item, limited to 16% RoE. Since this RoE has never been achieved till date, in future also due to the anticipated loss for the next 3 years, even when exemption under Section 80-IA is removed, MAT only may be applicable.

55. IT Department raised an additional IT demand of Rs.9.77 Crore for the assessment year 2007-08 to 2010-11, while returns were picked up for scrutiny. This claim was mainly on account of interest due, on payments receivable from the Respondent on presumption basis. The Respondent confirmed it to IT Department that there are outstanding dues amounting to Rs.37.46 Crore, including interest of Rs.12.41 Crore, which was not released due to disputes.

56. The Petitioner cited Judgments of Supreme Court, ruling that the interest on deposits, on receivable and on arbitration awards are to be treated as 'business income' (though recorded as 'other income' as per income tax filing format). KPCL has no other business other than the generation & sale of power to the Respondent exclusively and hence the MAT liability may be reimbursed in full.

57. The Hon'ble Appellate Tribunal for Electricity (APTEL) has dealt with similar issues relating to Income Tax and Minimum Alternate Tax (MAT) in its order dated 21.10.2011 in Appeal No. 39 of 2010 – Jaiprakash Hydro Power Limited (JHPL) Vs Himachal Pradesh State Electricity Regulatory Commission and Himachal Pradesh State Electricity Board. In the said order the Hon'ble APTEL has held that the amendment / modification of the Income Tax Act, 1961 by insertion of Section 115 JB in place of Section 115 JA by Legislature would squarely fall under the term change in law. According to Section 80-IA of the Income Tax Act, 1961 the Petitioner is entitled to tax holiday for ten consecutive assessment years out of 15 years from the date of operation. The relevant portion of Section 80- IA is quoted here under.

> *"80-IA (1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with a subject to the*

provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to hundred per cent of the profits and gains derived from such business for ten consecutive assessment years.

(2) The deduction specified in sub-section (1) may, at the option of the assessee, be claimed by him for any ten consecutive assessment years out of fifteen years beginning from the year in which the undertaking or the enterprise develops and begins to operate any infrastructure facility.

(4) This section applies to……………

(iv) an undertaking which-

(a) is set up in any part of India for the generation or generation and distribution of power if it begins to generate power at any time during the period beginning on the 1st day of April, 1993 and ending on the 31st day of March, 2011".

58. In view of the above provision in the Income Tax Act, 1961 the Petitioner can avail tax holiday for ten years from the year of commercial operation. However, by insertion of Section 115 JB in the Income Tax Act with effect from 1.4.2001, the Petitioner is also liable to pay MAT which was originally introduced as Section 115 J with effect from 1.4.1988. Subsequently as per amendment to Section 115 J, Power Generating Companies were exempted from MAT. Subsequently Section 115 J was withdrawn during the period from 1.4.1991 to 31.3.1997 and thereafter it was reintroduced with effect from 1.4.1997 by insertion of Section 115 JA. With effect from 1.4.2001, Section 115 JA was withdrawn and Section 115 JB was introduced by which all corporate entities

including Power Generating Companies were made liable to pay MAT. The table indicating the Legislative changes in respect of MAT since its introduction as given in the order dated 21.10.2011 of the Appellate Tribunal is reproduced hereunder.

Date	Legislative changes	Applicability on Power Generating Companies
01-04-1998	Section 115J was introduced in the Income Tax Act, 1961	MAT was made applicable to all Corporate entities including power Generating Companies.
01-04-1989	Section 115J was amended	Power Generating Companies were exempted from MAT
01-04-1991 to 31-03-1997	Section 115J was withdrawn from Income Tax Act, 1961	Applicability of MAT was withdrawn w.e.f 1.4.1991
01-04-1997 to 31-03-2001	MAT was reintroduced in the Income Tax Act, 1961 by insertion of Section 115JA	MAT was not applicable to Power Generating Companies
01-04-2001	Section 115JA was withdrawn. MAT was reintroduced by insertion of Section 115 JB in the Income Tax Act, 1961	MAT was made applicable to all Corporate entities including Power Generating Companies

The relevant extracts of Section 115 JB are quoted hereunder.

"115JB (1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 2001, is less than seven and one half per cent of its book profit, such book profit shall be deemed to be the

total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of (seven and one-half percent).

Every assessee, being a company, shall, for the purposes of this section, prepare its profit and loss account for the relevant previous year in accordance with the provisions of Parts II and III of the Schedule VI of the Companies Act, 1956 (1 of 1956):

Provided that while preparing the annual accounts including profit and loss account.

(i) The accounting policies;

(ii) The accounting standards adopted for preparing such accounts including profit and loss account;

(iii) The method and rates adopted for calculating the depreciation.

Shall be the same as have been adopted for the purpose of preparing such accounts including profit and loss account and laid before the company at its annual general meeting in accordance with the provisions of Section 210 of the Companies Act, 1956 (1 of 1956)".

59. In view of Section 115 JAA of the Income Tax Act 1961, the MAT payment if any made by the Petitioner cannot be regarded as a regular income tax liability of the Petitioner for the next 10 successive years. The MAT paid has to be set off against the regular income tax liability within succeeding 10 years since the MAT credits of each assessment year are only in the nature of advance tax which can be set off against regular income tax liability. Relevant portion of section 115 JAA is quoted hereunder.

"Tax credit in respect of tax paid on deemed income relating to certain companies.

115JAA (1) XXX XXX XXX

(IA) Where any amount of tax is paid under sub-section (1) of section 115JB by an assessee, being a company for the assessment year commencing on the 1st day of April, 2006 and any subsequent assessment year, then, credit in respect of tax so paid shall be allowed to him in accordance with the4 provisions of this section.

(2)XXX XXX XXX

(2A) The tax credit to be allowed under sub-section (1A) shall be the difference of the tax paid for any assessment year under sub-section (1) of section 115JB and the amount of tax payable by the assessee on his total income computed in accordance with the other provisions of this Act:

Provided that no interest shall be payable on the tax credit allowed under sub-section (1A).

(3) XXX XXX XXX

(3A) The amount of tax credit determined under sub-section (2A) shall be carried forward and set off in accordance with the provisions of sub-sections (4) and (5) but such carry forward shall not be allowed beyond the tenth assessment year immediately succeeding the assessment year in which tax credit becomes allowable under sub-section (1A).

(4) The tax credit shall be allowed set-off in a year when tax becomes payable on the total income computed in accordance with the provisions of this Act other than section 115JA or section 115JB as the case may be.

(5) Set off in respect of brought forward tax credit shall be allowed for any assessment year to the extent of the difference between the tax on his total income and the tax which would have been payable under the provisions of sub-section (1) of section 115JA or section 115JB as the case may be for that assessment year."

Analysis and Decision of the Commission.

60. The provision in the PPA regarding liability of Income Tax reads as follows:

> *Article 7.2 (iii) (b): " The Board shall reimburse the Company Income Tax on 16% on equity subject to the Government of India policy/guidelines, if any, applicable to such projects. In the tariff period during which the Company becomes liable to pay Income Tax on such income which relates to generation of electricity under the terms of this agreement, the Company shall advise the Board of such liability and submit to the Board the necessary computation thereof. The reimbursement of Income Tax as per the above mentioned calculation shall be done by the Board to the Company against a Supplementary Invoice raised by the Company supported by documentary evidence of such payments of Income Tax. The Company shall use all reasonable endeavours to enjoy the maximum advantage out of the tax laws applicable from time to time in order to minimize the liability of the Board on this account."*

61. Though the issue is raised as a dispute before the Commission it can be seen from the documents produced and the averments made that both the parties had come to some level of agreement regarding the reimbursement of Income Tax till the Assessment Year 2007-08. It is seen from various assessment orders of the Company till Assessment Year 2009-10 that the IT authorities were assessing the Income Tax under both regular income tax rules and also under MAT rules and whichever is higher was levied. Till Assessment Year 2006-07 MAT was being levied since tax was less under normal Income Tax computation. From Assessment Year 2007-08 to 2009-10 Income Tax under normal IT rules was levied since that amount was higher. The Petitioner was raising the claims of actual MAT till Assessment Year 2006-07 and later on an assumed calculation of MAT for the next three years. The Respondent is agreeable to settle the claims upto Assessment Year 2006-07 but only with respect to the income from sale of power (though income from sale of power is exempt from Income Tax as per

section 80- IA under normal assessment). The Petitioner had also accepted this position (as seen from Ext.C-83). However the Respondent has not yet paid even this agreed amount so far on the plea that they had made over payments towards fixed cost.

62. For the Assessment Years 2007-08, 2008-09 and 2009-10 the assessment was under normal Income Tax rules. But the Petitioner raised the claim on MAT calculations which is not agreeable to the Respondent since under normal computation, the income from generation is exempt under section 80-IA which is clearly indicated in every assessment order. Thus the dispute boils down to the three assessment years of 2007-08, 2008-09 and 2009-10. This depends on the interpretation of clause 7.2(iii)(b) of PPA. Since Respondent is liable to pay Income Tax only on such income which relates to generation of electricity as per the agreement, the stand of the Respondent that they are not liable to pay Income Tax when tax is computed under normal rules stands to reason since section 80-IA allows exemption for income from generation of electricity.

63. The judgment of APTEL (Exhibit C-82) is about MAT, the applicability of which the Commission has no doubt and to which even the Respondent agrees. The other judgments cited by the Petitioner are not quite relevant to the issue under consideration, since here the liability is determined by the agreement clause which clearly says about "income which relates to generation of electricity". The Petitioner has also agreed to this position and even in the years when tax was computed under normal rules, they claimed from the Respondent only on a hypothetical calculation of MAT relating to income from generation of electricity.

64. Taking into account the consensus already reached between the parties on the applicability of MAT, Commission orders that the Respondent shall reimburse proportionate MAT for the income which relates to the generation of electricity for all the Assessment Years till 2006-07 on production of proof of payment of MAT. The Petitioner has subsequently produced orders of the Commissioner of Income Tax (Appeals), Kozhikode dated 19.07.2013 regarding the Income Tax assessment for the years 2007-08, 2008-09 and 2009-10 revising the earlier assessment orders by the Assessing Income Tax Officer. By virtue of this order of the Appellate Commissioner, if the Company is once again assessed under MAT for these three years under dispute, the Respondent shall settle the MAT claims to the extent that relates to income from generation of electricity as ordered for

the earlier years. However if in any year the Petitioner gets the benefit of adjustment of MAT already paid by virtue of section 115JAA, then such adjusted amount will have to be refunded to the Respondent. Income Tax being a statutory liability and the Respondent having a contractual liability to reimburse the tax paid, the action on the part of the Respondent in delaying the payment even after admitting the claim is a serious lapse. The Commission orders that all the amounts of Income tax due to be reimbursed to the Petitioner as per the above orders shall be reimbursed at the earliest along with interest at "contractual rate of interest" as defined in the PPA. The interest shall be paid at the contractual rate of interest with effect from the date on which the Petitioner had claimed reimbursement of MAT after its remittance to the IT Department till the date of its reimbursement by the Respondent. The Petitioner shall avail the benefit under section 115JAA and set off the MAT paid by him against the regular income tax, if any, payable by him in the succeeding 10 years and the consequential benefit shall be passed on to the Respondent, who shall also monitor the same specifically.

