

PART – I

This Part I of the Report contains background, extracts from submissions of the Petitioner, response of the Administration and extracts from various Reports /Agreement as made available to the Expert.

1.0 BACKGROUND

The case relates to the Power Generation Project DG set based 20 MW plant (4x 5 MW) in the Andaman & Nicobar Island. The parties to the project are as under:

The **Petitioner** M/s Suryachakra Power Corporation Limited (in short SPCL/IPP/Agency/Company) is an Independent Power Producer(IPP), with its station situated at Bambooflat, Andaman & Nicobar Islands. It generates and supplies 20 MW power to the Electricity Department, Andaman & Nicobar Island , the Respondent No. 1. This power is being generated and supplied pursuant to the Power Purchase Agreement (PPA) dated 20.11.1997 entered into between the Petitioner and the Respondent No. 1. The Petitioner was awarded the *Project* after a competitive bidding process, in accordance with the extant Central Government of India Guidelines.

2.0 a) The **Respondent No.1** is the Electricity Department, Andaman & Nicobar Islands (in short A&N/ A&NI/ Administation/ Procurer) represented by its Superintending Engineer. It procures power from various power generators as well as from its own power generating stations and is responsible for distribution of power in the Union Territory.

b) The **Respondent No.2** (in short A&N/ A&NI/ Administation/ Procurer) is the Chief Secretary, A&N Administration. The Chief

Secretary is the administrative head of the Union Territory. The Electricity Department is also part of the A&N Administration.

After the commissioning of the project in April 2003, the Independent Power Generator (Petitioner) began raising the invoices. However, the A&NI Administration (Respondent) made payments after making some deductions which according to them were not as per PPA including non- finalization of project completed cost and other tariff determination related issues. The matter is under consideration of the Joint Electricity Regulatory Commission (JERC or the Commission in short) for the State of Goa and Union territories.

JERC, based on the mutual agreement of both the parties, have entrusted to the Expert to give his recommendations on the various issues as per the following Terms of Reference:

Broad terms reference:

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

- Capital cost of the project
- Issue relating to liquidated damages -- recoverability if any from the Petitioner by the Respondent.
- Issue relating to foreign exchange for rupee funding in terms of prevalent exchange rate regime during the period 1995 to 2003 and consequential admissibility of exchange rate variations in the tariff.
- All tariff parameters which flow from the capital cost of the project.

- Interest rate for debt servicing and interest on working capital.
- Operational parameters as per PPA / addendum to PPA /CEA decision which forms part of tariff.
- Payment / recovery of amounts due, but not aid, withheld, denied, if any, from the date they become due.
- Admissibility of interest on delay payments.
- Any other issue connected with finalization of project cost and determination of tariff payable to the Petitioner.

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

3.0 THE PROJECT BACKGROUND

3.1 The project is a diesel based power generation project, with generating capacity of 20 MW. Power is generated by using 4 DG set generators of 5 MW capacity each. Based on long term forecasts of peak load and energy requirements of A & NI. Andaman and Nicobar Islands, Administration decided to set up a power project in South Andaman. Accordingly, the A & NI Administration obtained approval from CEA in the year 1995 for installation of 20MW Diesel Generating Station and subsequently opted to establish this project through private sector participation. In February 1995 open tenders were invited, in terms of the extant policies of the Union Government in respect of public bidding. Competitive bids were received

from nine private power developers. M/s Suryachakra Power Corporation Ltd. (SPCL) was selected for setting up of 20 MW IPP at Bambooflat/Port Blair using liquid fuel. The Salient features of the PPA are given below:

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

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

4.0 DETERMINATION OF CAPITAL COST OF THE PROJECT

4.1 The Andaman & Nicobar Islands Administration accorded sanction vide their letter dated 22.6.97 for an estimated cost of Rs. 63.14 crores.

