ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION
4th & 5th Floors, Singareni Bhavan, Red Hills, Hyderabad 500 004

O.P. No.15 of 2010
&
I.A. No.29 of 2010

Dated: 02.03.2013

Present
Sri A.Raghotham Rao, Chairman
Sri C.R.Sekhar Reddy, Member
Sri R.Ashoka Chari, Member

Between
M/s GVK Industries Ltd.,
'Paigah House', 156-159, Sardar Patel Road,
Secunderabad – 500 003. …. Petitioner

AND

1. Union of India, Ministry of Power, New Delhi
2. Transmission Corporation of Andhra Pradesh Ltd (APTRANSCO)
3. Central Power Distribution Company of Andhra Pradesh Ltd (APCPDCL)
4. Southern Power Distribution Company of Andhra Pradesh Ltd (APSPDCL)
5. Northern Power Distribution Company of Andhra Pradesh Ltd (APNPDCL)
6. Eastern Power Distribution Company of Andhra Pradesh Ltd (APEPDCL)
7. Andhra Pradesh Power Coordination Committee (APPCC)
8. Principal Secretary, State of Andhra Pradesh, Department of Energy Secretariat, Hyderabad.

….. Respondents

This petition has come up for hearing on 02.06.2012 in the presence of Sri S.Ravi, Advocate for the petitioner and Sri P.Shiva Rao, Advocate for the respondents and having stood over for consideration to this day, the Commission delivered the following

ORDER

The petition filed by the above said petitioner u/s 86 (1) (f) of the Electricity Act, 2003.

2. The case of the petitioner is briefly:

a) The petitioner company is incorporated and registered under the Companies Act, 1956, and is inter-alia engaged in the business of power generation. The petitioner is an Independent Power Plant (IPP), which owns a 216.824 MW Duel Fuel based Combined Cycle Power Plant located at Jegurupadu Village, Kadiam Mandal, East Godavari District.

b) In pursuance of Section 43 (a) (2) of the Electricity Supply Act, the Union Government issued statutory notification dt. 30.03.1992 and the same stood amended by statutory notifications dt. 19.01.1994 and 22.08.1994. The said notification specifies the modalities of fixing "Annual Fixed Charges" (vide Clause 1.5 of the said notification). Return on Equity (ROE) is defined under Section I xxvii of the PPA dt. 19.04.1996 as "Return on Equity : means in relation to a specified period a return on the Equity during such period at a per annum rate of 16% and, in the case of Foreign Equity, converted to Rupees at the relevant Current Rate of Exchange". Clause 1.5 (E) specifies that the "Annual Fixed Charges" shall be computed by taking into account, among other things, Return on Equity @ 16% on subscribed capital relatable to the generating unit. Clause 1.6 specifies that full fixed charges shall be recoverable at generation level of 6000 KiloWatt hours per year and that payment of fixed charges below the said level shall be on prorate basis. The payment of fixed charges shall be on monthly basis proportionate to the electricity drawn by the respective boards. However, the necessary adjustment based on actuals shall be made at the end of each year, subject to adjustment.

c) In pursuance of the aforesaid statutory scheme, the 2nd respondent entered into a Power Purchase Agreement (PPA) on 17.06.1993 with the petitioner and the said PPA was subsequently modified by a Deed dt. 04.07.1994 which again stood amended in the year 1996 under what is called as an "Amended and Restated Power Purchase Agreement" dt. 19.04.1996.

d) Article 3 of PPA provides for computation of tariff rates. Article 3.1 defines Tariff as "Tariff : The Tariff rates will be determined on the basis of the Two-Part Tariff and shall be fixed for each Tariff Year period. The Tariff shall be the sum of the Fixed Charge, the Variable Charge Payment, the Incentive or disincentive payments (if any) and taxes on income, each as set forth in this Article 3 as further defined pursuant to the terms of this Agreement". Therefore, there are two components that are to be considered in computing the Tariff as notified by Ministry of Power (MOP), Government of India and shall be fixed for each Tariff year.