Claim 3 Payment of O&M Escalation Charges

Version of the Petitioner:

65. Article 7.2(iii)(a) of PPA provides for the adjustment in fixed charges due to variation of O & M charges for the tariff period and the same has to be calculated in terms of the formula agreed to there under. Accordingly the Petitioner has been raising invoices.

66. For the period from 2002-03 to 2008-09, the amount claimed is Rs. 93,90,427/-. The Respondent considered only Rs. 88,52,949/-. From this, they have made a unilateral deduction of Rs. 76,63,206/- under the heading " Disincentive amount payable to KSEB " and released Rs.11,89,743/- on 7.10.2010. From the year 2009-10, the Petitioner is entitled to be paid a sum of Rs. 24,52,738/-. The total amount due to the Petitioner under this head is Rs. 1,18,43,165/-. (Exhibit C-55, C-56)

Arguments in the Counter Affidavit filed by the Respondent:
(Para 34-40 of the Counter Affidavit)

67. The Petitioner has calculated and claimed O&M escalation charges taking capital cost as Rs. 70.77Crore. The Respondent admitted the charges based on the

capital cost of Rs.68.23 Crore. Due to high variable cost, the Respondent has not been scheduling power from the Petitioner. Hence the actual plant load factor(PLF) was much less than the normative value of 80%. However, while paying fixed charges& O&M charges, the Respondent has considered the non-scheduled period also as "deemed available". This period was also considered for arriving at PLF.

68. Due to non-availability of fuel, as admitted by the Petitioner (Annexure R 8) and not due to any directions from the Respondent, the actual PLF including deemed generation was 57.54% during 2007-08 and 73.33% during 2008-09. As per Article 7.2(iii)(d) of PPA penalty has to be imposed on the petitioner for these periods.

Deduction towards disincentive for 2007-08 (PLF 57.54%):		Rs. 51,20,457/-
Deduction towards disincentive for 2008-09 (PLF 73.33%):		Rs.25,42,749/-
Total	:	Rs. 76,63,206/-

69. For the period from 2002-03 to 2008-09, after setting off penalty (receivables) from penalty (payable), an amount of Rs. 11,89,743/- was released.

70. One machine was not in service since 12.11.2009, rendering the Petitioner to pay the above penalty for 2009-10. Shortage of fuel procurement together with non-availability of one machine caused low PLF of 73.09% in the plant. The Petitioner claimed Rs.24,52,738/-, (at a project cost of Rs.70.77 Crore)and the amount admitted was Rs.23,53,729/-,(at the project cost of Rs.68.23 Crore) whereas the penalty payable to the Respondent is Rs.26,11,666/-. The Petitioner is liable to pay to the Respondent Rs.2,57,939/-,after setting off O & M escalation charges against penalty.

Arguments in the Rejoinder of the Petitioner:

71. The Petitioner submitted that the issue of O&M charges is connected to the fixation of project cost.

Views in the Report of the Committee

72. While analysing the issue of project cost, the Committee recommended that the documents desired by the Respondent have to be furnished by the Petitioner, based on which the capital cost as per PPA has to be accepted. The Respondent shall recalculate the O&M escalation charges, based on the capital cost arrived.

73. As the PPA provides for '*disincentive*' if PLF falls below 75%, including deemed generation, the argument of the Petitioner that such a deduction as untenable, is not sustainable. So the issue to be analysed is whether the reason for fall in PLF is genuine or not. Hence the Committee recommended that such a deduction towards '*disincentive*' is to be made, after ascertaining whether shortage of fuel will come well under the '*force majeure'* conditions of PPA, after allowing both the parties to explain and justify their stand.

Remarks of the Respondent on the Report of the Committee:

74. Article 13.3 of PPA clearly specifies the events coming under '*force majeure'*, which includes natural calamities, strikes or boycotts intervening supplies & services etc. Article 13.4 (1) of PPA reads as, "*None of the following conditions shall constitute a Force Majeure Event unless due to Force Majeure events affecting Company's contractors." (i)* late delivery of plant, machinery, equipment, materials, spare parts, fuel, water or consumable for the project…." Article 13.2.1 stipulates that if a *force majeure* event has occurred, it is the duty of the party to report the occurrence of that event to the other party within 7 days in writing.

75. On a conjoint reading of these 3 articles, the shortage of fuel cannot be construed as a *force majeure* event. Hence on invoking the penalty clause of Article 7.2 (iii) (d) of PPA, KPCL is liable to pay the penalty. After netting off the O&M escalation charges against penalty payable, the Petitioner shall pay Rs.2,57,937/- to the Respondent.

Remarks of the Petitioner on the Report of the Committee:

76. The views of the committee are acceptable to Petitioner. It is prayed that fuel shortage from public sector suppliers may be treated as '*force majeure'* event.

Further Remarks of the Respondent on the Report of the Committee (letter dated 22.3.2013)

77. The Respondent further intimated that, taking capital cost as Rs.68.23 Crore, payment towards O&M escalation charges upto the Financial Year 2008-09 has been effected. For the period from 2009-10, the Petitioner has to bear the penalty as per Article 7.2(iii)(d) of PPA, as the actual PLF was below 75%.

Period	Actual PLF	O&M esc. Amount admissible
09-10	73.09%	-2.52 lakhs
10-11	53.42%	-82.27 lakhs
11-12	47.96%	-108.41 lakhs
12-13	34.02%	-83.67 lakhs
		-276.93 lakhs

78. The claim of the Petitioner that low PLF was due to short supply of fuel, cannot be admitted. Bharath Petroleum Corporation Ltd (BPCL) has been supplying fuel to the Petitioner as well as to Kozhikode Diesel Power Plant (KDPP), where shortage has not affected generation.

Reply of the Petitioner:

79. The Petitioner submitted that the Respondent has made a very unreasonable claim for imposing penalty for PLF below 75% for the years from 2006 till date, when payments were being withheld. The reason for the production loss, due to non-supply of fuel by BPCL or due to one engine being 'down' for years etc, was solely due to non-payment of pending claims by the Respondent & cannot be attributed to the Petitioner.

Analysis and Decision of the Commission.

80. The Respondent has no objection in the matter of O&M adjustment charges. The disagreement is on the project cost taken for calculation of O&M adjustment and deduction towards disincentive when PLF falls below 75%. Regarding capital cost, the Commission has considered the entire issue earlier in this order and decided that the amount of Rs.68.23 Crore as provided in the PPA shall be treated as the capital cost for calculating the fixed charges and therefore the same amount is to be considered for calculating O&M adjustment charges also.

81. As far as penalty towards non-achievement of the prescribed level of PLF for the years 2007-08 and 2008-09 the non-availability of fuel was brought to the notice of the Respondent by the Petitioner as early as 9.9.2009 with a request not to invoke the penalty clause as the crisis was beyond their control. According to the Petitioner during this period the fuel suppliers were not able to supply LSHS to the entire west coast consumers from Cochin Refinery. They had also pointed out in their letter that this crisis had affected even KSEB's diesel / LSHS plants and even these plants could not achieve the PLF. However KSEB had refuted this

argument and stated that force majeure condition cannot be claimed for delay in supply of fuel. The Petitioner also did not pursue this argument further.

82. However in their reply statement dated 17.5.2013, the Petitioner has argued that the production loss resulting in non-achievement of PLF was entirely due to the non-payment of dues from the Respondent which cannot be brushed aside. Payments like Income Tax, a statutory levy already paid by the Petitioner and expressly provided for reimbursement in the PPA, were not reimbursed in time. Payment routes such as Letter of Credit and Escrow account as provided for in the PPA were also not extended to the Petitioner. It is also true that there was undue delay in bilateral settlement of long pending disputes like fixed charges and other issues. The Petitioner had to face serious cash flow problems in view of the delay in payments to be received by them. There was also failure of engine which could not be repaired and rectified in time due to the financial problems. Further it can also be seen that the generation loss and consequent non-achievement of PLF started with the partial withholding of payments by the Respondent.

83. Section 31 of Sale of Goods Act cited by the Petitioner also casts a duty on the buyer to make payment to the seller, the due payments in terms of the contract before insisting on any penalty for failure in prompt delivery. The Respondent has also not successfully contested this argument raised by the Petitioner. In such circumstances imposing penalty for non-achievement of PLF cannot be considered fair on the part of the Respondent especially when the Petitioner was reported to be in dire financial straits. Therefore it is decided that the Petitioner is not liable to pay any penalty to the Respondent in this regard till settlement of dues in accordance with this order.

Claim 4: Balance Payment for Infirm Power

Version of the Petitioner:-

84. The plant was put into commercial operation on 14.05.2001. Article 5.2 of PPA makes it obligatory to the Respondent to purchase infirm power generated prior to the date of commercial operation. The Petitioner has been supplying infirm power to the grid since 01.04.2001. The petitioner has raised three invoices for the periods from 01.04.2001 to 13.05.2001 (Exhibit C-57), based on the actual fuel cost incurred. The Respondent short paid the same by following their own methodology which has no contractual basis. The Respondent shall pay the balance amount of Rs.57,49,394/-

Arguments in the Counter Affidavit filed by the Respondent (Para 41-44 of the Counter Affidavit)

85. Infirm power is to be billed at the actual fuel cost incurred by the Petitioner. KPCL has raised invoices for infirm power on the basis of total quantum of fuel purchased during the period, instead of actual fuel cost for the generation of infirm power.

Infirm energy injected into the grid during 03.03.2001 to 14.05.2001 is	-	1,01,12,000 Units
Total amount payable	-	Rs.2,46,97,002/-
Amount claimed by the KPCL	-	Rs.2,98,93,545/- (excess claim of Rs.51,96,545)
Amount paid by KSEB	-	Rs. 2,83,08,023/- (an excess paymentof Rs.36,11,021 made by mistake)

(Annexure : R10)

Arguments in the Rejoinder of the Petitioner (Para 36-37)

86. The Petitioner has denied the claim of Rs.36,11,021/-. The Respondent has ignored the lubricating oil consumption for the purpose of infirm power. Further the price of LSHS is wrongly taken as Rs.11,398.29/- instead of Rs.11,938.29/- by the Respondent in Annexure R-10, which amounts to Rs.10,34,912/- due to the Petitioner.

