

**ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION**  
**4<sup>th</sup> & 5<sup>th</sup> Floors, Singareni Bhavan, Red Hills, Hyderabad-500 004**

**I.A. No. 5 of 2011**  
**in**  
**O.P.No.11 of 2009**

Dated:20.06.2011

Present

Sri A. Raghotham Rao, Chairman  
Sri R.Radha Kishen, Member  
Sri C.R.Sekhar Reddy, Member

Between

1. Central Power Distribution Company of AP Ltd
2. Southern Power Distribution Company of AP Ltd
3. Northern Power Distribution Company of AP Ltd
4. Eastern Power Distribution Company of AP Ltd ...Petitioners

**AND**

M/s. Konaseema Gas Power Ltd.,  
2<sup>nd</sup> Floor, Progressive Towers, 6-2-913 / 914,  
Khairathabad, Hyderabad – 500 004. ... Respondent

This petition coming up for hearing on several occasions in the presence of Sri. P. Shiva Rao, Advocate for the petitioners and Sri. Jafar Alam, Advocate Sri. C.V. Narasimham, Advocate & Sri. Amardeep Jaiswal for the respondent, the Commission passed the following:

**ORDER**

This is a petition filed by the petitioner to ascertain losses, if any, of M/s. Konaseema and to fix up the rate of additional fixed charges and the period of truing-up to make good of the alleged losses and also requested to issue consent to effect the proposed amendment as agreed by DISCOMs and M/s. Konaseema. The Commission has heard the matter.

2. The petitioner's stand in the instant case is as follows:
  - a) The amendments to the PPA dated 12.01.2005, contemplating 80% of PPA capacity to APDISCOMs and permitting M/s. KGPL to sell 20% PPA capacity to third parties as approved by GoAP based on the recommendations of the Committee were initialed by M/s. KGPL and

APDISCOMs on 03.10.2008 and submitted the same to APERC on 14.10.2008 for issue of consent.

- b) GoAP has requested to take necessary action accordingly.
- c) Hon'ble ATE suggested the parties to sit together and come to some conclusion in regard to Option – 'a', so that the final order could be passed.
- d) Hon'ble ATE vide orders dated 16.12.2010 disposed the appeal filed by M/s. Konaseema and directed the parties to approach the Commission for fixing the tariff and complete the process within 2 months from the date of receipt of application.
- e) Commission vide its orders dated 05.12.2009 under chapter xvi para 15 mentioned that quantification of the entitlement of IPPs for fixed charges prior to 01.04.2009 has to be done keeping in view the circumstances and the state of readiness of the IPP to declare COD.
- f) M/s. Konaseema claimed that due to technical problems in steam turbine, it could not complete the project COD till 30.06.2010 though M/s. KGPL was supplied natural gas from February, 2009 onwards. In fact the APDISCOMs have imposed liquidated damages against M/s. Konaseema for not achieving COD of the project even after supply of gas. APDISCOMs have collected part of liquidated damages from M/s. Konaseema. Later M/s. Konaseema obtained interim orders from the Hon'ble High Court for not collecting liquidated damages by APDISCOMs.
- g) Now in the present proposals of M/s. Konaseema, the company calculated the alleged losses from notional COD with effect from 01.10.2006 and proposed to recover the loss with an additional fixed cost of Rs. 0.65 / unit from 01.07.2010 to September, 2019.
- h) The petitioners are claiming that as per PPA, there is no concept of notional COD, and therefore the DISCOMs are not liable to pay losses as claimed by M/s. Konaseema.

3. On 13.01.2011 the petitioners filed affidavit vide SR. No. 11 / 2011 while the said affidavit is in SR stage.

4. On 11.02.2011 the petitioners filed additional affidavit stating that:
- a) Consequent to the order of the Commission dated 05.12.2009 in OP No. 11 of 2009; all the claims that were made by both parties are nonest.
  - b) Subsequent to said order dated 05.12.2009 the respondent sought consent of petitioners for selection of option (a) of the said order and claimed losses on the ground that its project was ready in 2006, but since petitioners did not provide interconnection facility, it could not declare COD and such it is entitled for compensation of fixed costs of the project, on the assumptions of notional COD.
  - c) The said claim of the respondent is denied by petitioners stating that even though supply of gas and interconnection facility was provided much earlier, the respondent could not achieve SDOC of the project till 30.06.2010. Therefore, without prejudice to their having agreed for selection of option-A and also agreed for amendments of other Articles of PPA, they are not liable to pay any fixed cost compensation.
  - d) Consent for amendment to (18) clauses of PPA, including Articles 3.2 of PPA, was sought. As far as Article 3.2 of PPA is concerned, the amount of alleged losses, the proposed enhanced tariff and the period of payment of additional tariff is kept blank, as the same is disputed by the petitioners and still not ascertained. In view of the aforesaid circumstances, the petitioners in the application dated 13.01.2011, sought for adjudication of claim of respondent on the issue of alleged losses and also sought consent for (17) other clauses.
  - e) The petitioners disclaimed the liability of alleged losses. Therefore, the said issue of losses being contentious issue, the same has to be adjudicated, by the Commission, while considering the grant of consent for amendment of (17) other clauses of PPA.
  - f) The present proceedings are continuation of earlier proceedings O.P. No. 11 of 2009. Although there is one contentious issue among proposed amendments for (18) clauses of PPA, the Commission has powers to conduct enquiry on both aspects. The Commission is vested with powers to adjudicate the contentious issues u/s 86 (1) (f) of the Electricity Act, 2003, and to grant approval or otherwise for consensus

of proposed amendments u/s 86 (1) (b) of the Electricity Act, 2003 read with Section 21 (4) of Andhra Pradesh Electricity Reforms Act, 1998.

- g) The Commission may decide aforesaid both aspects in one and same proceedings, framing separate issues, as per judgment of Supreme Court in Tata Power Vs MERC at para 120, reported at 2009 ELR page 0246.
- h) It is prayed that the matter may be admitted on both aforesaid issues and pass orders after duly adjudicating the issue of alleged losses and also the approval of other amendments.

5. On 23.02.2011 the Commission passed an order in IA (SR) No. 11 of 2011 and as per its directions the affidavit filed by the petitioners on 13.01.2011 is numbered as I.A No. 5 of 2011.