e) Article 3.2.1 (ii) the ROE for the relevant Tariff Year, to be calculated in accordance with Article 3.3 ("Provisional Tariff; Adjustments") hereof. As per Article 3.3.1 ("Calculation of Payment") the 2nd respondent will make monthly payments of the Fixed Charge in Rupees in accordance with Article 6.1.

f) In pursuance with the PPA the petitioner company achieved financial closure and the plant has commenced combined cycle operations on 20.06.1997.

g) It is the statutory notification dt. 30.03.1992 (as amended from time to time) issued u/s 43 (A) (2) of the Electricity (Supply) Act, 1948 that constitutes the basis for computation of tariff and the modalities of computation of the same, in the PPA.

h) The 2nd respondent agreed to pay the petitioner therein, a monthly billing cycle, resulting in accelerated payment of 17.17% as against the specified percentage of 16%. This allegation was leveled by the petitioner therein W.P. No.19096 / 98, a public interest litigations based on the report of Comptroller and Auditor General for the year ending 31.03.1997 presented to the AP State Legislative Assembly.

i) The Government of AP as well as the 2nd respondent herein represented to Comptroller and Auditor General categorically asserting that the contractual terms agreed in the PPA by APTRANSCO was well within the purview and consistent with Electricity Supply Act, 1948 and the statutory notifications issued u/s 43 A (2) of the

said Act and that there was absolutely no infirmity whatsoever in providing for payment of ROE in a monthly billing system. Furthermore, it was categorically stated that the monthly payment was incorporated more in the interest of APTRANSCO.

j) To the utter surprise of the petitioner, the 2nd respondent issued a notice bearing Lr. No. CE / Comml / DE-BPP / ADE / F.ROE17.17 / D.No. 534 / 03 dt. 20.08.2003 alleging that the ROE paid @ 16% on a monthly billing system results in an effective payment of 17.17% as per the perception of the Comptroller and Auditor General and that it was decided in the meeting of Committee of Public Undertaking (COPU) held on 27.06.2003 that the excess paid over and above 16% shall be recovered from the future energy bills of the petitioner. The 2nd respondent also estimated the difference in the sum recoverable is of the order of Rs. 20.48 crs. The 2nd respondent also stated that the excess ROE paid on account of foreign exchange variations would be intimated separately. The petitioner was neither put on notice before issuing this impugned notice nor was it a party to the purported COPU meeting held on 27.06.2003. In effect, it is nothing but a unilateral decision taken by the 2nd respondent diametrically contrary to its consistent earlier stand, without even observing the basic principles of Natural Justice. The 2nd respondent did not respond to the said letter addressed by the petitioner. As such, the petitioner herein was constrained to approach the Hon'ble High Court of AP and filed W.P. No. 19316 / 03 questioning the veracity of the above mentioned impugned notice as being illegal, arbitrary, void ab initio and nonest, contrary to the provisions of Electricity Supply Act and the notifications thereunder and also its own consistent stand maintained all along as well as the stand taken in the Judicial Forums.

k) In view of said judgment of the Hon'ble Supreme Court of India, the Hon'ble High Court of AP, in the above said Writ Petition No.19316 of 2003 passed an order on 26.07.2010 stating that the writ petition is dismissed as withdrawn, with a liberty to the petitioner therein who

is the present petitioner, to approach the APERC on the issue and allowed the already issued stay order to continue for a period of 6 weeks. In view of the said order, the petitioner is filing the instant petition before the Commission for redressal of the above said dispute between the parties.

l) Article 6 of the said PPA describes "Billing and Payment" of which Article 6.1 explains about "Monthly Bills" and their payment process. As per this the generating company shall furnish a bill to the Board (2nd respondent) in such form as may be mutually agreed by the Board and the company (petitioner) for the Billing Month which bill will include monthly fixed charges and monthly variable charge payments.

m) The petitioner company has not been either provided a copy of the said CAG report upon which the 2nd respondent is relying nor was it a party to the purported discussions dt. 27.06.2003 wherein the decision was allegedly taken to adjust the amount in question. The 2nd respondent is trying to justify its unilateral and arbitrary decision by invoking the purported report of the CAG. In any event the 2nd respondent is not entitled to adjust Rs. 20.48 crs from the petitioner's future energy bills as the claim of the 2nd respondent itself is bad, illegal, unjust and arbitrary in nature.