Views Expressed in the Report of the Committee:

87. As per Article 5.2 of PPA, it is obvious that the company is obliged to sell and the Respondent is bound to buy all the infirm power generated, the cost of which will be based on actual fuel cost. There is no dispute on the sale or purchase of infirm power. Though the petitioner's claim is said to be based on the actual fuel cost incurred by the company they have not produced any documentary evidence to substantiate the actual use. The Committee observed that the Petitioner has not claimed the cost of lubricating oil in the three invoices preferred (Exhibit C-57), whereas the claim was for HFHSD & LSHS only. This issue of lubricating oil has not been raised in the Petition, but only

mentioned in the Rejoinder. On verification of invoices, it is seen that only HFHSD has been used for generation of infirm power and the use of HFHSD is not disputed by the Respondent, though they have effected payment, considering the entire generation based on LSHS only. The Committee observed that the problem to be surmounted is the actual use of fuel for generators of infirm power. The Respondent has not produced any documents to prove the quantity. Hence the Committee decides the petitioner to submit the following data, duly authenticated.

(i)Quantity and amount spent on the purchase of fuel upto COD.
(ii)Quantity of fuel actually consumed upto COD
(iii)Balance quantity of fuel on COD
(iv)Amount of fuel in stock as on COD, which was not capitalized on COD.

In the absence of these, the Petitioner shall submit certificates as per CERC orders with revised calculation, which will be verified by the Respondent and balance payment effected. If the Petitioner fails to do so, the payment of infirm power can be effected only as per Article 7.3 PPA.

Remarks of the Respondent on the Report of the Committee:

88. The Respondent agreed with the above recommendations.

Remarks of the Petitioner on the Report of the Committee

89. The PPA clearly allows reimbursement of expenses before COD as per Art. 5.2. All the bills have been submitted in time and the Respondent is liable to effect payment.

Further Remarks of the Respondent on the Report of the Committee (letter dated 22.3.2013)

90. The Petitioner has not produced necessary and sufficient records showing actual usage of fuel including lubricating oil for generation of infirm power prior to COD. KSEB has computed the quantum of fuel used for generation of infirm power, based on the normative Fuel Consumption Factor (FCF), as per PPA

terms. Accordingly, the Petitioner is eligible for Rs.2.64 Crore as fuel cost for infirm power. The Respondent has already released Rs.2.83 Crore towards this account. Hence the Petitioner has made an excess payment of Rs.18.92 lakh to the Petitioner.

Analysis and Decision of the Commission.

91. Article 5.2 of the PPA reads as follows:

5.2 The Company shall sell and the Board also shall purchase Infirm Power generated by the Project prior to the date of Commercial Operation. Such power shall be billed and paid for at the actual fuel costs incurred by the Company.

Article 9.1 reads as follows :

9.1 The Company shall submit to the Board a supplementary invoice each month for all Infirm Power supplied to the Board.

The three engines of the power plant started operations and the generators synchronized on various dates in March 2001 and April 2001. The project attained commercial operation on 14.05.2001. The three Supplementary invoices submitted by the Petitioner have been produced as Exhibit C -57 collectively. (Vol 19).

The details of the three supplementary invoices (Exhibit C-57) are abstracted below:

Supplementary Invoice	Period	LSHS (MT)	RateRs./MT	Claim Rs.
1/KPCL/2000-01	3.3.2001 to 1.4.2001	0		0
1(2)/KPCL/2000-01	1.4.2001 to 1.5.2001	203.023	11391.67	2312767.52
		557.821	11938.29	6659434.23
2(3)/KPCL/2000-01	1.5.2001 to 14.5.2001	1454.2866	11938.29	17361695.28
	TOTAL	2215.13		263,33,897.0

Supplementary Invoice	Period	HFHSD(MT)	Rate Rs. /MT	Claim Rs.
1/KPCL/2000-01	3.3.2001	44.037	16797.67	739722.19

	to 1.4.2001			
1(2)/KPCL/2000-01	1.4.2001 to 1.5.2001	166.785	16797.67	2801601.47
2(3)/KPCL/2000-01	1.5.2001 to 14.5.2001	1.0909	16797.67	18324.73
	TOTAL	211.913		35,59,648.39

Total amount claimed as per the three Supplementary Invoices (Exhibit C- 57) is Rs. 2,98,93,545.42.

92. But the Respondent allowed the claim of infirm power based on the actual energy injected and the computed fuel consumption based on heat rate etc, since the Petitioner failed to submit the claim based on the actual fuel costs incurred. This is the crux of the dispute on the payment towards the sale of infirm power. The claim admitted by the Respondent is Rs 246.97 lakhs based upon energy injected and consumption computed with heat rate. But the Respondent claims to have actually paid Rs 283.08 lakhs by mistake and the excess according to them are recoverable (Para 43 of KSEB Counter Affidavit dated 6.2.2012).

93. The statements and submissions made by the petitioner on the pre-COD claims are marked by inconsistencies and inaccuracies. As noted above, the copies of the original pre-COD claim invoices have been submitted by them as Exhibit C-57. The quantum of fuels and the related claims made in page 28 of the Original Petition are in line with the supplementary invoices collectively marked as Exhibit C-57. As per the Para (i) on Claim No 4 of the petition, the amount outstanding from the Respondent on account of this is Rs 57.49 lakhs and the Petitioner requests for allowing this balance claim. But as per the notice raising the disputes for arbitration dated 17.4.2010 addressed to the Respondent, the Petitioner claims that an amount of Rs 212.00 lakhs is outstanding on this account. This has been repeated in the letter dated 30.9.2010 to KSEB also. Later, in a rejoinder to KSEB dated 17.5.2013, during this adjudication process, the Petitioner raised claim for 'reimbursement of lubricating oil used for pre-COD period' since the 'first filling of the oil tanks were done prior to COD'. The bills for the lubricating oil amounting to Rs 10,90,362/- was enclosed as Annexure VII to the submission. (Para 9 of the reply dated 17.5.2013). This claim

is not seen included in the original supplementary invoice cited above (Exhibit C-57).

94. imilarly, in Para 8 of the above rejoinder dated 17.5.2013, the Petitioner submits that their total claim for pre-COD period, excluding the above lubricating oil bill is Rs. 306.81 lakhs. They have annexed a statement of split up details (Annexure I) and some invoices of HFHSD as well as LSHS. A comparison of the details in Exhibit C-57 and the above Annexure I are revealing another inconsistency:

Sl.No.	Particulars	Annexure 1	Exhibit C-57
1	LSHS supplied before COD	2215.13 MT	2215.13 MT
2	HFHSD supplied before COD	256.415 KL	211.913 KL

While the quantum and the bill amounts of LSHS remains tallied, the quantum of HFHSD has gone up by 44.5 KL and the total claim by around Rs 7.95 lakhs, over and above the claims for lubricating oil amounting to Rs 10.9 lakhs.

95. The Petitioner had not, at any stage, explained the reasons for such variations between the original claim (Exhibit C-57) and the subsequent claims. The claims are frequently modified and put up in a casual manner even before the adjudicating authority. The Commission cannot appreciate or approve such inconsistencies in an adjudication process. Hence the claims as per the original supplementary invoices alone shall be examined by the Commission. As noted earlier the dispute between KSEB and the Petitioner on the question of pre-COD claims boils down to the issues related to the quantum of fuel which was utilised for generating electricity before COD.

96. The issues to be decided in this case are:

(i) Whether the HFHSD and lubricating oil consumed before COD is to be reckoned as 'Fuel', over and above LSHS, and the actual costs of these items incurred are to be paid to the Petitioner as per PPA provisions?

(ii) Since the Petitioner explicitly failed to submit and substantiate the actual quantum of fuels consumed before COD, whether such quantum and costs can fairly be computed from the available records or whether the methodology followed by KSEB is the only fair calculation feasible?

97. The issues are examined below:

As per the Article 1, Definitions of the PPA *'Fuel' means Low Sulphur Heavy Stock (LSHS) or any alternate fuel pursuant to Section 7.5 used as the primary fuel in the project for generating electricity*. Article 7.5 deals with *Change in Fuel which is quoted hereunder:*

> *In the event of (a) non-availability of the fuel beyond the control of the company or (b) steep increase in the price of the fuel being used or (c) availability of alternate cheaper fuel , the Board retains the right to direct the company to use an alternate fuel provided that it does not involve additional capital expenditure on account of the company and the equipment supplier certifies that such fuel is compatible with the equipment in use and does not lead to accelerated degradation of the equipment . In case the company desires to use an alternative fuel for the above reasons, it may do so with the permission of the Board which shall not be unreasonably withheld or delayed.*

Article 7 on tariff specifies that '*unless pursuant to Section 7.5 the fuel is changed for the purpose of this Article 7, LSHS is the fuel'.* In the Schedule 8 Part II parameters taken for tariff calculation also the fuel is specified as LSHS and the landed price and LCV of LSHS only are specified. The schedule 9 provides only the mechanism for monitoring of primary and secondary fuel consumption which has not been furnished.

98. On careful analysis of the above provisions of the PPA, it can be seen that the agreement between the parties provide for only one fuel and it is LSHS. HFHSD has not been envisaged as a fuel anywhere in the PPA. HFHSD has not been defined either as secondary fuel nor as an alternate fuel anywhere in the PPA. Even in provisions explaining the technical parameters of the project there is no mention of HFHSD as a fuel to generate electricity. It has been reported that HFHSD was used as fuel for the auxiliary boiler to generate steam for preheating of LSHS in the storage tanks and piping systems before the Engines ramp up to capacity.(Letter dated 1.9.2003 of the Petitioner ,Exhibit C-33). Once the Engines attain capacity the waste heat boilers take over the function of generating steam for circulating through LSHS tanks and piping systems. Hence the HFHSD is not used to generate electricity as per the scheme of PPA. Hence the company cannot claim HFHSD as a fuel nor is KSEB bound to reimburse the cost of HFHSD before COD. So also the lubricating oil cannot be reckoned as fuel by any

standards and hence its consumption before COD will not qualify for reimbursement. The cost of HFHSD used for auxiliary boilers are covered under O&M cost. The Petitioner is not entitled for O&M cost before COD. So it is concluded that the Respondent is liable to reimburse only the actual fuel costs incurred by the Petitioner for generating electricity before COD. Hence the Commission comes to the conclusion that the pre-COD claims have to be limited to the cost of LSHS actually used for generating electricity before COD.