6. On 21.03.2011 the respondent filed its reply affidavit stating that

- a) In the order of the Commission dated 05.12.2009 in OP No. 11 of 2009 it is mentioned that the respondent is entitled to receive payment of the capacity charge for the period from which it was ready to commence operation of its project till the date on which it was allowed to test and commission its project by the petitioners.
- b) Further, at para 15 of the Commission's order it is mentioned that the exact quantification of capacity charge would depend on the state of readiness of respondent prior to 01.04.2009.
- c) The order of the Commission is final and binding on all concerned. The contention raised by the petitioners that they are not liable to pay capacity charge on a notional Commercial Operation Date (COD), that is, COD based on respondent's readiness to achieve the project COD (rather than actual COD) are barred by the doctrines of res judicata, estoppel, election, approbate-reprobate and ultra vires. It is stated and submitted that, the respondent was unable to achieve actual COD despite being ready to do so, owing to the deliberate and concerted acts and omissions of the concerned authorities including the petitioners. As such, the petitioners cannot be permitted to derive any unjust benefit from their own wrongs to the severe detriment of

respondent. It is therefore denied that the petitioners are not liable to pay capacity charges to respondent as averred or otherwise.

- d) In view of the above, the petitioners are liable to make good the loss of capacity charge suffered by respondent.
- e) In the light of the statements made by the petitioners, the captioned matter is a fit case for a judgment on admissions (as contemplated under Order 12, Rule 6 of the Code of Civil Procedure, 1908), to the extent that the petitioners have admitted that they are liable to pay Rs. 581.90 cr to respondent as capacity charge for the period starting from 01.01.2007 to 31.03.2009.
- f) In its order dated 23.02.2011, this Commission has been pleased to hold that the Commission is required inter-alia to adjudicate a dispute between the parties u/s 86 (1) (f) of the Electricity Act, 2003 (the 'Act') as to the determination of the losses suffered by the respondent. The statements made on behalf of and / or by the petitioners, particularly as to the quantum of their liability to respondent, settle the said dispute conclusively to the extent of Rs. 581.90 cr.
- g) The documents available on record would corroborate the unequivocal statements made by and / or on behalf of the petitioners that respondent was ready to commence operation of its project at least by 2006 and was unable to do so only because the petitioners refused to provide it with the requisite Inter Connection Facility and start-up power, and the concerned authorities, acting in concert, refused to recommend the project to the MOPNG for the supply of natural gas, only so as to avoid payment of capacity charge to respondent.
- h) The respondent was ready to test its switchyard by December, 2005. However, the petitioners refused to provide the Inter Connection Facility and start-up power that were necessary to test the switchyard. As a result, the respondent could not avail of the gas that GAIL had initially indicated it could provide for 30 days in April, 2006, to test and commission its gas turbines. The said Inter Connection Facility and start-up power were provided to the respondent only in July, 2006, at which time respondent's requests to GAIL and the APPCC for the supply of gas did not receive any response.

- i) The delay in the testing and commissioning of the project switchyard had a cascading effect on the date by which all the three generating units were ready.
- j) Despite the delays, the two gas generating units were ready prior to July 2006 (at least in March 2006), while the Steam Generating Unit was ready by October 2006. Thus, in light of this Commission's order, it is stated that 01.07.2006 ought to be taken as the date from which respondent was ready to commission its Gas Turbines. It is therefore stated with reference to the proposed amendment to Article 3.2 vide Amendment Agreement IV that 01.07.2006 ought to be taken as the start date for computation of capacity charge.
- k) The respondent began to receive capacity charge as per the PPA from 01.07.2010. It is therefore stated that 30.06.2010 ought to be taken as the end date for the said computation.
- l) Without prejudice to the aforesaid, it is further stated and submitted that the provision of Inter Connection Facility, start-up power and gas were made conditional by the petitioners and the concerned authorities upon the respondent acceding to the deletion of the alternate fuel clause. It is submitted that the said condition laid down by the petitioners and the concerned authorities amounts to a change of permit under Article 11 of the PPA. It is further submitted that the modification in the MOPNG's and GAIL's stance with respect to supplying gas to respondent – where at first, GAIL had stated that it would provide gas to all its consumers including respondent from its existing supplies on a pro-rata basis, but later, at the instance of the concerned authorities, it refused to provide gas – amounts to a change of law under Article 11 of the PPA. The said change of permit and change of Law cast an economic burden on Konaseema, inter alia, as respondent could not commission its project and receive capacity charge. As such, under Article 11 of the PPA, respondent is entitled to be put it in the same economic position as it would have occupied in the absence of the said economic burden. It is stated and submitted that the said economic burden was cast upon respondent on and from 01.07.2006 and continued till 30.06.2010. Without prejudice to its

rights under the PPA, as per Amendment Agreement IV respondent is entitled to be paid capacity charge on and from 01.07.2006 till 30.06.2010.

- m) As borne out by record, immediately, upon the execution of the Amendment Agreement III, the respondent was provided the Inter Connection Facility, start-up power and gas. Within a month of being supplied natural gas, respondent began to supply power generated by its two gas generating units to the petitioners on an infirm basis and on 04.06.2009, the date appointed by the concerned authorities, successfully completed the PAT and commissioned its two gas turbines.
- n) It is stated that its two gas turbines, having successfully commenced operation, respondent initiated the commissioning process in respect of its last generating unit, being a steam turbine, expecting that it would commence operation by 02.09.2009. However, on account of a catastrophic failure of major components of the steam turbine, respondent was unable to commence operation of the steam turbine. The respondent promptly informed the petitioners of the said catastrophic failure declaring the same to be a force majeure event under the PPA. It is pertinent to emphasize that the delay in commencing operation of the steam turbine and achieving project COD, was not because the project was not ready, as is sought to be contended by the petitioners, but because of the said catastrophic failure of major components of the steam turbine.
- o) It is stated that computing the capacity charge with the aforesaid start and end date, namely 01.07.2006 and 30.06.2010, the amount payable as capacity charge by the petitioners to respondent for the said period is INR 1439.58 crs. Based on the said amount payable, the AFC payable as per the proposed amendment to Article 3.2 of the PPA, is INR 0.70 per unit. The detailed working out of the said computations are annexed herewith and marked as Annexure R-71)
- p) In the light of the above facts, circumstances and submissions it is respectfully stated and submitted that this Commission be pleased to allow the captioned petition granting its consent to the Amendment

Agreement dated 06.11.2010 after determining the AFC payable by the petitioners to respondent at INR 0.70 per unit.

7. As the matter involves public interest, the Commission has permitted the public to submit their representations as they were also heard in the earlier proceedings of the main OP itself.