As mentioned by the Petitioner, the total project cost was broadly divided into the following :

Particulars	Project Cost (Price level 6/95 at the time of bid) (Rs. in Lakhs)	Project Cost (Revised Price level June 97 (Rs. in Lakhs)	Escalation (Rs. in Lakhs)
Land & Site	60.00	63.00	3.00
Buildings & Civil	499.00	549.00	50.00
Imported components and indigenous equipment	2568.50	3790.80	1222.30
Customs Duty	327.00	450.45	123.45
Indigenous	748.50	389.75	(358.25)
Electricity & Fixed assets	231.00	265.75	34.75
Preliminary and capital issue expenses	145.00	185.25	40.25
Contingencies	275.00	275.00	NIL
Margin Money for	66.00	0.00	(66.00)

Working Capital			
Startup fuel	0.00	45.00	---
(IDC)	305.00	300.00	(5.00)
Total	5225.00	6314.00	1089.00

As per the Petitioner, “ *the actual project cost or the completed project cost incurred by the Petitioner is Rs 85.10 crores . Thus there is an increase of Rs 21.96 crores over the TEC approved cost of Rs 63.14 crores.*”

The variation in the project cost as stated by the Petitioner was due to “(a) price escalations/inflation (b) exchange variations (c) additional items (d) change in design parameters based on soil conditions of the site etc. The auditors of the Petitioner after auditing the accounts of the Petitioner have given their report dated 23.12.2004, in which they have certified the following actual amount as the Project capital cost:

Rs. In Lakhs

Particulars	Approved Cost	Revised Cost	Cost Certified by the CA
EPC Cost			
- Foreign	3312.50	2227.70	
- Domestic	1910.38	3661.65	
- Sub-Total	5222.88	5889.35	5884.12
Non-EPC Cost			
- Foreign	40.00	0.00	

- Domestic	1051.12	2621.06	
- Sub-Total	1091.12	2621.06	2482.65
Total			
- Foreign	3352.20	2227.70	
- Domestic	2961.50	6282.71	
- Sub-Total	6314.00	8510.41	8366.77

The Auditors have issued a certificate for an expenditure of Rs. 83.67 Crores as against the submitted project cost of Rs. 85.10 Crores. The balance expenditure of Rs. 1.44 Crores is provided as part of the project cost, which the Auditors have not certified. Hence, the balance expenditure of Rs. 1.44 Crores has not been included in the project capital cost.”

4.2 DETAILED REASONS AND ANALYSIS OF THE CAPITAL COST VARIATION UNDER SPECIFIC HEADS AS SUBMITTED BY THE PETITIONER ARE GIVEN BELOW:

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

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

grown trees in A&N Islands, change in the transmission line and withdrawal of the foreign technicians by their respective governments due to War threat between India and Pakistan. ”

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

month of January 2003 to meet the Islands power demand. However the Administration took 6 weeks and declared only Provisional Commercial Operation Date on 01-04-2003 which was not as per the provisions of PPA.”

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

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

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

Because of lack of credit as per the terms of the PPA, the release of working capital limits got delayed accordingly commercial operation also got delayed

Amendments to the above letters of credit were provided only on 07.04.2003 much after commercial operation date.”

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

As per Article 3.3 (b) (ii) (d) of the PPA, the A&NI Administration was required to provide support to the company by providing reliable construction power, to allow the Petitioner to effectively carry out the construction activity. Notwithstanding this obligation, power supply interruption occurred very frequently and for long durations, and these interruptions disrupted construction and caused delays in completion activities. The problem in obtaining reliable construction power had

been brought to the notice of the A&NI Administration even by the EPC Contractor viz., Reliance Power Limited formerly known as M/s. BSES Ltd.

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

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

b.1 Towards land/site development

“The reason for this variation is that there was an inadequate provision made in the sanctioned TEC/PPA. At the time of drawing up the PPA; there was inadequate information and data of site conditions. It was only when the actual work of land and site development began that the Petitioner had to face conditions that were completely unforeseen viz. before the land could be made fit for installation of the equipment, there was the requirement of removing and dredging slush that formed during the monsoons. This problem of slush had not been pointed out nor taken into account while finalizing the terms of the PPA or its execution. Further, the problem of slush would

have been a perennially intermittent phenomenon, had the Petitioner not constructed storm water drainage systems all around the project site. The construction of a storm water drain was also not reckoned at the time of execution of the PPA.