99. The other issue to be decided in this regard is the actual quantum and cost of LSHS used for generating electricity before COD. In the Exhibit C-57 the Petitioner had enclosed three supplementary invoices showing there in a total quantum of 2215.13 MT of LSHS delivered between 1.4.2001 and 14.5.2001. This quantum of LSHS is equal to the same claimed by the Petitioner in the Annexure I along with the rejoinder dated 17.5.2013. But the Petitioner could not substantiate that this quantum was the actual quantum of LSHS *used before the date of COD* during hearing or in any submissions. Hence the Commission advised them to produce the details of the closing balance of LSHS on 14.5.2001, the date of COD. In response to this the Petitioner in their submissions dated 17.5.2013 stated that the fuel supplier BPCL had segregated and certified the quantum supplied before COD. The fuel tanks are also in the control of BPCL. Based on this, the documents submitted by the Petitioner along with Exhibit C-57 supplementary invoices and Annexure I of rejoinder dated 17.5.2013 were closely examined by the Commission.

100. The Petitioner has attached copies of several invoices of BPCL, related to supply of LSHS and HFHSD along with the rejoinder dated 17.5.2013. Out of these invoices the following three invoices relate to supply of LSHS before COD.

Product	From	To	Quantity (MT)	Amount Rs	Invoice no
LSHS	23.03.2001	17.04.2001	219.591	25,01,508	201232
LSHS	18.04.2001	14.05.2001	1929.694	230,37,257	201233
LSHS		18.4.2001	65.846	7,86,088	261225
		Total	2215.131	263,24,853	

The quantity of LSHS as per the above invoices are same as in the supplementary invoices of the Petitioner (Exhibit C-57).

101. On close examination of the documents it was found that , along with the supplementary Invoices (Exhibit C-57), the Petitioner had attached a statement dated 14.5.2001 by the fuel supplier BPCL(Page 8 and 22 of Exhibit 57 Vol 19).

The statement shows the quantity of LSHS drawn from the two storage tanks of BPCL on various occasions before the date of COD. From the total quantity of LSHS drawn during the period from the storage tanks, the balance quantity available in the service tank and buffer tank as on 14.5.2001 has been deducted, thus arriving at the net quantity of LSHS 'consumed' by the plant as on 14.5.2001. According to the statement dated 14.5.2001 of BPCL , the petitioner KPCL has 'consumed' 2178.103 KL of LSHS as on 14.5.2001 (3.00PM).Thus it is clear that the actual use of LSHS before COD is 2178.103 KL . The Petitioner had submitted claim for 2215.13 MT of LSHS in their supplementary invoices (Exhibit C-57). In order to ascertain the weight (in MT) of 2178.103 KL of LSHS , the density of the LSHS supplied during April and May2001 duly verified by BPCL authorities is required. On obtaining the density of the supplied LSHS supplied from BPCL , the quantum of LSHS drawn by KPCL in MT can be calculated .The Petitioner was advised on 27.6.2013 to report the density of LSHS drawn before the COD with certificates from the supplier BPCL. On 28.6.2013 the Petitioner forwarded two test reports dated 27.3.2001 and 9.4.2001 of two samples obtained from BPCL. The density of these samples are 0.9454 and 0.9384 respectively. Taking an average of the two samples the weight of 2178.103 KL of LSHS can be worked out as 2051.55MT.

102. Based on the above the Commission concludes as given below on the issue of pre-COD claims:

(i) The amounts payable to the Petitioner on the account of the cost of infirm power will be the cost of 2051.55 MT of LSHS at the rates provided in the supplementary invoices collectively marked as Exhibit C-57, which would be approximately equal to Rs 243.81 lakh.

(ii) The Petitioner shall not be eligible for the cost of HFHSD and lubricating oil purchased / consumed before COD towards the price of infirm power since the infirm power can be *'billed and paid for at the actual fuel costs incurred by the Company'* as per PPA conditions.

Claim 5: Incentive for Delivering Energy in Excess of 80%PLF.

Version of the Petitioner:

103. Article 7.2(iii) (c) of PPA contemplates adjustment in the fixed charge component as incentive payment for the energy delivered in excess of 0.8 PLF. During 2002-03, the Petitioner delivered energy in excess of 0.8 PLF and are

entitled for incentive as per PPA. The Petitioner has submitted their claim of Rs. 43,36,193. (Exhibit C-58) But the Respondent neglected to pay any amount under this head.

Arguments in the Counter affidavit filed by the Respondent:

(Para 45-48 of the Counter Affidavit)

104. As per Article 7.2(iii) (c) of PPA, incentive payment is applicable when energy delivered is in excess of 80% PLF. For calculation of the incentive, actual energy generated alone is accountable and deemed generation cannot be included. The Petitioner has accounted actual energy generated and deemed generation for calculating the incentive for 2001 -02.

Incentive z = C x 8760 x(PLFn - 0.8)x I , where
C = Guaranteed Capacity in kW,
I = 25% of fixed charge (FO + FO&M)
PLFn = PLF based on net metered energy during the Tariff Period "n" with upper limit of 0.85.

105. During the period from 14.5.2001 to 31.3.2002, the actual PLF is only 65%, without considering the deemed generation. Hence the claim of Rs.37,04,503/- is not maintainable. For 2002-'03, actual PLF without considering deemed generation is 82.476% and hence eligible for Incentive. The Respondent admitted this claim for 2002-03 and effected payment of Rs. 6,77,288/- on 31.3.2006 towards the incentive (calculated taking capital cost as Rs. 68.23 Crore, whereas the claim of the Petitioner for Rs. 6,81,517/- is based on capital cost of Rs. 70.73 Crore). Hence no further payments are due to them on this account.

Arguments in the Rejoinder of the Petitioner (Para 38)

106. In the rejoinder, the Petitioner alleged that they have not received the admitted amount of Rs. 6,81,517/- towards incentive. Moreover, it is connected with the fixation of capital cost.

Views Expressed in the Report of the Committee:

107. The main issue for the purpose of calculating the incentives is whether the deemed generation can also be added to the actual generation for calculating the excess energy above 0.8 PLF. As per Art.7.6 of PPA, "deemed generation for

any period shall mean with respect to any period, any reduction in supply of electricity which the company could have generated and sold during such period. However deemed generation during the Tariff period will be only when PLF for the period does not exceed 80% of guaranteed capacity. Hence the Committee recommended that the Petitioner is not eligible for the claim for the year 2001-02. The incentive for 2002-03, may be reworked based on the revised capital cost arrived at.

Remarks of the Respondent on the Report of the Committee:

108. The Respondent agreed with the Committee's recommendations. The Respondent has submitted that they have released the Rs. 6,77,286/- vide cheque no. 874527 dt. 31.3.2006.

Remarks of the Petitioner on the Report of the Committee:

109. The Petitioner also accepted that the incentive for 2002 – 03 shall be based on the capital cost arrived at.

Analysis and Decision of the Commission.

110. The dispute relates to only two years viz. 2001-02 and 2002-03 and the main issue is whether for the purpose of calculating the incentives the deemed generation can also be added to the actual generation for calculating the excess energy above 0.8 PLF. The Petitioner had claimed incentives for both the years taking into account the deemed generation and taking the capital cost as Rs.70.77 Crore. However according to the Respondent deemed generation cannot be taken for claiming incentive and the Petitioner is not eligible for incentive for 2001-02, the PLF being 65% only without deemed generation. However for 2002-03 PLF is 82.4% without considering deemed generation and the Petitioner is eligible for incentive. As per Art.7.6 of PPA, "deemed generation during the tariff period will be allowed only when PLF for the period does not exceed 80% of guaranteed capacity." So it is seen that deemed generation should not be added to actual generation for calculating incentives. The Petitioner has also not contested this argument. Hence the Petitioner is not eligible for any incentive claim for the year 2001-02. Incentive for 2002-03 is to be re-worked based on the capital cost of Rs.68.23 Crore as now approved by the Commission for calculation fixed charges, O&M, RoE etc. The Respondent claims that they had already paid Rs.6,77,286/- towards incentive for the year 2002-03. But the Petitioner asserts that they have not received payment. The

Respondent shall inform the Petitioner the date of encashment (clearing) of the cheque along with a certificate from the bank that the cheque for Rs.6,77,286/- was cleared in favour of the Petitioner indicating the date of such clearance. This information shall be given within one month failing which the Respondent may re-issue the cheque for the exact amount of incentive for the year 2002-03 calculated as per the method now decided by the Commission. If there is evidence that the cheque is cleared and there is found to be difference in the amount of eligible incentive, the difference amount may be paid or refunded as the case maybe. There is no order as to interest.

Claim 6: Loss on Account of Excess Consumption of HFHSD, due to Frequent Start/Stop of Engines.

Version of Petitioner:-

111. Article 5 of PPA deals with sale and purchase of energy and Schedule 5 deals with despatch procedure. As per clause 5.1, of the schedule 5 the Petitioner shall operate the plant on despatchable basis at guaranteed capacity or less and shall follow the directions of the Respondent to back down and resume generation consistent with the project's technical limits, prudent utility practices and recommendations of the manufacturers of the major equipment. Though the Respondent has to purchase the entire electricity generated, frequent directions of the Respondent to back down and to resume generation are against the purport and intent of PPA and also had a major effect on the life of equipment, which further entailed in an additional cost on account of extra HFHSD. The amount due to the Petitioner is Rs.11,20,87,016/-.

Arguments on the Counter Affidavit filed by the Respondent: (Para 49-52 in the Counter Affidavit)

112. The Petitioner is operating with LSHS as fuel and the variable cost is one among the highest (@Rs. 10.63/Unit.) When cheaper power is available from other sources and when system frequency is high, resulting unscheduled interchange (UI) rates less than the variable cost of generation, KSEB is forced to issue directions to reduce generation from such thermal stations. KSEB operates its own thermal stations, viz., BDPP & KDPP in the similar manner for meeting peak load requirements. Moreover the State Load Despatch Centre (SLDC) can issue despatch instructions on merit order only. The Commission in disposing of the OP 12/2009 on 15.7.2009 has refused to pass orders to issue despatch instructions to the Respondent to run the plant for 24 hours and to pay the cost of HFHSD, used for start-up/ stop operations. The Respondent is admitting

deemed generation, hence the Petitioner is getting the fixed charges, irrespective of the scheduling the plant. The plant was not envisaged as one to be operated on a continuous basis and was always meant for peak load requirements only. The cost of HFHSD has been factored into the tariff calculation in terms of Article 7 of PPA. Hence the Petitioner is not entitled for the claim.