8. Sri. M. Venugopala Rao and Sri B.V. Raghavulu submitted detailed arguments and stated that

- a) The contention of the respondent that it is entitled to get a sum of Rs. 1411.88 crs towards capacity charge and interest thereon, etc., for its 445 MW combined cycle power project from the DISCOMs for the period from 01.07.2006 to 30.06.2010, and that the additional fixed charge (AFC) payable to it as per the proposed amendment to Article 3.2 of the Power Purchase Agreement (PPA) between it and the DISCOMs is 70 paise per unit upto the year 2019 is untenable and illegal, baseless materially and imposes totally unjustifiable and avoidable burden on the consumers of power from the DISCOMs. If the Commission accepts the claim of the respondent and gives consent to it, it will set a bad and dangerous precedent, defying all legitimate canons of a rational regulatory process.
- b) The arguments submitted by these objectors earlier pertaining to this case may be taken into consideration by the Commission.
- c) Sri. M. Venugopala Rao and Sri B.V. Raghavulu also filed written submissions.

9. Sri. A.Punna Rao submitted that

- a) Failure of equipment i.e., the steam turbine cannot be considered as “catastrophic failure” as it is a manufacturing defect.
- b) The respondent employed the services of M/s. TDS Technical Drying Services (Asia) Pvt. Ltd to preserve project Equipment till such time the project could be commissioned.
- c) The respondent has to pay liquidated charges due to its failure to put the total plant into operation in time.

10. On 02.04.2011 the petitioners filed reply affidavit to the claim of losses by the respondent filed on 21.03.2011, stating, inter-alia, that

- a) All the statements made by the respondent except which are specifically admitted are factually incorrect and legally not sustainable at law.
- b) Any claim of losses or damages to respondent entailing with consequences of obligation to petitioners with its track record from 1997 and subsequent amendments agreements dated 21.11.2003 and dated 11.01.2005, and also within the mandate of Section 73 of Indian Contract Act, but not otherwise.
- c) As per Clause 7.2 of the PPA the predecessor of petitioners and the petitioners are obligated to provide Inter Connection facility three months before the schedule date of completion of first unit, and if such facility is not provided on or before such date, the respondent need to designate an independent engineer, who is acceptable to other party, and if the said engineer certifies that the project is ready to begin the process of interconnection, the petitioners shall pay liquidated damages specified therein for such delay. In the instant case, it is an indisputable fact that the respondent never designated any engineer, nor got it certified that on 01.01.2007 on which date the respondent claims to have got ready or 01.07.2006 and that the petitioners did not provide such interconnection facility. On the other hand admittedly interconnection facility was provided on 12.07.2006 by petitioners, without admitting the readiness of the company. Therefore, the claim of the respondent that petitioners are liable to pay damages / losses does not arise. It is the obligation of the respondent to prove and establish the fact of readiness as a condition precedent to claim losses.
- d) The claim of the respondent is that the fuel for getting the generating unit tested i.e., natural gas was not made available though plant is ready, is not concerned to the petitioners. No where in the said PPA or by or under any document, petitioners are obligated either to provide the gas or to recommend to the concerned Authority, to make the gas available to the project particularly for commercial operations.

- e) The entitlement of fixed charges to the respondent arises only when the respondent declares its availability, either with primary fuel or with alternate fuel, but could not go for production due to acts of petitioners. The readiness, to claim fixed charges, in terms of PPA, is only after completion of testing and reaching the stage of making the plant's capacity available to petitioners with the available fuel.
- f) Even though Inter Connection Facility was provided outside the PPA on 17.07.2006, respondent could not undertake the testing and commissioning of the project. The said fact alone belies the claim of respondent of its state of readiness. The state of readiness means its readiness to declare COD enabling to declare its projects capacity availability to petitioners.
- g) In view of the indisputable facts borne out by the records, it is clear that the respondent failed to establish the fact of readiness entailing the consequences of claim of losses against the petitioners.
- h) The liability for payment of capacity charges as per the provisions of the PPA, would commence after COD of the project, conducted as per PPA, which in this case is from 30.06.2010 only. Even after RIL D-6 gas was available from April, 2009 upto the rated capacity, respondent could not complete the COD formality as per PPA till 30.06.2010. In view of the above, it is clearly evident that the claim of respondent that they are ready from 01.07.2006 is absolutely false.
- i) With regard to claim of the respondent about application of resjudicata, the petitioners submit that the procedure to be adopted in the proceedings before the Commission has been specified by its Conduct of Business Regulations. Further even as per the substantial law, the applicability of provisions of CPC have been excluded except on four aspects. Thus the Section 11 CPC or the principle or resjudicata is excluded.
- j) With regard to the doctrine of estoppel, it is submitted that the petitioners or its predecessor did not go back on any of its assurances / obligations flown under the PPA. It is the GAIL and ONGC who went back and failed to provide gas, though promised. Therefore, doctrine of estoppel is not applicable to the case on hand.

- k) In view of the above, it is prayed that the Commission is requested to reject the claim of alleged losses of respondent.

11. On 23.04.2011, the respondent filed an affidavit explaining the amendment agreement dated 12.01.2005 to the PPA dated 26.05.2003 executed between the parties and the implications as to the date from which capacity charges became payable to respondent.

12. On 28.04.2011, on behalf of the petitioners, an "Additional Reply" was filed reiterating the earlier statement and it was further submitted that:

- a) The amendment agreement to which consent was given by the Commission precludes the respondent from claiming readiness as SDOC of the project is deemed to have extended day to day resulting from non-availability of gas, before 01.01.2007.
- b) Though mode of calculation of capacity charges is a matter of record of PPA the very claim is not tenable at law. The company is not entitled for capacity charges for any part of the period upto the date of COD.
- c) As there is no liability of payment of any part of capacity charge, there is no question of payment of interest or additional fixed charge at all.
- d) The claim of the respondent that it kept the machine ready and kept the same in suspended animation is without any basis or material.

13. On 29.04.2011, the respondent filed an affidavit explaining the expenditure incurred after FY 2006-07.

14. On 07.05.2011, on behalf of the petitioners, "Further Additional Reply" to the affidavit dated 23.04.2011 of the respondent was filed. It was stated therein that:

- a) The claim of the respondent that the petitioners delayed the matter before the Commission is not correct and the record of proceedings of the Commission would falsify the said statement of the respondent.
- b) It is incorrect to state that the gas is available at relevant time and that when Vemagiri Company which was placed in similar situation, the petitioners made the gas available to said company, while denying it to respondent. As stated in earlier reply, Fuel Supply Agreement is between GAIL and respondent, but not with petitioners.

- c) The claim of the respondent that it can claim readiness of the project de hors to the amendment agreement dated 12.01.2005 is absolutely strange to law, particularly in view of the submissions and materials placed by the petitioners.
- d) Even after providing of interconnection facility admittedly on 17.07.2006 respondent could not go for testing for want of supply of natural gas. As mentioned earlier getting fuel supply or risk of fuel supply is purely on the respondent, but not on the petitioners. Therefore, by operation of law, the company is precluded from asking the petitioners to recommend gas supply to Ministry of Petroleum particularly curtailing the supply to existing projects. Therefore, the claim of respondent that gas is very much available is nothing but its illusion and without any basis.