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

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

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

b.2 Buildings and Civil constructions :

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

Rs in lakhs

	Approved	TEC	As per	Actuals	Variation
Buildings and Civil Constructions (IC)	549.00	1085.71	536.71		

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

b.3 Work cost:

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

The details are as follows:

(Rs in Lakhs)

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

As some of the foreign equipment were indigenously available, the Company decided to procure those equipment, indigenously and executed EPCC contract accordingly. Hence the Company has utilized

a part of the foreign component in Indian Rupees for procurement of the said equipment indigenously. The cost variation of Rs.225.68 lakhs is mainly due to increase in rates of foreign exchange and providing additional items of closed circuit cooling system with Cooling Towers instead of approved provision of direct cooling system. Other reasons are due to increased cost of inflation index over a period of 5 years from the year 1997.

b.4 The reasons for cost variation of Rs.388.60 Lakhs in Electricals are due to providing PLC based control system instead of conventional systems and providing additional 1 no, power transformer of 10/12.5 MVA which have been recommended by CEA and increase in capacity of power transformers (2 nos.) from 10MVA to 12.5 MVA. Other reasons are due to increased cost of inflation index over a period of 5 years from the year 1997.

b.5 The following major additional works were carried out to approve at technology equipment for the plant to make it reliable, modern and stable.

A. Engine controls and protection with digital technology, with single point control and displays. Computer programming and displays, PLC controls for acquiring data and processing. Latest models of governing system and voltage regulation system.

B. Increasing the chimney height from the approved 15 meters to 33.5 meters, to reduce the pollution in the dwelling areas of neighborhood and environment friendly and to keep the surrounding greenery intact.

C. As per the project, seawater was proposed for secondary cooling of the engines because of insufficient availability of sweet water. As

per the recommendations of the experts, closed circuit cooling with expensive cooling towers and a blow of 10% was adopted, to allow safe and natural marine growth.

- D. The sea is shallow near the project site. To ensure uninterrupted and problem-free running of the water cooling system became necessary to provide make-up water pump house at a distance of 135 meters into the Bay of Bengal.
- E. The project site is surrounded on three sides by mountain slopes. During rains, there is heavy inflow of water from the slopes, which threatened inundation and wash off of the project area during the rains. To protect the project from flooding, a deep and wide concrete drain of adequate capacity on three sides of compound was constructed to collect the water and pass it into to the sea. This project also required high compound wall with deep concrete foundation side protection to ensure its safety during heavy rainwater flooding, which was also not considered at the time of estimating the project cost.
- F. There have been additional jobs that were carried out as per instruction of Electricity Department, which were not a part of the TEC report like, supply of 33KV XLPE cables, providing check metering panel for export, additional 10/125MVA, 11/33KV Transformer and two numbers of 125 KVA Black DG sets.
- G. Certain works, which were not provided in EPCC contract, were implemented as per decisions taken at various meetings with Electricity Department, CEA and the Petitioner like; additional Black start DG of 125 KVA, additional auxiliary transformer of 1250 KVA with corresponding HT & LT switchgear, cables, Civil

works etc., class Tri-vector meter for 4 DG sets and auxiliary transformers for accuracy of measurement along with 0.2 class CT and PT system etc.

H. The HSD supplied by IOCL contained suspended material and was causing frequent chocking of filters . It became necessary to provide for a HSD Centrifuge of sufficient capacity and also standby unit.”

c) Interest During Construction

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

	Approved TEC As per Actuals Variation		
IDC	300.00	629.80	329.80

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

d) Other Causes and Effects

“The cost inflation index during the financial year 1996-97 is 305 and the same during the financial year 2002-2003 is 447. The inflation is 46.5%. In addition to the above, the inflation rate is Andaman Islands was higher because of logistical constraints. The cost of living in A&N Islands is also very high as compared to main land. These

factors have also contributed to cost escalation. Specialists had to be brought from Germany for executing Governor checking and related necessary checks”

4.3 REPLY OF ANDAMAN & NICOBAR ISLANDS ADMINISTRATION (RESPONDENT) REGARDING SUBMISSION OF STATEMENTS OF COST OF THE COMPLETED PROJECT

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

Description of items		Quantum of Expenditure Rs. Crores	Para Ref. of Committee report
Approved Cost		63.14	15,17,29 & 30
IDC	(-)	3.00	
Cost excluding IDC	(+)	60.14	
Increase in cost of Establishment due to extended gestation period	(+)	3.30	17

Increase due to Exchange Rate variation considering only 5.13 MUS\$ Rs. 11.0445 per dollar	(+)	5.67	Allowed as per actual utilization
Additional Transformer and Black Start DG Set – Work done after COD	(+)	0.31	22
Hard Cost excl. IDC		69.42	
Proportionate IDC on the hard cost of Rs. 69.11 cr.	(+)	4.91	Revised on hard cost
Completed cost including IDC/Project Cost		74.33	
Liquidated damage @ 5% on Rs. 74.33 crores	(-)	3.72	
Project Completed Cost		70.61	

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

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

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

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

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

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

(iv) **Electrical** - Based on the justification furnished by the agency and if the modified works are undertaken by the Agency with the approval of A&N Admn., the additional

expenditure could be considered for the revised project cost, since this would reduced cost of O&M expenditure during the life of the plant.