n) Clause 1.6 it is made to understood that it is a mandatory provision and will come into play only if there is any "necessary adjustment based on actual at the end of each year". Consequently, the respondent can adjust any excess amounts only at the end of tariff year.

o) In the Public Interest Litigation before the Hon'ble High Court of AP in W.P. No. 19096 of 1998, the 2nd respondent herein, who was one of the respondents therein, had filed detailed counter categorically denying the contentions of the petitioners therein, by way of explanation to the Hon'ble High Court that there is no discrepancy and that the ROE paid by them sums up only to 16% per annum though it is paid on a monthly basis. As such, the 2nd respondent is estopped by their conduct; and now cannot turn back and claim the alleged

excess amount paid in terms of the ROE matches with the very same issue, with the present petitioner.

3. The petitioner company therefore prays that this Commission may be pleased to:

a) Pass an order declaring the contents of the Lr. No. CE / Comml / DE-BPP / ADE / F. ROE17.17 / D. No. 534/03 dt. 20.08.2003 of the respondents as bad, illegal, arbitrary in nature, unenforceable and not in accordance with the statutory notification No. S.O.251 (E) dt. 30.03.1992 as well as the provisions of the PPA and order the respondents herein not to adjust Rs. 20.48 crs from the future monthly bills of the petitioner herein.

b) Pass an order directing the respondents herein to implement and give effect to the statutory notification of the first respondent No. S.O. 251 (E) dt. 30.03.1992 in so far as it provides for a Return of Equity of 16% along with the provisions of the PPA and not to deduct any amount on this account from the future bills of the petitioners, and

c) Pass such orders as this Commission may deem fit and proper in the circumstances of the case and in the interest of the Justice.

4. The petitioner also filed Interlocutory Application u/s 94 (2) of the Electricity Act, 2003. The case of the petitioner is briefly as follows :

a) The petitioner company is generating company within the meaning of Section 2 (28) of Electricity Act, 2003 and has constructed, commissioned and is operating an Independent Power Plant (IPP) and owns a 216.824 MW Duel Fuel based Combined Cycle Power Plant located at Jegurupadu Village, Kadiam Mandal, East Godavari District.

b) In pursuance of the aforesaid statutory scheme, the 2nd respondent entered into a PPA on 17.06.1993 with the petitioner and the said PPA was subsequently modified by a Deed dt. 04.07.1994 which again stood amended in the year 1996 under what is called as an “Amended and Restated Power Purchase Agreement” dt. 19.04.1996.

c) In pursuance with the PPA the petitioner company achieved financial closure and the plant has commenced combied cycle operations on 20.06.1997.

d) The Ministry of Power acknowledged that the PPA and the tariff contained therein, as on the date of the letter, do not deviate from and are not inconsistent with, nor are repugnant to the Electricity (Supply) Act or the notifications of the Government of India. The fixation of tariff is in pursuance of exercise of statutory power. As such, the PPA is only an arrangement or agreement done in exercise of said statutory power.

e) Since the date of commencement of operations of the petitioner in the year 1997, the 2nd respondent was making monthly payments of the amounts towards the variable charges of the tariff in terms of the Article 3.1, 3.3.1, 3.3.2 read with Article 6.1 of the PPA dt. 19.04.1996.

f) While so, to the utter surprise of the petitioner, the 2nd respondent issued a notice bearing Lr. No. CE / Comml / DE-BPP / ADE / F. ROE17.17 / D. No. 534/03 dt. 20.08.2003, alleging that the ROE paid @ 16% on a monthly billing system results in an effective payment of 17.17% as per the perception of the Comptroller and Auditor General and that it was decided in the meeting of Committee of Public Undertaking (COPU) held on 27.06.2003 that the excess paid over and above 16% shall be recovered from the future energy bills of the petitioner. The 2nd respondent also estimated the difference in the sum recoverable is of the order of Rs. 20.48 crs. The 2nd respondent also stated that the excess ROE paid on account of foreign exchange variations would be intimated separately.

g) The petitioner was neither put on notice before issuing the said impugned notice nor was it a party to the purported COPU meeting held on 27.06.2003. In effect, it is nothing but a unilateral decision taken by the 2nd respondent diametrically contrary to its consistent earlier stand, without even observing the basic principles of Natural Justice. Further, the petitioner company has replied by its letter dt.