15. Before adverting to rival contentions it is necessary to mention that, in the year 2009, petitioners herein filed four separate applications in respect of four different power projects that of the respondent herein vide OP No. 11 of 2009 seeking grant of consent for certain amendments proposed and initialed between the parties. By a common order dated 05.12.2009, the Commission disposed off all the said applications. The respondent herein preferred appeal vide Appeal No. 100 of 2010 before Hon'ble ATE, challenging the above mentioned order on several grounds. After hearing the parties, the Hon'ble ATE passed an order on 16.12.2010 wherein it is recorded that the respondent herein (appellant before ATE) agreed for 'Option – A' mentioned by the Commission in its order dated 05.12.2009. Accordingly the ATE directed the parties to approach the Commission for fixing tariff. The petitioners herein (Respondent 3 to 6 before ATE) under took to file necessary application before the Commission, thereupon the ATE disposed off the Appeal No. 100 of 2010 with a direction to dispose off such application to be filed before the Commission within two weeks from that day i.e., 16.12.2010.

16. However, the respondent herein filed an application before ATE seeking certain modifications to the order passed by the ATE dated 16.12.2010 in Appeal No. 100 of 2010. Upon hearing the counsel for the parties the Hon'ble ATE modified its order dated 16.12.2010. As the necessary application was already filed before the

Commission, the ATE directed the Commission to dispose off the said application within two months from the date of receipt of the said order of ATE dated 20.01.2011. At the request of the Commission, the Hon'ble ATE extended time upto 25.05.2011.

17. During the public hearing, the learned advocate for the petitioner argued that the Hon'ble ATE suggested the parties to sit together and discuss on option (a) so that the final order can be passed and finally the Hon'ble ATE directed the parties to approach the Commission with a petition to determine the tariff and also to determine the additional fixed charges and directed the Commission to complete the process within 2 weeks from the date of receipt of the application. The respondent i.e., M/s. Konaseema Gas Power Ltd (M/s. KGPL) claimed that due to technical problems in steam turbine, it could not complete the project COD till 30.06.2010 though M/s. KGPL had supplied natural gas from February 2009 onwards and that the DISCOMS have imposed liquidated damages against M/s. KGPL for not achieving COD of the project even after supply of gas and that the respondent approached Hon'ble High Court and obtained a stay order from the Hon'ble High court directing the petitioners not to collect liquidated damages.

18. The learned advocate for the petitioner also further argued that there is no concept of Notional COD in the PPA entered in between the parties and therefore M/s. KGPL is not entitled for any loss as claimed by them. Consequent on the common order of the Commission dt.05.12.2009 in OP 11/2009 and others 3 petitions, the respondent sought consent of petitioners for election of option (a) and claiming losses on the ground that the project is ready by 2006 and the petitioners did not provide interconnection facility as if, the petitioners have to arrange the supply of gas. It is also further agreed that the interconnection facilities was made much earlier and that the respondent could not achieve SDOC of the project till 30.06.2010 and therefore they are not liable to pay any additional fixed charges. Having agreed for election of option – (a) and also agreed for amendments of other articles of PPA, the Commission is requested to consider the same. In the light of the above said circumstances, the petitioners filed this application with a request to adjudicate the claim of the respondent on the issue of alleged losses and also sought for consent on 17 other clauses. In fact there is no need to pay AFC as the

respondent has not discharged the burden cast upon them. They have never reported readiness to Commission, the COD.

19. The learned advocate for the petitioner further argued that prior to 01.07.2006; no document is filed to substantiate their readiness as in compliance of the procedure defined in schedule – F of PPA. The subsequent correspondence clearly reveals that they were not ready by that date and ready long after that date, since presumption can be drawn both upwards and downwards. Hence, the respondent is not entitled for AFC as claimed.

20. In reply to the said argument, the counsel for the respondent argued that the Commission passed an order dt.05.12.2009 in OP No.11/2009 in which it is clearly mentioned that the respondent is entitled to receive the payment of capacity charges from the date of its readiness to commence the operation of the project till the date on which it is allowed to test and commission its project by the petitioners. The exact quantification of capacity charge would depend on the date of readiness of the respondent prior to 01.07.2006. The petitioners are denying the claim made by the respondent on the ground that they are not liable to pay any capacity charge on a notional COD and it is nowhere mentioned in the PPA and this is a plea raised by the petitioners, is not sustainable and the COD is based on the respondent's readiness to achieve the project COD rather than actual COD. The objection raised by them is unsustainable and it is hit by the doctrine of res judicata, estoppel, election, approbate-reprobate and ultra vires. The respondent was unable to achieve the actual COD due to the deliberate and concerned acts and omissions of the concerned authorities including the petitioners and therefore, the petitioners cannot be permitted to derive unjust benefit from their own wrongs and act in detrimental to the respondent's claim.

21. The counsel for the respondent has further argued that the petitioners are liable to make good the loss of capacity charge suffered by the respondents and that is a dispute that has to be adjudicated by the Commission. The counsel for the respondent has argued that the petitioners have also admitted that they are liable to pay Rs.581.90 crs to the respondents towards capacity charge for the period starting from 01.01.2007 to 31.03.2009 and that the Commission is also competent to

conduct an enquiry on this issue u/s 86(1)(f) of the Electricity Act, 2003 as it has to determine loss suffered by the respondent. The record filed before the Commission has revealed the unequivocal statement made by and / or on behalf of the petitioners that the respondent was ready to commence the operations by 2006 but it could not be achieved as the petitioners refused to provide the interconnection facility and start-up power and the concerned authorities, acting in concert, refused to recommend the project to the MOPNG for the supply of natural gas only so as to avoid payment of capacity charges to the respondent. Though the respondent was ready to test its switchyard by December 2005, the petitioners failed to provide the inter connection facility and start-up power that were necessary to switchyard. As a result, the respondent could not avail the gas from the GAIL that it had indicated it could provide for 30 days in April 2006 to test and commission its gas turbines. The said inter connection facility and start-up power were provided to the respondent only in July 2006 by which time, the respondent's requests to GAIL and APPCC for the supply of gas did not receive any response. The delay in testing and commissioning of the project switchyard had a cascading effect on the date by which all the three generating units are ready, inspite of the above said delays, two generating units are ready, even prior to July, 2006. In the light of the Commission's order, 01.07.2006 ought to be taken as the date from which respondent is ready to commission its gas turbine. It is also clear that on 04.06.2009, the date appointed by the concerned authorities, the respondent had successfully completed the PAT and commissioned its two gas turbines.