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

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

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

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

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

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

4.3.3 JOINT EXERCISE BY A&N ADMINISTRATION AND SPCL

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

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

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

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

4.3.4 OBSERVATIONS of CEA

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

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

The IDC has been worked out based on above mentioned cost of Rs. 71.77 crores and taking the construction period as given in the PPA. The loan

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

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

Quote

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

<i>Approved Cost</i>	<i>Rs. 63.14 crores</i>
<i>IDC</i>	<i>Rs. 3.00 crores</i>
<i>Cost Excld IDC</i>	<i>Rs. 60.14 crores</i>
<i>Increase due to Exchange Rate variation (10.53xMn US\$ x Rs. 11.0445 per \$)</i>	<i>Rs. 11.63 crores</i>

<i>Increase in cost of Establishment</i>	<i>Rs. 3.30 crores</i>
<i>Completed Hard cost excld IDC</i>	<i>Rs. 75.07 crores</i>
<i>IDC</i>	<i>Rs. 5.31 crores</i>

The IDC has been re-worked out based on the above mentioned hard cost of Rs.75.07 crores and taking extended gestation period as recommended by A&N Administration and the revised IDC works out to Rs. 5.31 crores as given in Annexure-1(of CEA report). Thus, the total expenditure including IDC works out to Rs. 80.38 crores. However, considering that the total amount of funds tied up for the project worked out to be Rs. 77.595 crores as per details given in our earlier comments, the completed cost could be limited to Rs. 77.595 crores.

Unquote

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

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

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

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

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

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

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

(vi)The completed cost is now works out to be Rs.82.110 crores (RS.77.595 crores + Rs.3.865 crores + 0.65 crores) which protects the full IDC Cost of Rs.5.31 cores on the base cost of Rs. 75.07 crores ”

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

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

4.3.7 REVIEW BY TANGENDCO

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

SI No.	Description	Amount (Rs. lakhs)	Recommendation of TANGEDCO
--------	-------------	-----------------------	----------------------------

(a)	Additional transformer & black start DG Set	30,97	Allowed as per MOM dt.19.8.2003
(b)	Centrifugal	39.85	To consider under natural
(c)	Road, Culverts, Jetty Bldg. & Civil Contn,	88.45	Subject to approval from APWD
Total		159.27	

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

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

4.3.8 RECOMMENDATIONS OF A&NI ADMINISTRATION COMMITTEE

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

“(a)M/s SPCL was assigned the task of establishment of power project at Bamboo flat, Port Blair in pursuance of an elaborate process of tendering/bidding on the-basis of the lowest bid offered by the company, Consequently, an agreement was also executed between A&N

Administration and M/s SPCL. Any post tender amendment/modification of the terms and conditions of NIT/RFP for the purpose of extending benefit to the bidder/contractor is against the guiding principles of fairness and transparency in public dispensation. Such an act vitiates/nullifies the very spirit of tendering process which is supposed to be fair, transparent and equitable. Thus, no benefit beyond the provisions of Techno-Economic Clearance and PPA can be allowed. Doing otherwise would mean extending unlawful benefit.