Arguments in the Rejoinder of the Petitioner: (Para 39 - 42)

113. Due to the arbitrary scheduling by the Respondent, the Petitioner had to incur huge cost on HFHSD. OP 12/2009 was filed only for a direction to the Respondent for continuous scheduling, which was rejected by the Commission. The Commission has not denied any payment of HFHSD. Moreover, the expenditure towards HFHSD is implied to the cost of generation as LSHS cannot be used independently without HFHSD for Start /stop cycles for keeping LSHS warm. This is the practice being followed in the BDPP plant of the Respondent. Hence the additional cost of HFHSD is to be reimbursed.

Views Expressed in the Report of the Committee:

114. The Committee has observed that neither the Petitioner nor the Respondent could point out any clause in PPA relating to the use of HFHSD. There is no dispute regarding the use of HFHSD and frequent start up and stop. The Petitioner has not presented this claim before the Respondent, since it is outside the purview of the PPA. The PPA defines the fuel as LSHS and Article 7.5 does not allow the petitioner to change the fuel from LSHS without the consent of the Respondent. The Committee observes that the use of HFHSD is to flush out the LSHS from the engine and it can be treated only as O & M cost. Hence the claim of the Petitioner for the cost ofHFHSD used for start up & shut down operations cannot be admitted.

Remarks of the Respondent on the Report of the Committee

115. The Respondent accepts the recommendation of the committee that if HFHSD is used to flush out the engine, it can be treated as O & M cost only. Hence the claim of HFHSD for start up and shutdown cannot be admitted.

Remarks of the Petitioner on the Report of the Committee:

116. The Petitioner submitted that the view of the committee cannot be accepted. HFHSD is an essential fuel and a technical necessity for starting and stopping the engine, heating and keeping the primary fuel LSHS liquified. The Petitioner states that the usage of HFHSD is implied under the terms and conditions of PPA

and LSHS plants cannot be operated without it. Even in the diesel plants of the Respondent, HFHSD is very much used. As per the spirit of the PPA, plant is supposed to be continuously running with minimum 85% PLF. If the Respondent takes care of the above while scheduling, the variable cost of HFHSD would have been reasonable. Avoiding payment of extra variable costs stating fixed charges are being paid is flawed, since the payment of fixed costs is towards the recovery of capital costs. If part scheduling is being done by the Respondent, there is bound to be much more variable costs for HFHSD and for all such low scheduling periods, the cost of HFHSD needs to be reimbursed.

<u>Further Remarks of the Respondent</u> (letter dated 22.3.2013)

117. The Commission has already decided the issue in OP No.12/2009 on 15.07.2009. It is also submitted that the normative FCF as per PPA was 0.2167Kg/Unit, which is much higher than the FCF at KDPP & BDPP, which is about 0.205 Kg/Unit.

<u>Reply of the Petitioner:</u>

118. As per PPA and engine manual, the plant is a continuous running plant with only provision for scheduling, there has to be a provision for reimbursing the extra cost fully, without which RoE @ 16% can never be met. HFHSD acts as the fuel for producing power and for heating auxiliary boiler and not merely restricted for cleaning nozzle and for maintenance purpose, as presumed by the committee. As per Schedule 5 of PPA, the engine has to run 24 hrs daily for at least 2500 Hrs (104 days) at a stretch for optimum life. Only after 8000 Hrs, shut down maintenance schedule is to be carried out. This has been violated by KSEB with their intermittent scheduling. As per Schedule 5(ii) on Despatch rights, "*No dispatch instruction shall require the company to operate the Unit at a gross generation capacity below 75% of the installed capacity for any period of time*". The Petitioner seeks the approval of the Commission, for not running the plant, wherever any future dispatch instructions are below 75% of the installed capacity. During such days full deemed generation has to be granted. For every start & stop, about 600 lit of HFHSD per engine and 300 lit for warming the aux. boiler, resulting in total consumption of 2100 lit of HFHSD/Start & Stop. Thus if the Respondent is only scheduling part loads of power every day, for the whole month (which has been the practice for the last many years, there is an extra cost of Rs.30 lakhs per month, due to intermittent scheduling. Specific ruling from the Commission to reimburse HFHSD costs becomes critical for the survival of the plant.

Report of theTechnical Committee Deputed to KPCL Site to Examine the HFHSD Consumption:

119. The specific mandate to the committee was to ascertain, (i) Whether the technical manuals and operating instructions of the engine manufacturers specify that HFHSD has to be used for start/stop operations and (ii) if it is actually used, what is the average quantity of the fuel used and the time for which it is used ?

120. The committee visited the plant, which is having three 16CM32 Caterpillar DG sets of capacity of 6.812 MW each, using LSHS as heavy fuel and HFHSD as distillate fuel. On 19.6.2013 and 20.6.2013 the DG#3 was started, loaded to full capacity for 30 minutes and shutdown. Since the machine was remaining idle since March 2013, it took more time to switch over from HFHSD to LSHS during starting on 19.6.2013 due to non-attainment of the required jacket water temperature, whereas the starting was trouble free on 20.6.2013. During the shutdown on 19.6.2013, switching over from LSHS to HFHSD had to be done at 80% load. On 20.6.2013, the switching over from heavy fuel to distillate fuel could be done at 60% load. During the tests, consumption of HFHSD varied from 1085 litres to 142 litres per operation. Since the values shown huge variation, it was difficult to obtain a representative average value. Moreover, the consumption of fuel for starting/stopping operation depends on (i) ambient temperature, (ii) load at which the fuel is switched over, (iii) duration of running on distillate fuel. Such huge variation points to the need for optimising the start/ stop operations so that consumption of distillate fuel can be minimised, while keeping the engine and components healthy and protected.

121. The manuals do not explicitly state that HFHSD has to be used for start/stop operations. The starting performance will be better with distillate fuel. The conditions for starting the engine with heavy fuel are very restricted. A more viscous fuel makes ignition more difficult. The Committee observed that the use of HFHSD during start/stop of the engines can be viewed as a prudent utility practice as per manual and is beneficial for reducing mechanical stress on fuel injection pump elements due to increased viscosity of LSHS at lower temperatures, deposit formation on combustion chambers, exhaust system, turbo chargers etc and the consequent wear on pistons, cylinder liners and other engine components. On analysis for a wider period from September 2007 to May 2008, with the records of the plant, it was observed that the

consumption of HFHSD for each start or stop operation comes to about 300 – 350 litres per engine.

Submission of the Respondent (letter dated 19.7.2013)

122. The Petitioner has been demanding compensation for HFHSD. The Commission directed to re-examine the issue with special reference to the provisions of PPA. KSEB submitted that the PPA terms cannot be deviated without reaching mutual consensus between the parties. The PPA conditions do not have any relevant provision on the consumption of HFHSD due to frequent start/stop procedures. There are provisions relating to the heat rate correction to be applied in the event of the project operating below 70% PLF. The claim of the Petitioner for LSHS &lubricating oil is based on the normative values specified in the PPA. The fuel consumption factor (FCF) at normative values is much higher than the specifications of the manufacturer.

123. As per tariff table in Article 7.2 of PPA the normative heat rate of the station shall be as follows:

2100 k Cal/kWH - for the 1st year
2120 k Cal/kWH - 2nd – 7th year

124. For the DG sets loading between 70% - 100%, the FCF shall be 2130 k Cal/kWH and for loading between 50% - 70%, it can be as per the heat rate correction curve (Annexure 4 of PPA). Below 50% loading of the machine, the Petitioner is free to back down and will qualify for deemed generation. The PPA clearly specifies the heat rate to be applied, when the machine is running below 70% PLF.

125. The heat rate of MAK 16CM 32 DG set as per the specification of M/s. Caterpillar is 7748KJ/kWH, ie 1851.8 kCal/kWH. Net heat rate allowable, after accounting auxiliary consumption of 3.5%, can be 1918.96 kCal/kWH. Hence it can be seen that the heat rate allowed in PPA is about 10.47% higher than that of manufacturers' specifications. This has resulted in claiming higher quantity of LSHS, than the actual quantity used for generation. KSEB has not raised any dispute on this claim, as it is as per mutually agreed PPA. It is a fact that HFHSD is generally used in the DG sets for start/stop operations. There is no mention about the usage of HFHSD or its compensation in PPA, whereas it allows usage of fuel at a rate which is 10.47% higher, with a view to compensating the use of HFHSD. KSEB has been following the merit order principles for purchase/scheduling of power. Due to excessive cost, scheduling of power from all liquid fuel stations is being done only during contingencies. If the Petitioner is

insisting for reimbursement, the payment of LSHS has to be regularized as per the actuals from COD, based on the documentary support.

Further Remarks of the Petitioner

126. In reply, the Petitioner contested the arguments of the Respondent on the heat rates specified in PPA & that in the engine manual as follows:

The fuel consumption factor (FCF) quoted from manual of manufacturers, as per ISO 3046/1, is as per standard reference conditions of 25^0C, 100kPa pressure and on ideal test conditions, which are different from actual working conditions in the plant. What is mentioned is a 'purified fuel oil' consumption of the engine and not the plant station heat rate, which will be certainly more, due to various reasons. Standard heat rate of MAK 16CM 32 engine is 1918.96kCal/kWH. Considering ambient temperature of 35^0C, heat rate is corrected as 1957.34kCal/kWH. The standard calorific value of LSHS is 10,200 kCal/Kg and the FCF is 0.192Kg/kWH. But the actual calorific value will be 9500 kCal/Kg & the actual FCF will be 0.2060kg/kWH. Considering 4% auxiliary consumption, actual fuel consumption on export can be 0.21427 kCal/kWH. In addition to this, ageing factor has also to be considered from 2nd year after COD. Hence the claim of the Respondent that extra heat rate was given to compensate HFHSD is totally erroneous.

127. It is submitted that this is not only a case for reimbursing HFHSD costs, but also for revising reimbursement norms of LSHS and lubricating oil, since none of the assumption for a continuously running plant are valid, when the Respondent schedules intermittently. The Petitioner submitted that the three member committee deputed to visit the plant has concluded that the HFHSD is a necessary secondary fuel for start/stop operations and is a vital prudent utility practice. They have observed that for each start or stop, an average of 325 lit HFHSD is used. Due to intermittent scheduling alone, usage of extra fuel was necessitated, solely on the decision of KSEB to use the plant as a peak load station, instead of a base load station, as originally envisaged.