22. The counsel for the respondent has further argued that the objective of AA IV is to enable the respondent to recover the losses suffered by it on account of the delay in the commissioning of its power plant owing to the non-supply of natural gas, interconnection facility and start-up power by or owing to the actions of the APDISCOMs/APPCC/GoAP. In this respect it is pertinent to set out recitals H to K of the AA IV, which state that the intent underlying AA IV is to provide for the recovery of losses suffered by the respondent due to non-availability of natural gas by the payment of an additional fixed charge, subject to the ascertainment of losses by this Ld. Commission. The said recitals are reproduced hereunder:

*"H. Whereas, M/s. Konaseema vide letters dtd. 05.05.2010 & 10.05.2010 furnished proposals for deletion of alternate fuel provisions as per*

*option 'a' as suggested by APERC in their order dt.05.12.2009 considering entire PPA capacity to APDISCOMS with a provision of Additional Fixed Cost for payment by APDISCOMS to the company to recover the losses of the company due to non-availability of natural gas.*

- I. Whereas, GoAP vide letter dt. 20.10.2010 directed APDISCOMS to adopt option 'a' as specified by APERC in its order dt.05.12.2009, subject to ascertainment of losses by APERC and triuing-up, for initiating the proposed amendments.*
- J. Whereas, during the meeting dt.28.10.2010, APDISCOMS and M/s. KGPL agreed to process the amendments for additional fixed cost and the period for payment of the same.*
- K. Whereas, parties agreed that the losses of the company shall be ascertained by APERC, hence the parties agreed to amend the PPA on the terms and conditions set forth hereunder."*

23. The counsel for the respondent has further argued that, at present, owing to the delay in the commissioning of the respondent's power plant, the respondent stands to suffer a cumulative deficit of Rs.1393 crs and is at the brink of being declared a NPA by its lenders whereupon the respondent will be constrained to shut down operations of its power plant. On account of the increasingly precarious position of the respondent over the period of the delay in the commissioning of the respondent's power plant, the respondent has been constrained to accede to the APDISCOMS' demand for the deletion of the alternate fuel clause in lieu of being compensated only for the loss of capacity charge already suffered.

24. The counsel for the respondent has further argued that, admittedly, including in the light of past actions of the APDISCOMS/ APTRANSCO / APPCC/ GOAP (preventing the supply of natural gas to the respondent) the supply and / or availability of natural gas in the future is highly unreliable and completely outside the control of the respondent. As such by agreeing to the deletion of the alternate fuel clause, the respondent has agreed to expose itself to an incalculably large risk- of being unable to service its debt obligations to its lenders and being rendered a NPA in the event of non-supply / unavailability of natural gas. Indeed, as has been elaborated by the respondent in its affidavit dt.28.04.2011, presently the respondent is at the brink of being declared a NPA owing to the loss of capacity charge suffered by it since 01.07.2006.

25. The counsel for the respondent has further argued that, yet, in lieu of the deletion of the alternate fuel clause the respondent is seeking compensation only for the loss of capacity charge suffered by it over the period that has lapsed since 01.07.2006 when the respondent was ready to commission its power plant (but was unable owing to the acts and deliberate omissions of the APDISCOMS/ APPCC/GoAP including the non-supply of natural gas, to prevent the respondent from commissioning its power plant). The respondent has not claimed any compensation for the risk it stands to face in the future and the corresponding benefit to the APDISCOMS, during periods of non-supply or unavailability of natural gas, when while the respondent will still have to service its debt obligations to its lenders, it will not have any capacity charge to service those debts. In view of the said uncertainty, it is stated that the benefit that will accrue to the APDISCOMS by the deletion of the alternate fuel clause is inestimably greater than the benefit to the respondent. It is stated that during periods of non-supply or unavailability of natural gas, the APDISCOMS will be relieved of the liability to pay capacity charge. Indeed, by preventing the commissioning of the respondent on 01.07.2006, the APDISCOMS have already benefited and the respondent has lost Rs.1411.88crs.

26. The counsel for the respondent has further argued that, the GOI resolution does not apply to the respondent's power plant as it is applicable only to diesel generating units of reciprocating type.

27. The counsel for the respondent has further argued that, the Commission passed its order on 14.12.2004 "*Having given assurances about adequate supply of natural gas during the entire duration of the PPA, the Commission expects that the developer shall make all reasonable efforts to ensure that uninterrupted supply of natural gas is available at least from 01.01.2007 onwards*". In this Commission's order, it is contended that the obligation to secure adequate supply of natural gas was upon the respondent. It is denied that this is so. The meaning sought to be forced by the objector upon the said sentence is artificial and based upon a false, tendentious and partisan reading of this Ld.Commission's said order.

28. The counsel for the respondent has further argued that, the capacity charge has been calculated based on the rates and formulae stipulated in the PPA. As such there is no inconsistency in the claims of the respondent.

29. The counsel for the respondent has further argued that, the objector's apprehension that the deletion of the said proviso will expose the APDISCOMS and its consumers to arbitrary actions by the respondent is entirely misplaced and unreasonable.

30. The counsel for the respondent has further argued that, on account of the steam turbine failure of major components, the respondent was unable to commence steam turbine by 02.09.2009; it was also informed that it was a force majeure event under the PPA. The counsel for the respondent has further argued that the respondent is entitled for capacity charge with effect from 01.07.2006 up to 30.06.2010, the amount payable is Rs.1439.58crs @ Re.0.70 per unit and also requested the Commission to allow the petition for deletion of AFC from 01.07.2006 till 30.06.2010 and directed the petitioners to pay the AFC to begin forthwith along with the payment of arrears from 01.07.2010 till the date of actual payment otherwise, the respondent is going to sustain great loss as he has to discharge the loans obtained from various banks and other institutions and if the same is not paid there is no other option except to close down the unit.

31. On behalf of the objectors / public, several organizations have participated in the public hearing and also submitted written submissions apart from addressing arguments as hereunder:

(a). **Sri M.Venugopal Rao, Senior Journalist**, on behalf of the public argued that the contention of the M/s. KGPL is entitled to get a sum of Rs.1411.88crs towards capacity charge and interest thereon for its 445MW combined cycle power project from the DISCOMs for the period from 01.07.2006 to 30.06.2010, and that the additional fixed charge (AFC) payable to it as per the proposed amendment to Art. 3.2 of the PPA between KGPL and DISCOMs is Re.0.70 per unit upto the year 2019 is untenable and illegal, baseless materially and imposes totally unjustifiable and avoidable burden on the

consumers of power from the DISCOMs. If the Commission accepts the claim of the respondent and gives consent to it, it will set a bad and dangerous precedent, defying all legitimate canons of a rational regulatory process and it should make good by the Commission in the matters of other cases. It is not the responsibility of the APTRANSCO/DISCOM and the GoAP to get the natural gas to the projects either for the Commissioning or for operating the same after commissioning.