- (b) M/s SPCL was required to establish the power project strictly in accordance with physical & technical limits prescribed in the Techno Economic Clearance (TEC) vide OM Dt.20.11.1997. No deviation was/is permissible beyond the terms of technical/ commercial limits prescribed in the TEC except those which have been duly and formally approved by the Administration, in view of the provision of the Article-1(vii) & Appendix-D of the PPA read with the OM 20.11.1997.
- (c) M/s SPCL have committed major deviations in regard to construction/estimates of the project vis-à-vis the prescribed limits in the Techno-economic Clearance. To the best of our knowledge the said deviations were not formally approved by the Administration/ CEA and therefore, any expenditure on account of such deviations is not legally admissible in the light of provisions of article-1 (vii) & Appendix- D of the PPA.
- (d) As per the committee , “ *CEA had allowed benefit of foreign exchange rate variation to SPCL in respect of 10.53Million US Dollar, whereas M/s SPCL had actually utilized foreign component of 5.13 Million US Dollar. The difference between admissible amount of foreign exchange rate variation and benefit actually allowed by the CEA is around Rs. 6.00 crores. **The inclusion of Rs. 6.00 crores towards***

completed cost of the project is factually and legally unjustified, amounts to extension of unlawful benefit and is , therefore, required to be deducted from the total cost of the project.”

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

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

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

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

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

The recommendation at (b) & (c) cannot be agreed to, as PPA does not have provision to consider expenditure on natural justice and for inclusion of expenditure being certified by APWD. Hence the only expenditure admissible is the cost towards additional transformer & Black start DG sets

at a cost of Rs 30.97 If lakhs for the works done after COD i.e . 02.04.2003.

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

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

Description of items		Quantum of Expenditure	Para Ref.
Approved Cost		63.14	15,11\29&30
IDC	(-)	3.00	
Cost excluding IDC		60.14	
Increase in cost of Establishment due to	(+)	3.30	17

Increase due to Exchange rate variation considering only 5.13 MUS \$ @ Rs. 11.0445 per	(+)	5.67	Allowed as per actual utilisation
Additional Transformer and Black Start DG Set - Work done after COD	(+)	0.31	22
Hard cost excl. IDC		69A2	-
Proportionate IDC on the hard cost of Rs. SS.11cr.	(+)	4.91	Revised on hard cost
Completed cost including IDC / Project Cost		74.33	
Liquidated damage @ 5% on Rs. 74.33 crores.	(-)	3.72	
Project Completed Cost		70.61	-

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

3.3 COMPARATIVE STATEMENTS OF COST AS ARRIVED BY VARIOUS COMMITTEES

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

	Committee/ Consultant	Year	Project Cost	Remarks
1.	M/s KPCL	June	Rs. 73.40 Cr +	

	[Karnataka Power Corporation Ltd.]	2004	Balance left to A&N Admn	
2.	Joint Exercise between Petitioner & Respondent	April 2010	Rs. 76.14 Cr + Balance Rs. 8.82 Cr in respect of IDC & prelim expense was left to be examined by the CEA.	
3.	CEA, New Delhi	Nov, 2010	Rs. 75.60 Cr as hard cost without taking into consideration the increase in cost of establishment and IDC on account of delays from both the sides	CEA Letter Ref: DPD/UT/374-6 (A&N)/2010/2181-83 dated 03-11-2010
4.	CEA, New Delhi	May, 2011	Rs. 77.595 Cr not considering the tied-up funds of Rs. 4.02 Cr & Rs. 2.05 Cr.	CEA Letter Ref: UO No. 1/AN/SS/Diesel/TPI/2011/1534 dated 16-05-2011
5.	M/s TANGEDCO	Nov,	Rs. 82.11 Cr	.

	(Tamil Nadu Electricity Generation & Distribution Company]	2011 1 st Report		
6.	CEA, New Delhi	March 2012	Rs. 80.38 Cr without taking into cognizance of the two tied up loans and leaving them to be looked into by A&N Administration	CEA Letter Ref No. DPD/UT/374-6 (A&N)/2012/648 dated 15-03-2012
7.	M/s TANGEDCO [Tamil Nadu Electricity Generation & Distribution Company]	June, 2012 2 nd Report	Rs. 82.11 Cr reconfirmed as final project cost	
8.	M/s TANGEDCO [Tamil Nadu Electricity Generation & Distribution Company]	Oct, 2012 3 rd Report	Rs. 79.439 Cr + other issues to be taken care by Electricity Department	
9.	A&N Admns Five	Jan,	Rs. 70.61 Cr as	

	member committee	2013	final project cost	
--	------------------	------	--------------------	--

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

4.1 ISSUE OF REBATE

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

“Rebate

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

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

(c) *Notwithstanding the foregoing, THE ADMINISTRATION shall not be allowed a rebate under this Article 8.4, unless the Letter(s) of*

Credit specified in Article 8.3 and the Collateral Arrangements are, at the time such rebate is to be allowed, being maintained by THE ADMINISTRATION in accordance with Article 8.3.