Final Submission of the Respondent

128. The Respondent agreed that the diesel plants are generally conceived for meeting peak demand, as it can be started quickly and it has no standby losses as in the case of thermal plants, for keeping boilers hot. They can be started from 'cold conditions' and take up load very quickly. Moreover, the diesel plants play very

little role in bulk power generation, due to uneconomical operation costs. Hence normally used for peak load conditions of the system. As per the prudent utility practices, diesel power plants are operated as peak load stations, considering high cost of generation and ease of starting and stopping. Schedule 2 of PPA does not stipulate any technical limit on frequent start/stop of the plant, nor mandates continuous operation of the plant as base load station.

Analysis and Decision of the Commission.

129. The claim of the Petitioner for reimbursement of the cost of HFHSD is based on the ground that the respondent did not give dispatch instructions on continuous basis after initial years. For each shut down the Petitioner was required to use costly HFHSD to flush out the LSHS after running the engines for a minimum of 20-30 minutes as per the safety norms prescribed by the manufacturer. The frequent directives of the Respondent to back down generation and later on to resume generation had a very major effect on the life of the equipment also . The same also entailed in additional cost on account of extra HFHSD. In the replies, the Respondent pointed out that the expenditure towards HFHSD is included in the cost of generation of electricity as the LSHS cannot be used independently without HFHSD during start and stop cycles and for keeping LSHS warm and this is a technical requirement. The Petitioner claimed that the HFHSD is an essential fuel and technical necessity for starting and stopping the engine, heating and keeping the primary fuel (LSHS) liquified and hence use of HFHSD is implied under the terms and conditions of PPA. The variable costs of HFHSD could have been reasonable if KSEB had scheduled the plant at 80% PLF. Avoiding payment of extra variable costs stating fixed cost are paid is flawed since the payment of fixed cost is towards recovering capital costs .The Petitioner claimed that for all the low scheduling periods the costs of HFHSD needs to be reimbursed.

130. The essential issues to be decided on this dispute are :

(i) Whether the HFHSD required for start and stop of the engines can be reckoned as ‘fuel’ and the cost can be considered as cost of fuel?

(ii) Whether the cost of HFHSD required for starts and stops as well as for use in auxiliary boilers are to be reckoned as operation cost which forms part of O&M costs ?

(iii) Whether the Petitioner is eligible for any compensation as per PPA conditions, by way of reimbursement of additional cost of HFHSD

due to frequent start and stop consequent to the dispatch instructions of the Respondent?

131. The PPA for purchase of power from the 21.178 MW Kasaragod plant of the Petitioner was executed on 12.8.1998 and the plant was synchronized in April 2001. The PPA shows that the power plant was originally conceived as having two engines . The "project" has been defined in the PPA as below:

"Project" means the diesel power station proposed to be established by the Company in Kasaragod District in the State of Kerala, India, comprised of two diesel generator sets (each , a unit) ancillary equipment and facilities suitable for generating nominal capacity and shall include all plant, machinery, land, buildings (including staff quarters if any) and infrastructure and other facilities, ancillary and related establishments, equipment and conveniences and references to the project shall, where appropriate mean the project.

132. The Respondent has pointed out that two Wartsila make engines were proposed originally, which were subsequently changed to three Caterpillar engines. The techno economic parameters appearing in the PPA should be related and relevant to the two engine configuration originally conceived. When the configurations were changed as three engine Caterpillar system, the Petitioner did not go for changes in the techno-economic parameters in the PPA. The Respondent has pointed out that the normative tariff heat rate of the power station provided in the tariff table under Article 7.2 was higher by around 10.47% over the heat rates of the Caterpillar MAK 16-CM 32 diesel engine generator set. The Petitioner has challenged this observation by stating that the heat rates specified in the technical brochures of engines cannot be directly translated to station heat rates. However the fact remains that even though the two engine Wartsila configuration was changed to three engine Caterpillar configuration , the developer was confident of the normative station tariff heat rate being sufficient for recovery of variable cost.

133. The PPA provides for raising tariff invoices towards monthly fixed charges and variable charges and supplementary invoices for any adjustment in tariff. The Petitioner had not raised any claim in the tariff invoices or supplementary invoices towards cost of HFHSD incurred for running the plant from the commencement of operations. In fact the claim for consolidated compensation towards cost of HFHSD was put up before the Respondent only by the letter

dated 17.4.2010 which listed the disputes between the parties and stated that the cost of HFHSD incurred was Rs 732.57 lakh out of the total disputed claims of Rs 3746.65 lakh. This letter contains, for the first time, the quantification of the claim and dispute on HFHSD.

134. Earlier on 01.09.2003, in the correspondence on certain disputes related to the availability declaration by the Petitioner, the issue of use of costly HFHSD for start up and shutdown was initially raised by them as follows:

" The letter specified by you cites two cases, where the generation could not be started as stated in the availability report. In this regard, we would like to state that the existing Power Purchase Agreement does not support your claim of keeping the fuel oil and other auxiliaries' system running, when shut down instructions are given by you. For each time of shut down, we have to use the costly fuel of HFHSD to flush out the LSHS after running the engines for a minimum of 20 - 30 minutes as per the plant safety norm prescribed by the Manufacturer. Similarly for each start up we should use only HFHSD as start up fuel for a minimum period of 20-30 minutes before changing the fuel to LSHS. For changing the fuel to LSHS for the engines to run on continuous mode as mentioned above, we require the fuel to be heated upto 80^0 C. The heating is required not only for the fuel we store along with the steam tracing for the entire lines used by us but also for the fuel stored in BPCL tanks and their lines. Since, LSHS is being drawn on a daily basis during operation from BPCL, we require heating of BPCL tanks to make it in a liquid state before drawal into our tanks".

On 10.1.2005 the Petitioner pointed out that,

"Further, we have been incurring huge cost on running the auxiliary units on a running condition and the boiler for heating purposes during the period of shut down."

On 31.10.2006 the Petitioner noted that,

"In fact we have been incurring huge cost on account of reduced calorific value as well as additional cost on account of HFHSD due to frequent (in fact on a daily basis) backing down and start up instructions from KSEB for the last two years. We are enclosing herewith the details of additional HFHSFD consumed for the last two

years .We request you to kindly consider our claim of HFHSD in view of the present plant conditions of daily start and backing down ".

On 25.12.2006 the Petitioner complained that,

"we have incurred substantial amount on account of HFHSD for keeping the plant on standby mode for the last two and half years . We request you to consider the same as the shut down instructions given by KSEB without any definite shut down period and we had to incur huge cost for heating and other auxiliary consumption".

135. It is seen that the question of HFHSD was not discussed in the meetings held for resolving the disputes between the Petitioner and the Respondent on 6.5.2008 and 14.9.2009 as per the minutes available. Technical report of 'Caterpillar', contained in the letter dated 4.3.2009 does not mention anything on quantum or use of HFHSD for start up and stop. As mentioned earlier, the disputes with KSEB were consolidated by a letter dated 17.4.2010. This letter contains, for the first time, the quantification of the dispute on HFHSD and the amounts involved. The notice for Arbitration was issued on 30.8.2010 as per provisions of PPA.

136. It can be seen that HFHSD was being utilized in the plant of the Petitioner for two purposes:

(i) For generating steam in an auxiliary boiler before the engines start up. The steam is used for initial heating up of LSHS in the pipelines and the storage tank. When the engines attain the required level of output the waste heat boilers take over the function of generation of steam. Then the auxiliary boilers are shut down.

(ii) For initial firing of the engines during start up and for flush out during shut downs. Petitioner claims that such use in the engine would last for 20 to 30 minutes on each start up and shut down.

In other words if the engines were running continuously, steam from the waste heat boilers will be used for pre heating the LSHS. If the engines are shut down and restarted after an interval, the LSHS in the pipelines and tanks has to be pre heated by the steam generated in auxiliary boilers using HFHSD .Thus the consumption of HFHSD for heating the LSHS is a function of the number of starts of the engines as well as the interval between the starts. But the associated cost is essentially an operational, which is part of the O&M cost and the same is enhanced periodically. It is also true that this component of O&M cost has an inverse co-relation with the PLF. The consumption of HFHSD for starts and stops has to be examined more closely. This consumption of HFHSD was the direct

outcome of the change in engine configuration from the two engine Wartsila configuration to three engine Caterpillar configuration. It has been pointed out that HFHSD is not being used for starts and stops in the Kozhikode Diesel Power Plant of the Respondent where Wartsila engines are used.

137. Even though the PPA is silent about the use of HFHSD for start and stop, the Commission decided that the actual technical parameters of the existing engines in the Kasaragod power plant with respect to the requirement of HFHSD has to be examined closely. Hence a committee of technical experts, consisting engineers representing the Respondent, the Petitioner and the Commission, was appointed to visit the plant and to submit report on the following points:

> *(i)Whether the technical manuals and operating instructions of the manufacturers of the engine specify that HFHSD has to be used for starting and stopping of the engines?*
>
> *(ii)If HFHSD has actually been used in the plant for starting / stopping the actual average quantity of HFHSD used for each start up and stop operation and time for which it is used after observing the working of the plant for the required period and verifying the log books and other records in the plant?*

138. The committee reported that '*the technical manuals and operating instructions of the Original Equipment Manufacturer (OEM) of the engines installed at KPCL, Mylatti does not explicitly state that distillate fuel has to be used during starting and stopping of the engines'*. The committee also quoted from technical manuals as follows*:*

> *The starting performance is better with distillate fuel. A more viscous fuel will make the ignition more difficult. When the engine is running on heavy fuel, a changeover to distillate is only required if servicing the fuel injection system is intended etc. Before a lengthy period of standstill heavy fuel engines are to be changed over to distillate fuel operation.*

139. The Committee concluded as follows :

> *The use of HFHSD during starting and stopping of the engines can be viewed as a prudent utility practice as mentioned in the O&M manuals and is beneficial for reducing the mechanical stress on the fuel injection pump elements due to the increased viscosity of LSHS at*

> *lower temperature and also reduces the deposit formation in the combustion chambers, exhaust systems, turbo-chargers etc and the consequent heavy wear on pistons, cylinder liners and other engine components.*

140. In short, it can be concluded that use of HFHSD for starts and stops is a practice adopted for improving the performance and upkeep of the engines. The claim of the Petitioner that the HFHSD is an 'essential fuel and technical necessity for starting and stopping the engine' has not been substantiated by the technical and operating manuals and the findings of the committee. Undoubtedly the performance and efficiency of the station would improve and the repair and maintenance costs would come down by using the HFHSD for starts and stops. That should directly reflect upon the station heat rate of the power station and margins in the variable costs of operation.