**Sri M.Venugopal Rao** has also argued that in the writ petition, it is observed that compelling respondent No.6 to supply gas to the writ petitioners by curtailing supply to the existing units working with supply of gas is totally against the public interest and this itself holds that nobody can compel the GAIL to supply gas curtailing the supply to other units. It is also unjust to accept the claim made by M/s. KGPL without getting even single unit of power during the pre-COD period. The court must carefully examine the entire matter and ensure that the public interest is not sacrificed in the name of protecting the individual's right and reject the proposed amendments / facilities illegitimate claims of IPPs including M/s. KGPL for payment of fixed charges not in the form of power and not generating and supplying to APTRANSCO/DISCOMS before COD of the projects and protect interest of large consumers interest in right earnest.

- (b). **Sri A.Punna Rao, Convener, Praja Energy Audit Cell** submitted lengthy written submissions with regard to the functioning of turbines and the failure on the part of the respondent in making the turbines work and nature of the project, etc. He has also argued that failure of equipment of steam turbine cannot be considered as catastrophic failure and it is a manufacturing defect. It is also further argued that M/s.KGPL made M/s.TDS Technical Drying Services (Asia) Pvt. Ltd to rectify the defects of the equipment till such time, the project could not be commissioned. The problems at BFP, CEP and DC5 will not be treated as catastrophic failure. Therefore, the respondent is not entitled for any capacity charge on the other hand; it is liable to pay liquidated damages to its failure to put the total plant into operation in time.

- (c). **Sri B.V.Raghavulu, Secretary, A.P.State Committee, CPI (M)** also submitted his written submissions and also argued narrating all the grounds mentioned in the written submissions submitted by Sri M.Venugopal Rao. He has further argued that the Commission has to look into the interest of the public at large, instead of the interest of the individual claim made by the respondent to a tune of Rs.1411.88crs towards capacity charge is unjust and untenable as it cannot claim the sum on notional COD and if the same is entertained by the Commission, it causes unavoidable burden on the public at large. Furthermore, the petitioners are not responsible for the failure of supply of gas by the GAIL and the proposed amendments sought by both the parties is against the public interest and the same is liable to be rejected.
- (d). **Sri Janaki Ramulu, State Secretary, RSP**, submitted that the respondent has admitted in the submissions made on 17.03.2011 at paragraph number 8 that interconnection facility and start-up power were provided in July 2006. Hence, it implies that lack of interconnection facility and start-up power cannot be a reason to claim recovery of capacity charge from July 2006. The IPPs have appended only the Gas Supply Agreements (GSA) to the amended PPAs of 2003. FSA for the supply of alternate fuels like naphtha were not made part of the above PPAs. They did not have FSA for alternate fuel. Hence it is to be reaffirmed that even this GSA is toothless. It is the developer's responsibility to source sufficient fuels. As per the Commission's order dt.14.12.2004, the Commission laid down that the Schedule Date of Completion (SDOC) shall be extended day to day for any delay resulting from non-availability of gas before 01.01.2007. This order was given after the Discoms and the developers including the KGPL placed mutually agreed suggestions before the Commission to postpone the SDOC. This date of 01.07.2006 cannot be taken as a start date for calculation of recovery of capacity charge. The catastrophic failure of the steam turbine cannot be taken as force majeure. The present petition filed by the developers is one sided as they only address the losses suffered by the IPPs who have set up 4 gas based power plants in the State. They do not address the burden borne by the consumers because of the failure of the developers to start power generation from these plants in time as envisaged in the PPAs. Consumers

suffered heavily as they are forced to pay higher tariffs as power from costly sources was procured in the absence of power generation from these plants. State Government also had to meet huge expenditure because of this high cost power purchases. There is no balance of convenience in favour of the respondent. The irreparable injury and the balance of convenience are in favour of public interest and the claim at Re0.70 per unit on all electricity consumers of the state is unjust. Therefore, the Commission may refuse to give the consent to the above proposed amendments to impose additional fixed costs.

- (e). **Sri Prasadanna, CPI (ML), A.P.Rythu Coolie Sangham**, submitted his written submissions to the effect that, the claim of Rs.1411.88 Crs from DISCOMs is unjust since the project would not be completed due to non-supply of the gas, even in the year 2009. Therefore, it cannot claim the above said amendment. The DISCOM has clearly informed that it cannot take fuel risk inspite of the same the IPPs are claiming without any basis. If the claim is entertained by the Commission, it will directly give impact on each and every consumer in the State and the Commission may be pleased to reject the consent sought by the petitioners.
- (f). **Sri G.Obulesu, State Secretary, AITUC**, submitted his written submissions to the effect that though the case is pending before the Commission, they have approached the Hon'ble High court and other courts would reveal that they are going to any extent to obtain any order favourable to them by misleading the courts. They have also obtained an order of APTEL with a condition to dispose of the matter within a particular date by hanging a knife on the Commission itself and thereby obtaining the benefit from the Commission. If the Commission is prepared to give consent, the same consent is to be given to other 3 IPPs and inturn it would effect Rs.6000crs additional liability on the consumers. It is M/s. KGPL which entered into agreement with GAIL and if it is a failure on the part of the GAIL, they have to approach against the GAIL but not against the DISCOMS. When GAIL has reported its failure to supply on 02.04.2009, M/s. KGPL ought to have approached against the said GAIL for damages instead of claiming damages

against the DISCOMS and the same cannot be entertained. The Government is also taking decisions in favour of the IPPs ignoring the burden on the consumers. When the institutions and the Government are exceeding their limits it is the Commission which has to safeguard the interest of the public and the findings of the Commission should be appreciated by all and it should be an exemplary one. It is therefore prayed that the request made by the petitioners and the respondent for consent may kindly be rejected.

- (g). **Sri M.Thimma Reddy**, submitted his written submissions on behalf of M/s. PMGER.