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

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

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

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

for rebate.

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

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

5.1 RESPONDENT SUBMISSIONS

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

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

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

The Petitioner invariably includes in their monthly tariff invoices undue claims viz., Water Charges, Octopi charges, HSD handling/ transportation losses, HSD consumption at enhanced station heat rate @ 2080

kcal/kwh, enhanced interest rates @18% on working capital and@ 12.15% on Debt, enhanced project cost (Rs.80.38 cores), cost of HSD and Lube oil for the period which is supplied by the Respondent accounted in variable charges as well as in working capital etc Hence the Respondent only allows such payments in the monthly tariff invoice which are in accordance with the provisions of Appendix-D of PPA. The Respondent is legally neither obliged nor authorized to allow any claim which is beyond the above said provisions of PPA.

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

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

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

5.2 INTEREST ON DELAYED PAYMENT (Late Payment)

5.2.1 The Petitioner in its submission have stated the following:

Clause No.8.6 of PPA stipulates that “If any amount due hereunder from one Party (the “Payer”) to another Party (the “Payee”) is not paid when due, there shall be due and payable to the payee interest at the rate which is one half percent (0.5%) above the Cash Credit Rate, from and including the date on which such payment was due to but excluding the date on which such payment is paid in full with interest. All such interest shall accrued from day to day and shall be calculated on the basis of a 365-day year, compounded monthly, and paid on demand. If no due date is specified under this agreement with respect to any amount due under this Agreement, the due date thereof shall be fifteen (15) days after demand is made therefore by the payee”.

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

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

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

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

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

5.2.2 In its reponse the Respondent has stated the following:

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

It is further submitted that Petitioner has claimed the interest on delayed payments largely on the following accounts viz. (a) Completed cost (b) HSD density at ambient temperature, (c) HSD transportation/ handling losses (d) pass through amounts, (e) water charges etc. The comments of the Respondent in respect of each of the items are as follows :

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

b) **HSD density at ambient temperature** : Upon the advice of the CEA and directives of MHA a new provision for conversion of HSD density from weight to volume was incorporated in the PPA considering the density at ambient temperature by issuing an addendum-2 to PPA on 18.08.2011. It is respectfully submitted that the Respondent had settled all the arrears on this

account from April, 2007 onwards immediately after the receipt of the supplementary invoice, hence any claim in respect of interest on delayed payment on this account is unlawful, unjustified and therefore denied.

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

5.3 **INTEREST ON WORKING CAPITAL:**

5.3.1 Petitioner has submitted that interest on working capital shall be calculated and paid to the Petitioner, on the basis of the PPA, irrespective of any interim arrangement as regards fuel procurement made by the Respondents with the IOCL. The Petitioner is entitled to

the said interest as per the bank rates prevailing in the State Bank of India, who is the prime lender of the Petitioner. This would also be as per the terms, of the PPA.

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

capital as per the documents submitted by the Petitioner varies from 12.75% to 17%.

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

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

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

It is further submitted that despite the said GO, the Respondents have been continuing to refuse to consider the losses incurred by the Petitioner. Till July 2008, HSD was being procured as per the PPA and the Fuel Supply agreement with effect from August 2008, the Respondent made an ad-hoc arrangement of purchasing the fuel from IOCL and the same is continuing till date.

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

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

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

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

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

month and wants to be reimbursed by the Respondents.

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

5.6 OCTROI CHARGES FOR RELEASE OF CONSIGNMENT

The Petitioner has to transport all the spares required to operate the Power generating station from various places of mainland India. While transporting the same into Port Blair, the Municipal Council of Port Blair levies Octroi Charges on the Petitioner. This practice has begun from mid of 2009. It is pertinent to mention here that as the power station is located outside the Municipal Council limits, the Petitioner is exempt from paying Octroi Charges, still the Municipal Council has been levying Octroi on the Petitioner. It is respectfully submitted that the Petitioner has paid, till date an amount of Rs. 4,51,555/- to Municipal Council, Port Blair as Octroi for the transportation of the normal consumable spares as well as spares for DG3 48000 hrs maintenance.