141. The claim of the Petitioner that HFHSD is to be treated as a fuel for the station has also to be examined. As quoted earlier the PPA defines fuel as follows: *'Fuel' means Low Sulphur Heavy Stock (LSHS) or any alternate fuel pursuant to Section 7.5 used as the primary fuel in the project for generating electricity*. Article 7.5 deals with Change in Fuel:

> *In the event of (a) non-availability of the fuel beyond the control of the company or (b) steep increase in the price of the fuel being used or (c) availability of alternate cheaper fuel , the Board retains the right to direct the company to use an alternate fuel provided that it does not involve additional capital expenditure on account of the company and the equipment supplier certifies that such fuel is compatible with the equipment in use and does not lead to accelerated degradation of the equipment . In case the company desires to use an alternative fuel for the above reasons, it may do so with the permission of the Board which shall not be unreasonably withheld or delayed.*

> Article 7 on Tariff specifies that '*unless pursuant to Section 7.5 the fuel is changed, for the purpose of this Article 7, LSHS is the fuel'.*

142. In the Schedule 8 Part II parameters taken for tariff calculation also specify LSHS as fuel and the landed price and LCV of LSHS only are specified. HFHSD has not been mentioned as fuel anywhere in the PPA. The PPA is silent on use of HFHSD for starting and stopping purposes. The tariff calculations and formulae under

Article 7 are based upon the definition of fuel under Article 1. In other words the PPA recognizes only LSHS as the fuel for the plant.

143. Since the adjudicatory process by the Commission has to be generally confined to the frame work and scope of the PPA, the Commission concludes that HFHSD cannot be recognized as fuel for the purpose of tariff computation and the Respondent has no obligation in terms of PPA to reimburse the cost of HFHSD used for starts and stops by the Petitioner.

144. It is true that the power plant was utilized as peaking station by the Respondent after initial years due to the high variable cost. Claim of the Respondent that the station was expected to be run as peaking station has not been substantiated. The Respondent has not produced any evidence to substantiate such a claim. Peaking stations cannot attain 80% PLF as provided in the PPA by any means. In fact the conversion of such liquid fuel based power stations to peaking stations was the outcome of changed scenario in fuel prices. It is well known that steep increases in fuel prices create additional problems for thermal power plant operators. A power plant with a long-term Power Purchase Agreement originally designed to run in base-load mode normally find itself becoming a peaking plant if, for example, fuel prices increase or if additional power at lower rates, such as hydropower and coal base thermal power, becomes available. The change from base-load station to peaking station can have a substantial influence on the O&M cost also. While certain components of the O&M costs would remain unchanged or even increasing, there would be substantial reduction in certain costs due to continuous backing down of the station. This principle is true in the case of Petitioner also since the O&M charges of the Petitioner's plant is related to the capital costs, corrected with inflation index and recovered as fixed charges.

145. Undoubtedly, the usage and costs of HFHSD for operational needs of the power plant of the Petitioner have gone up due to the frequent start and stop instructions and the low load factor operations. But the PPA does not provide for any compensation for such variations in operational costs under any circumstances .Hence the claim of the Petitioner for compensation on account of such factors do not come under the purview of the PPA and consequently under the purview of the adjudicatory process by the Commission at present.

146. On the dispute related to the loss on account of excess consumption of HFHSD due to frequent start/stop of engines, the Commission concludes as follows:

(i) The HFHSD required for start and stop of the engines cannot be considered as 'fuel' under the terms and conditions of PPA and therefore the cost of HFHSD cannot be considered as cost of fuel.

(ii) The cost of HFHSD required for start and stop and for use in auxiliary boilers has to be considered as part of O&M costs

(iii) The issues relating to compensation by way of reimbursement of additional cost of HFHSD due to frequent start and stops consequent to the dispatch instructions of the Respondent have not been specifically covered by the terms and conditions of the present PPA and therefore the Commission is unable to pass any awards on the matter in terms of the PPA.

147. However it remains a fact, approved both by the Petitioner and by the Respondent, that the impugned plant is being scheduled as a peaking station for last several years. Thus the plant of the Petitioner, which was originally envisaged as a based load station is being run as a peaking station under compelling legal, contractual and financial considerations faced both by the Petitioner and the Respondent, though beyond their control. So also the committee constituted by the Commission as per order dated 14.06.2013 has stated in its report submitted on 05.08.2013 that, the use of HFHSD during starting and stopping of engines can be viewed as a prudent utility practice. Thus scheduling of power from the plant of the Petitioner only during peak hours has resulted in additional expenditure to the Petitioner by way of cost of distillate fuel HFHSD for every start and stop of each machine. Therefore the Petitioner and Respondent may re-evaluate the above facts and circumstances realistically and arrive at a negotiated settlement in a just and fair manner.

Claim 7 :Fulfilment of Conditions in Article 2.1(d) and 2.1(f) of PPA

Version of the Petitioner:

148. Article 2 of PPA deals with the Conditions Precedent and stipulates obligations of the Petitioner coincidental to the occurrence of the following in full.

2.1(a) GoK guarantee to take care of payments due to the Petitioner (which was executed on 6.10.2000)

2.1(d) The company shall have received the draft format of the Letter of Credit Agreement in the form and content acceptable to the company pursuant to Section 9.3 along with the commitment from the issuing bank.

2.1(f) Format of Escrow Account Agreement in terms of Art. 9 shall have been accepted by the Company, the Board and its bankers.

149. The Respondent has failed and neglected to fulfill conditions in Art. 2.1 (d) & 2.1 (f) (i.e. in respect of the letter of credit and escrow account) , resulting in serious hardship to the Petitioner in as much as they do not have any security to fall back on and they are left to the mercy of the Respondent all these years. The 15 year tariff period will expire on 14.5.2016. The Respondent maybe directed to comply with Article 2.1(d) and 2.1(f) of PPA for the remaining tariff period.

Arguments in the Counter Affidavit filed by the Respondent:

150. These were Conditions Precedent of the PPA. The obligations of the Petitioner and Respondent were made conditional to the occurrence of certain events including those specified in Article 2.1(d) & (f) of PPA. By not insisting on the fulfilment of the said conditions prior to taking up their obligations and rights under the PPA, in effect, the Petitioner has waived the said Conditions Precedent to PPA. Though Art.2.3 of PPA entitles the Petitioner to terminate the agreement by giving 21 days written notice, if the Conditions Precedent were not fulfilled within 180 days of signing the PPA, the Petitioner chose not to do so. The Petitioner had waived the said Conditions Precedent. After more than 13 years of signing the PPA, it cannot be heard to seek a direction from the Commission and the claim is hopelessly barred by limitation. The Respondent never defaulted payments the Petitioner is entitled to under the PPA, but has only refused such claims which are not as per agreed PPA terms as well as withheld some payments to set off refunds or payments due to the Respondent.

Arguments in the Rejoinder of the Petitioner:

151. The Petitioner has denied the arguments of the Respondent. As per Article 19.4 of the PPA, non- insistence of the conditions in the Article 2.1 (d) & (f) does not amount to the waiver. The Petitioner has been insisting the Respondent for opening the L.C. and Escrow Account (Exhibit C 86 – 91). The Respondent has failed to comply with their obligations for opening L.C.

Views Expressed in the Report of the Committee:

152. The argument of the Respondent that non–resorting to actions as per Article 2.3 of PPA amounts to waiver of the Conditions Precedent, is challenged by the Petitioner in the light of Article 19.4 of PPA. The committee finds that the Petitioner could have availed the remedy for his grievances as per Article 2.3 of PPA and he has not given any reason for not invoking Article 2.3 at the appropriate time. The next question is whether limitation of time can be applied in this case. The committee considers that it is not appropriate to approach the Commission seeking relief on issues that could have remedied under Article 2.3, thirteen years ago. The committee recommends that the Commission may not consider the issue relating to failure to open the letter of credit (L.C.) and Escrow account.

Remarks of the Respondent on the Report of the Committee :

153. The Respondent accepted the recommendation and further submitted that the Respondent has never defaulted in making payments the Petitioner is entitled to by the PPA, but only refused those which are not as per agreed terms.

Remarks of the Petitioner on the Report of the Committee:

154. The Petitioner submitted that the view of the Committee is not acceptable. Opening of the L.C. is one of the primary and essential conditions of the PPA. As such if the Respondent is directed, not to open the letter of credit, it would be contrary to law. Just because the Petitioner has not insisted on this condition, it does not mean the PPA gets amended. The Petitioner definitely wants to retain the right to ask for L.C., in case the Respondent delays payment or deducts in future.

Final Submission by the Respondent

155. "Financial Closure" means the signing initial financial documents for project financing and the fulfilment of all Conditions Precedent to the initial availability of funds there under. The "financing documents" means loan, notes, indentures and security agreements etc relating to the long term financing of the project as

such documents maybe modified, amended or supplemented till the COD. It is submitted that the Petitioner has not provided the details of the financing documents, as stipulated in PPA.

Analysis and Decision of the Commission.

156. The Article 2.1(d) and 2.1(f) of the PPA deal with letter of credit and escrow account to be provided by the Respondent. This is for the purpose of providing security for the payment to be made by the Respondent to the Petitioner in terms of the PPA. It is true that letter of credit and escrow account facility have not been provided by the Respondent. It has to be specifically noted that letter of credit and escrow accounts were Conditions Precedent in terms of Article 2 of the PPA. The Petitioner is not seen to have insisted on compliance of these Conditions Precedent. The PPA was executed on 12.8.1998. At this distant date there is little justification for the Petitioner to claim compensation for non-compliance of Article 2.1(d)&Article 2.1(f).The Article 9.4 of the PPA deals with direct payments and disputed payments. Article 9.5 deals with escrow account. Article 9.7 deals with the order in which payments in respect of tariff invoices and any supplementary invoices can be ensured by invoking letter of credit or escrow account when direct payments are not effected by the Respondent. In this case the Respondent has effected payments in respect of major portion of the tariff invoices and supplementary invoices except in cases of disputed claims. In the case of delay in payments interest can be realized by the Petitioner in terms of Article 9.4 (b) and 9.4 (c).Since the Commission has issued orders to the effect that interest can be levied in terms of the PPA for the delayed payments, if any, the Petitioner is not eligible for any additional compensation. It is therefore ordered accordingly.