The summary of the submissions of Sri M.Thimma Reddy are extracted as hereunder:

According to GOI's MoP resolution A-27/94 – IPC (Vol-II) dated 06.11.1995, “the responsibility of either indigenous or imported fuel linkage would be that of the IPP and any fuel supply risks would have to be shared between the IPP / Fuel supplier. The State Electricity Board will not take any fuel supply risk.” This resolution is quite clear that KGPL cannot escape from its responsibility with regard to fuel risk. KGPL entered into one sided FSA with GAIL. There is no corresponding provision to make GAIL pay compensation incase it fails to supply the required quantity of gas. The IPP has obtained consent of PPA and made investments based on the assurances/agreement with ONGC, GAIL, GOI and GoAP. If these assurances/ agreement are not honoured then other parties like GAIL and ONGC should make good, what ever losses, the respondent is speaking about, but the same cannot be forced on the consumers. The Board/DISCOMs will help or assist the company in obtaining the fuel linkage but it is not binding on the Board/DISCOMs to obtain fuel linkage for the company. In the PPA dt.26.05.2003 with KGPL, the Art. 7.2(g) is “intentionally left blank”. This means that KGPL did not want any assistance in this regard. In the order of APERC dt.14.12.2004, the observation made that the developer shall make all reasonable efforts to ensure that uninterrupted supply of natural gas is available atleast from 01.01.2007. This also shows the obligation on securing adequate supply of natural gas is on

the developer, but not on the DISCOMs. The fuel supply makes it clear that the fuel risk is on the developers but not with the DISCOMs. It is also further submitted that the plant is not generating power at minimum PLF because of the failure of the developer to secure fuel or for other reasons for which the developer is responsible, then the developer need to pay penalty as laid down in Art.3.6 of PPA. But this aspect of responsibility of the developer is concealed and only one sided story of the need to pay fixed charged is being repeated. There is a clear cut clause in the PPA to pay liquidated damages to the DISCOMs incase of failure in declaring COD to the DISCOMs. There is abnormal delay in the COD and M/s. KGPL is liable to pay liquidated damages to a tune of Rs.155crs. The amendment to the explanation to Art. 3.6 is nothing but a clear and open attempt to shift the fuel risk. Therefore, M/s. KGPL is not entitled for AFC @ Re0.70 per unit and consent to the proposed amendment cannot be given and the same is to be rejected.

32. In the light of the above rival contentions, the following are the issues that emerge for consideration of the Commission:

**Issue 1:**

Whether the petitioners have the responsibility as per the PPA to make gas available to the respondents for testing purpose?

**Issue 2:**

Whether non-recommendation of gas by the GOAP for testing purpose as expected by the respondent will entitle the respondents to claim that, the respondent was notionally ready to generate power for invoking the alternate fuel clause as per the existing PPA in the context of capacity charges based on alternate fuel clause?

**Issue 3:**

What is the day on which the respondents can be said to have established readiness from the point of view of claiming capacity charges in terms of the alternate fuel clause of the existing PPA?

**Issue 4:**

Is there an entitlement for capacity charges based on the alternate fuel clause of the existing PPA and if so, what is the period for such entitlement and what is the quantum thereof?

**Issue 5:**

Whether there is justification to accord consent by the Commission to the PPA amendment package as filed jointly by the two parties?

33. The above issues are examined in detail as hereunder:

**34. Issue 1:**

**Whether the petitioners have the responsibility as per the PPA to make gas available to the respondents for testing purpose?**

a. One of the arguments advanced by the respondent is that they were prevented from declaring COD due to non-cooperation of the petitioner in supplying gas and therefore, they are entitled for additional fixed charge. On the other hand, the petitioners are claiming that supply of gas is not within the ambit of PPA and it is only between the GAIL and the respondent but not with the petitioners. The respondents have failed to convince this Commission by citing relevant provisions of the PPA whereby the petitioners are required to supply gas either for testing or thereafter. There is no privity of contract between the respondent and petitioner for supply of gas. The gas supply contract is only between the KGPL and GAIL, to which agreement the petitioners are not parties. If at all if there is any grievance that loss is sustained due to non-supply of gas, it is for the respondents to workout their remedies against GAIL but not against the petitioners.

b. For all the reasons mentioned above, it is held that the petitioners do not have the responsibility as per the PPA to supply gas either for testing or thereafter.

35. **Issue 2:**

**Whether non-recommendation of gas by the GOAP for testing purpose as expected by the respondent will entitle the respondents to claim that, the respondent was notionally ready to generate power for invoking the alternate fuel clause as per the existing PPA in the context of capacity charges based on alternate fuel clause?**

As per the PPA there is no responsibility cast upon the petitioner to make gas available to the respondent. The letter dated 06.12.2004 of Sri Deepak Kumar Panwar, Prl.Secretary, GOAP, addressed to Additional Secretary, Gol, Ministry of Petroleum & Natural Gas to retain supply of natural gas on pro-rata basis amongst the IPPs in AP has to be considered as a request outside the scope of the PPA and has to be construed as a superfluous goodwill gesture. The subsequent letter of the Minister for Energy and Coal, GoAP., addressed to Sri Mani Shankar, Union Minister for Petroleum & Natural Gas has also to be seen in this context. Be that as it may, as per the PPA, there is no obligation on the part of the Government of A.P to make available the gas required by the respondent for testing purpose. Further, even if it is considered, for argument's sake, that the Government has to recommend gas for testing purpose, it cannot be concluded that, had gas been recommended, it would have been allotted by GAIL, the test would have been got conducted and the test would have been successful and the respondent would have successfully demonstrated readiness. Such a presumption cannot be drawn in the circumstances of this case. This is all the more so because under the terms of the existing PPA, there is no obligation on the petitioner to make available gas to the respondent. The respondent has no legal basis to claim that he can claim deemed readiness and that he is entitled to invoke the capacity charges based on alternate fuel clause merely because the GoAP has not facilitated the allotment of gas to the respondent by GAIL.