5.7 HSD-AMBIENT TEMPERATURE

5.7.1 The Petitioner had requested the Respondents in 2007 to allow the Petitioner to change the variable cost of HSD oil calculations from the month of May 2007 to the basis of density being measured at the ambient temperature and accepting the same. The Respondents began paying for the density on the ambient temperature with effect from

April 2007. However, the Respondents refused to pay for the period between April 2003 and April 2007 on the ground that as the Petitioner had not raised the invoice before April 2007 therefore the Petitioner is not entitled to claim for the said period. For considering the claim of Petitioner for calculation of tariff on HSD density at ambient temperature, the exact temperature in respect of delivery of each consignment is necessarily required. The Petitioner has not been able to furnish invoices issued by IOCL reflecting thereon exact temperature at the time of delivery of the consignment, without which the claim cannot be examined/considered

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

5.8 RENOVATION & MODERNISATION PROGRAMMES

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

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

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

5.9 DAMAGES FOR LOSS OF OPPORTUNITY

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

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

6.0 Incentive for generation above normative PLF

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

Quote

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

Unquote.

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

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

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

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

Unquote.

7.0 ISSUE OF LIQUIDATED DAMAGES FOR DELAYED COD

7.1 Andaman & Nicobar Island administration vide letter dated 20.11.97 had accorded sanctions to the proposal to M/s Suryachakra Power Corp. Ltd. (SPCL – Petitioner) at an estimated completed cost of US \$ 10.53 million plus Rupees 25.232 crore totaling to Rs. 63.14 crore. Regarding commissioning schedule, it was stipulated in the sanctions letter that the project shall be completed in a period of 24 months from the date of clearance from CNE (Committee for Non-Plan Expenditure) with unit 1&2 to be commissioned in 19 months, unit 3 in 21 months and the last unit no. 4 within 24 months from the date of clearance of CNE.

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

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

S. No.	Milestone	Date
1.	Financial closing	Four months from the date of fulfillment of conditions precedent as mentioned in Article 1 Clause (Lxi) 3 at Page 17 PPA.

2.	Effective Date	Same as financial closing date.
3.	Commercial Operation date of the first and second units.	19 th month after the financial closing.
4.	Commercial Operation Date of the third units.	24 th month after the financial closing.
5.	Commercial operation date of the fourth units.	24 th month after the financial closing.
6.	Commercial Operation Date	24 th month after the financial closing of the project.

As per above, the COD works out as under:

First two units – 1.3.2002 (577 days)

Rest two units - 1.8.2002 (730 days)

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

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

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

1. Evacuation facilities were supposed to be ready by 1st November 2011 i.e. 120 days prior to the scheduled commercial operation date i.e. 1st March 2002 as per article 3.3 (c) (v) of PPA. However the evacuation facilities were not ready on the scheduled date .
2. A&N vide letter dated 7.12.2001 has informed that Supreme Court prohibited cutting of tree vide its order dated 11th October 2001 and covers under force majeure.
3. Refer point 1 above, the evacuation facilities should be ready by 1st November 2001 but Supreme Court order were issued on 11th October, 2011. No major work was carried up to the court order date and it is not possible to complete the evacuation facilities within 20 days. We have not received any further intimation when the prohibition was lifted by Supreme Court and when the evacuation facilities were ready.
4. Since the delay in evacuation facilities were not a force majeure event , we requested for payment of fixed charge, but A&N has not paid.
5. A&N supposed to open letter of credit as security 60 days before COD, which they have not opened .
6. SPCL, requested several times for Operating procedures / manual for inter connection facilities and A&N has not provided.
7. A&N informed on 20th May 2002, that existing transmission line strengthened to receive 6 MW To 7 MW of power.
8. SPCL informed A&N that the existing 53 km. line is not reliable and requested for new 33 kv. transmission line as per the provisions of PPA.

9. EPC Contractor (BSES limited) informed on 3rd June 2002, that the plant is ready for synchronization and commencement of operation and ready for synchronization and commencement of operations and ready to complete the acceptance test (72 hours per DG Set) by 20th June 2002, provided the arrangement for synchronizing of machines is made available. We requested A&N vide our letter dated 3rd June 2002 enclosing copy of BSES Limited Letter.