Claim 8: Interest

Version of the Petitioner:

(i) Interest on delayed payments:

157. Article 9.4 (b) of PPA stipulates that any payment made beyond due date (7 days after receipt of tariff invoices or supplementary invoices) shall carry interest at the Contract Rate of Interest. Article 1 of PPA defines the Contract Rate of Interest as a per annum interest equal to the sum of (i) rate of interest as per the Initial Financing Documents and (ii) 2%. The Respondent had caused

delays in the matter of releasing even the payments passed for payment. Such delayed payments should carry interest in terms of the above clause. Accordingly, the Respondent shall pay to the Petitioner a sum of Rs. 21,86,43,591/-.

(ii) Interest on Claims:

158. The non-payment of dues payable under the PPA qualify for payment of interest after a week from the date of submission of invoice till the date of payment@ 18% per annum . (Claims 1 -7)

Arguments in the Counter Affidavit by the Respondent:

159. The Respondent has been paying all the amounts due. Delay, if any, caused were only on account of the Petitioner claiming in excess of their entitlements. In spite of repeated requests, most of their claims were not substantiated by supporting documents and proof. In a few instances like that of lubricating oil, details provided by the Petitioner were much later in time. Hence the Petitioner is not entitled to the Claims 1 – 7 and no interest payable by the Respondent.

Arguments in the Rejoinder of the Petitioner:

160. The essence of the PPA is prompt payment. The Respondent is withholding payment unilaterally. PPA specifies payment of interest on delayed payments.

Views Expressed in the Report of the Committee

161. It is an undisputed fact that the Petitioner is eligible for interest on any delayed payments and the Respondent argued that no amount is payable to the Petitioner, except disputed claims. The Committee examined each case and gave recommendations as follows: The Respondent adjusted the O & M escalation charges due to the Petitioner from penalty during 2007-08 and 2008-09. The Petitioner is eligible for payment, one week after the presentation of the bills for O&M charges till 31.3.2008. Interest from 1.4.2008 can be decided after issuing orders on the admissibility of incentives.

162. On the issue of *balance fixed charges*, the dispute was due to the increased project cost from Rs. 68.23 Crore to Rs. 70.77 Crore The Petitioner has not produced any supporting evidence to substantiate the increase in project cost and the deviations in financial package. On the b*alance of lubricating oil*

charges, consensus has reached between the two parties. On reimbursement of MAT, though the Petitioner is eligible for interest as per PPA terms, the Petitioner has produced the revised calculations only on 7.3.2012. The Committee has not recommended payment of interest to these claims.

Remarks of the Respondent on the Report of the Committee:

163. The Respondent has accepted the recommendations of the Committee.

Remarks of the Petitioner on the Report of the Committee :

164. The Petitioner submitted that the PPA provided for payments through LC so that payments would not get delayed. In spite of such stringent norms, the Respondent breached the terms in Article 9.4 of PPA and withheld payments. Hence the Respondent is liable to pay the interest.

Final Submission by the Respondent

165. As per 9.4(b) of PPA, interest payable on any delayed payments is as per 'Contract Rate of Interest', which is defined as the rate of interest as per the lending rates in initial financial documents (15.5%) plus 2%. Hence it is prayed that the interest payable on all the arbitration amounts, should be 17.5%.

Analysis and Decision of the Commission.

166. The Commission has already issued orders earlier in this order on the payment of interest to be made by either party, on belated payment/ excess payment in respect of fixed charges. Similarly orders have also been issued with regard to the interest on the reimbursement of IT/ MAT payable by the Respondent to the Petitioner. In view of the said orders no further directions are seen necessary in this regard. However it is clarified that the Petitioner is eligible for interest in terms of Article 9.4(b) & 9.4(c) on any delayed payment. Similarly the Respondent is also eligible for interest on any refund to be made by the Petitioner. The rate of interest is the contract rate of interest as defined in Article 1 and it shall be paid for the period from the due date of payment as defined in Article 1 to the date of actual payment.

Claim 9. Costs:

167. The Petitioner stated that the Respondent has been solely responsible for non – settlement of the claims and hence the Petitioner has been driven to the litigation, entailing huge costs. The Respondent denied this claim. The Committee analysed and opined that the delay in payment by the Respondent

was due to the Petitioner not furnishing the desired documents in time and hence the claim on costs is not recommended.

168. The Petitioner submitted that the views of the Committee on the issue of costs are not acceptable to them.

Analysis and Decision of the Commission.

169. In view of the detailed analysis made and decisions already taken by the Commission on various issues raised by the Petitioner and the Respondent, it is found that there is no justification to allow cost. Hence there is no order as to cost.

Orders of the Commission

170. The issues have been analysed in detail and decisions have been recorded by the Commission under the sub headings "Analysis and decision of the Commission" in respect of each claim made by the Petitioner. Consequently the Commission issues the following orders:

(i) **Fixed charges shall be calculated taking Rs. 68.23 Crore as capital cost in terms of the PPA out of which Rs. 47 Crore shall be treated as Indian loan at an interest rate of 15.43% and the balance amount of the capital cost amounting to Rs. 21.23 Crore shall be treated as equity. All components which are based on the project cost such as O&M expenses, depreciation and return on equity shall also be worked out on the above basis. The balance of fixed charge, if any, payable to the Petitioner, being the difference between the amount of fixed charges that has now become payable as per these orders and the amount of fixed charges already paid by the Respondent to the Petitioner, shall be reimbursed to the Petitioner. Excess payment of fixed charges, if any, received by the Petitioner from the Respondent shall be adjusted in the payments due to the Petitioner. Interest on belated payment/ excess payment shall be paid by either party as per Article 9.4 of the PPA.**

(paragraphs 27-33)

(ii) **Regarding the claim made by the Petitioner on the balance payment for the lubricating oil, the Commission refrains from passing any award, since the Petitioner and Respondent have reported that they have already arrived at a consensus on the settlement of the dispute relating to payments for lubricating oil.**

(paragraph 41)

(iii) **Regarding the claim for reimbursement of Income Tax / MAT it is ordered that the Respondent is not liable to reimburse the Income Tax assessed as per normal computation and paid by the Petitioner since, as per terms of the PPA, Respondent is liable to reimburse only the Income Tax levied on the income from generation of power and since, as per section 80-IA of the Income Tax Act 1961, the income from generation of power is exempted from payment of IT for the first 10 years from the date of commissioning of the project. The MAT paid if any, by the Petitioner shall be reimbursed by the Respondent to the extent that relates to income from generation of electricity. Interest shall be paid by the Respondent to the Petitioner at the contractual rate of interest with effect from the date on which the Petitioner had claimed reimbursement of MAT after its remittance to the IT Department till the date of its reimbursement by the Respondent. The Petitioner shall avail the benefit under section 115JAA and set off the MAT paid by him against the regular income tax, if any, payable by him in the succeeding 10 years and the consequential benefit shall be passed on to the Respondent, who shall also monitor the same specifically.**

(paragraphs 60-64)

(iv) **Regarding the claims relating to O&M adjustment charges it is ordered that the O&M adjustment charges shall be worked out treating Rs. 68.23 Crore as capital cost as provided in the PPA. In view of the facts and circumstances explained in paragraphs 80 to 83, it is also ordered that the Petitioner is not liable to pay any penalty or disincentive for the non-achievement of the normative level of PLF as provided in the PPA till settlement of dues in accordance with this order.**

(paragraphs 80-83)

(v) **Regarding the claim in respect of infirm power it is ordered that the Respondent is liable to reimburse only the actual cost of fuel incurred by the Petitioner for generating electricity before COD and therefore the pre-COD claims have to be limited to the cost of LSHS actually used for generating electricity before COD. The amount payable by the Respondent to the Petitioner on account of cost of infirm power shall only be the cost of 2051.55 MT of LSHS at the rates provided in the supplementary invoices collectively**

marked as Exhibit C – 57. The Petitioner shall not be eligible for the cost of HFHSD and lubricating oil purchased / consumed before COD towards the price of infirm power since, as per terms and conditions of PPA, the infirm power can be billed and paid for only at the actual fuel cost incurred by the Company.

(paragraphs 91-102)

(vi) **Regarding the claim of the Petitioner for incentive for delivery of energy in excess of 80% PLF it is ordered that the Respondent shall inform the Petitioner the date of encashment (clearing) of the cheque claimed to have been issued by the Respondent to the Petitioner, along with a certificate from the bank that the cheque for Rs.6,77,286/- was cleared in favour of the Petitioner indicating the date of such clearance. This information shall be given within one month failing which the Respondent may re-issue the cheque for the exact amount of incentive for the year 2002-03 calculated as per the method now decided by the Commission. If there is evidence that the cheque is cleared and there is found to be difference in the amount of eligible incentive, the difference amount may be paid or refunded as the case may be. There is no order as to interest.**

(paragraph 110)

(vii) **Regarding the claim for additional expenditure on account of excess consumption of HFHSD due to frequent start and stop of engines, it is ordered that (i) the HFHSD required for start and stop of the engines cannot be considered as 'fuel' under the terms and conditions of PPA and therefore the cost of HFHSD cannot be considered as cost of fuel. (ii) the cost of HFHSD required for start and stop and for use in auxiliary boilers has to be considered as part of O&M costs and (iii) the issues relating to compensation by way of reimbursement of additional cost of HFHSD due to frequent start and stops consequent to the dispatch instructions of the Respondent have not been specifically covered by the terms and conditions of the present PPA and therefore the Commission is unable to pass any awards on the matter in terms of the PPA. However the Petitioner and the Respondent may take appropriate action on the observations made by the Commission in paragraph 147 of this order.** **(paragraphs 129-147)**

(vii) Regarding the claims relating to non – fulfillment of Articles 2.1(d) & 2.1 (f) of PPA relating to letter of credit and escrow accounts, it is ordered that the Petitioner is not eligible for any additional compensation in this regard.

(paragraph 156)

(viii) **Regarding the claims for interest it is clarified that, in terms of Articles 9.4(b) & 9.4(c) of the PPA, the Petitioner is eligible for interest on any delayed payment and the Respondent is eligible for interest on any refund to be made by the Petitioner at the contract rate of interest as defined in Article 1of the PPA and it shall be paid for the period from the due date of payment as defined in Article 1 of the PPA to the date of actual payment.**

(paragraph 166)

(ix) **There is no order as to cost.** **(paragraph 169)**

171. Petition No. OP 30/2011 and I.A. No 3/12 , 4/12 and 5/12 are disposed of accordingly.

Sd/-	Sd/-	Sd/-
P.Parameswaran	**Mathew George**	**T.M.Manoharan**
Member	**Member**	**Chairman**

Approved for Issue

Sd/-
Secretary