36. **Issue 3 :**

**What is the day on which the respondents can be said to have established readiness from the point of view of claiming capacity charges in terms of the alternate fuel clause of the existing PPA?**

a. Claiming of the capacity charges under the PPA, by the respondent would arise only after declaration of Commercial Operation Date (COD). As a prelude to declaration of COD and in terms of Schedule – F of the PPA, the company has to give 15 days prior notice, the date on which the tests would commence, then both the company and petitioners have to designate representatives to witness and observe each test and ensure that the tests are being performed in accordance with test procedures.

b. However, no written notice with a date prior to 01.07.2006, has been produced before this Commission to show the readiness on the part of the respondent as on 01-07-2006. Even in the letter dated 19.08.2006, the respondent has not mentioned about their readiness w.e.f 01-07-2006. If really they were ready by 01.07.2006, they should have mentioned the same at least in this letter which is subsequent to that date. In the said letter addressed to GAIL, they have requested GAIL to supply gas as per the revised schedule commencing from 10.09.2006 for commissioning of gas turbines. No mention has been made in this letter about the readiness by 01.07.2006 or that it could not be done due to non-supply of gas or non-cooperation of the petitioners. Further, the respondent has not mentioned anywhere even in the letter dated 01.12.2006 about their readiness, though they have mentioned about the processing of PPA, but never mentioned about the readiness of the unit.

c. From the beginning, the respondent is claiming that the department was not cooperating in making interconnection facility and also in supplying gas. If really they were ready, they should have issued a notice as contemplated under Schedule - F demanding the petitioners to comply with the requirements to commence COD. The record clearly reveals that the interconnection facility had already been provided by the department and the same fact is borne out from the letters addressed by both the parties.

d. Against the above back-drop, on 01.09.2009, the respondent has addressed a letter to CE/IPC stating that due to unforeseen circumstances the synchronization of steam turbine could not be done and that they were unable to undertake COD on scheduled date 02.09.2009 and requested for postponement of COD on 02.09.2009.

Even thereafter, in another letter addressed on 07.09.2009, a request was made for fixing COD. Again same was also postponed on their request due to certain unresolved technical snags in the steam turbine generators; it could not be fully rectified yet. On 25.05.2010, the respondent has addressed a letter to CE/IPC to depute the officials concerned for witnessing the plant performance and declaration of COD.

e. Furthermore, there is no data placed before the Commission to show that the responsibility to be shouldered by the respondent has been discharged by giving notice to the petitioner under schedule – F of PPA for conducting the test for declaring COD of units 1 & 2. The admissions made by the respondent in the letters subsequent to that date have clearly disclosed that they were not ready by 01.07.2006 as claimed. The counsel for the petitioners has also submitted that the admissions made by the respondents in the documents filed by them are sufficient to hold that the respondents were not ready by 01.07.2006. The respondent has to establish that they are ready by 01.07.2006 in order to claim any capacity charges w.e.f that date under alternate fuel clause. Ignoring their own admissions in the documents filed before the Commission, they have simply stated that they are ready by 01.07.2006. The learned counsel for the petitioners relied upon 2009(3) Supreme 2004 U.P.Power Corporation Ltd. vs National Thermal. The record placed before the Commission by the petitioners has clearly established that the COD was declared on 30.06.2010 but not by 01.07.2006.

f. In the result, it is held that 30-06-2010 is the date on which the respondent established his readiness to produce power and hence the question of claiming any capacity charges based on alternative fuel clause before this date does not arise.

37. **Issue 4:**

**Is there an entitlement for capacity charges based on the alternate fuel clause of the existing PPA and if so, what is the period for such entitlement and what is the quantum thereof?**

a. It is for the respondent to unequivocally establish his readiness w.e.f a particular date in order to entitle him to claim capacity charges, in periods

subsequently to the date of established readiness, during periods wherein the petitioner asks him not to produce power using alternative costlier fuel.

b. It is only w.e.f or after the date of such demonstrated readiness that any claim for F.C entitlement (capacity charges) will arise, upto the date of gas becoming available since it is only in situations wherein the unit is otherwise ready but gas is not available that alternate fuel clause will come into play.

c. In the instant case, the demonstrated date of readiness is 30-06-2010. It is only after this date that payment of any capacity charges, in event of gas not being available, will arise.

d. In these circumstances, the Commission holds that there was no entitlement or scope in the instant case for the respondent to claim any capacity charges basing on the alternate fuel clause.

e. Since, there is no entitlement for capacity charges based on the alternate fuel clause of the existing PPA, as explained against Issue 3 above, the period for such entitlement and the quantum thereof does not arise.

38. **Issue 5:**

**Whether there is justification to accord consent by the Commission to the PPA amendment package as filed jointly by the two parties?**

a. As regards consent to the PPA amendments, the Commission notes that in the present hearing, the predominant issue that was addressed by the two parties is about the reimbursement of "losses" discussed in "**Issue – 1 to 4**". No views were expressed in detail regarding the desirability of each of the various amendments proposed in the amendments for which consent was sought. Only Mr.Raghu, one of the objectors addressed this issue in detail. The two sides merely sought consent to the amendments package without making their stand known on the merits of each amendment and also did not indicate any agreement on the quantum of Additional Fixed Cost (AFC). The respondents were seeking almost 70 paise increase in the F.C. as a part of the amendment. The DISCOMs on the other hand were seeking

the consent for amendments while simultaneously claiming that no additional F.C is payable. In view of this vast divergence between the stands of the two parties on issue of quantum of Additional F.C, it cannot be considered that the two parties have achieved “consensus ad-idem” regarding the terms of the agreement. The two sides appear to have agreed on the amendment package in the light of their respective expectations regarding the quantum of additional F.C., which are grossly at variance with each other. The Commission cannot consider the joint filing of request for consent with a blank space in the crucial “quantum of additional F.C”. clause, as a blanket acceptance in advance of any adjudicated figure to be filled in by the Commission, as a precursor to giving consent to the entire amendments package.

b. Further, the Commission has to have before it, a complete proposal, as mutually agreed between the two parties, including the proposed methodology for true-up, to enable the Commission to take the issue of consent thereto, by undertaking the case in public hearing mode to test the proposed amendments from overall public interest point of view.

c. In the above circumstances, the Commission’s view is that the two sides may pursue further consultations on the issue of PPA in the light of findings of the Commission against “**Issue – 1 to 4**” and come up with specific proposals as they deem fit after arriving at a mutually acceptable specific PPA amendments in complete shape without any blank columns, including the proposed methodology for true-up, before seeking the consent of the Commission.

d. In the result, we are of the considered opinion that the respondent is not entitled to any AFC in the instant case. As regards the amendments to the PPA, the two parties can take further action as indicated in sub para **(c)** above.

*This order is corrected and signed on this 20<sup>th</sup> day of June, 2011.*

Sd/-  
(C.R.Sekhar Reddy)  
**MEMBER**

Sd/-  
(R.Radha Kishen)  
**MEMBER**

Sd/-  
(A.Raghotham Rao)  
**CHAIRMAN**

The order in I.A.No.5/2011 in O.P.No.11 of 2009 was prepared and signed by the demitting Member on 14.06.2011 i.e., on his last working day. On the same day, the Chairman accepted the same and signed on 14.06.2011. Where as Member/Finance, who was at Delhi in the meeting of FOIR and returned to office on 17.06.2011 and after reading the same, he signed the order on 20.06.2011. Hence, the Secretary of the Commission is directed to put the date of the order as 20.06.2011, on which date the last signature was subscribed.

CHAIRMAN

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