10. All the 4 DG Sets were run with auxiliary equipment loaded up to 2.5 MW to 3 MW in June 2002 . At this stage on 8th June 2002, the German Embassy send a message to German technicians working on commissioning of project , to leave India because of war like situation between India and Pakistan. Hence Germans left the country and DG sets were shutdown. This is a force majeure as per PPA.

11. The German Technicians came in October 2002 and notice pitting & rusting in lube oil piping and need repickling & passivation.

12. SPCL on several occasions requested A&N to organize engineer from CEA for witnessing during conducting of Acceptance Test. Dates were fixed several times and rescheduled due to non availability/ arrival in time of CEA engineer for supervising the Tests.

13. Finally Acceptance test for individual DG sets were conducted from 8th January 2003 to 4th February 2003 and for all the sets for 72 hours on 18th February 2003.

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

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

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

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

“ADMISSIBLE GESTATION PERIOD

a) First Two Units – The milestone schedule as per PPA the first two set COD should be in 19 months from financial closure date. Since the financial closure date is 01.08.2000, the COD should be on 01.03.2002. As per this a total of 577 days gestation period admissible as per PPA. The 53 km transmission (Tiger) line was completed and ready by 01.05.2002. But the supervisor of MAK CAT, Germany (Engine manufacturer) was withdrawn due to war like situation at Indo-Pak border during first week of June, 2002. Further, the Hon’ble Supreme Court ordered ban for felling of naturally grown trees resulting in change of original alignment of Panther Transmission line & was modified to be re-done. The COD was therefore modified vide MOM dt. 05.06.2002 for first two set to 31.08.2002. Due to

which this period of 184 days from 01.03. 2002 to 31.08.2002 stands admissible. However, M/s SPCL could not get back their Supervisor, MAK CAT by 31.08.2002, and could reach Port Blair by October, 2002, though the war like situation was there for only about a fortnight. The A&N Admn. completed the double circuit Panther transmission line on 10.12.2002 and M/s SPCL was ready with their first two unit only on 13.12.2002. The extended gestation period from 31.08.2002 to 13.12.2002 for 104 days is therefore not admissible. The period from 13.12.2002 to 08.01.2003 for 26 days taken by independent engineer (CEA) to reach Port Blair was not under the control of either party and hence should cause no effect on IDC or LD. The testing started w.e.f. 08.01.2003 and completed in all respect on 18.02.2003 and this 42 days also not considered to be admissible as these testing are essential and must be completed before COD.

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

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

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

During first week of June, 2002 due to the war like situation referred above, supervisor of MAK, CAT, Germany (Engine manufacturer) were

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

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

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

7.4 Extracts of TANGEDCO report dated 11.11.2011

The Electricity Department of Government of Andaman & Nicobar Islands had requested the services of the Tamil Nadu Generation and Distribution Corporation Ltd. (formerly Tamil Nadu Electricity Board) in the matter of examining the Power Purchase Agreement entered into by Andaman & Nicobar Islands administration with M/s Suryachakra Power

Corporation Ltd. for the 4 x 5 MW Diesel Generating Plant established by them at Bamboo Flat Island on a build own and operate basis.

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

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

“Clause 3.3.0 (i), (ii) and (v) of Power Purchase Agreement, stipulates that the administration is obliged to cause the transmission facilities by laying and rerouting new transmission lines etc., for drawing and receiving electricity produced by Independent Power Producer 120 days before COD of the first engine / power station, i.e. 19 months from the financial closure date of 01.08.2000 for Unit I & II and 24 months for Unit III & IV. But the COD was extended till 31.08.2002 mutually for Unit I and II and till 15.10.02 for Unit III and IV as per MOM dt. 05.06.20002. Accordingly, the Andaman Administration should have completed and offered a new transmission line by 01.04.2002 as per MOM dt. 05.06.2002 which was not done by the Administration. Without readiness of the transmission facilities, matching parameters set forth in Appendix E of Power Purchase Agreement, it is not appropriate to expect the Independent Power Producer to commence operation of the units. As seen from the records, the double circuit panther transmission line was ready only by 10.12.2002 and Independent Power Producer was ready to commence the required tests on the engines by the above date. However, the Independent Engineer who was to witness these tests as per Power Purchase Agreement clauses could not arrive by that date i.e., 13.12.2002, the date fixed for commencing the Performance Tests on the

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

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

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

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

However TANGEDCO had further opined at para 4.0 that :

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

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