22.08.2003 categorically stating that the adjustment of excess payment in terms of ROE is in violation of PPA and that the tariff agreed under PPA was confirmed by the Ministry of Power, Government of India vide their letter No. A-1 / 95-IPC.I(Vol.XIII) dt. 14.05.1997.

h) The petitioner herein was constrained to approach the Hon'ble High Court of AP and filed W.P. No. 19316 / 03 questioning the veracity of the above mentioned impugned notice.

i) The 2nd respondent's communication dt. 20.08.2003 is illegal, arbitrary, void ab initio and nonest apart from the fact that it is contrary to the provisions of Electricity Supply Act and the notifications thereunder and also its own consistent stand maintained all along as well as the stand taken in the Judicial Forums.

j) In view of said judgment of the Hon'ble Supreme Court of India, the Hon'ble High Court of AP, in the above said writ petition No. 19316 of 2003 passed an order on 26th July, 2010 stating that the Writ Petition is dismissed as withdrawn, by giving liberty to the petitioner therein who is the present petitioner, to approach the APERC on the issue and allowed the already issued stay order dated 12.09.2003, to continue for a period of 6 weeks from the date of its orders i.e., from 26.07.2010.

k) Hence the Commission to be pleased to continue the interim stay orders issued by the Hon'ble High Court of AP in W.P. No. 19316 of 2003 on 12.09.2003 which was further extended vide its orders dt. 26.07.2010, till the final disposal of this petition by way of restraining the respondents herein from implementing the impugned notice bearing Lr. No. CE / Comml / DE-BPP / ADE / F. ROE17.17 / D. No. 534/03 dt. 20.08.2003 and thereby proceed with adjusting the alleged excess payment of Rs. 20.84 crs towards the interest payable on the Return on Equity and pass any other order as this Commission may deem fit and proper in the circumstances of the case and in the interest of justice.

5. The material averments of the Counter filed by the respondents are briefly as follows:

a) The respondent denies all the averments made in the petition under reply and those that are not specifically admitted hereunder and the petitioner is put to strict proof of the same.

b) As per the clauses of the Gazette of India extraordinary notification dt. 30.03.1992, which forms part of the PPA, the ROE shall be computed on the paid up and subscribed capital relatable to the generating unit and shall be at an annual rate of 16% of such capital.

c) In view of the CAG Audit report and as per the mathematical calculations based on the facts and figures therein, the effective / resultant total ROE works out to 17.17% for the simple reason that the payments are made on monthly basis yielding an extra 1.17% over and above the agreed 16% ROE at the end the tariff year. Therefore, the amount of progressive accruing interest on the ROE for the purpose of calculating fixed charges exceeds the proposed ROE payable by the respondent as per the terms of PPA.

d) The discrepancy / ambiguity regarding the payment of ROE arose in light of the findings of the CAG Audit and the respondent is statutorily obliged to set right the said anomalies in its statement of accounts. It is in this context, the petitioner was intimated that the amount of excess ROE paid shall be adjusted in the future energy bills as the petitioner is required to return the undue / unjustifiable benefit accruing contrary to the intention of the parties of the contract. As to what would be the petitioner's lawful entitlement, it is clearly stipulated in the PPA that 16% ROE and not a penny more. Thus the petitioner is not entitled to 17.17% ROE either by operation of law or as per the provisions of the PPA.

e) It was discussed in COPU meeting and accordingly decided to deduct the excess amount of Rs. 20.84 crs from the future energy bills. Hence there was no unilateral decision taken by the respondent and in fact the respondent has been paying the bills to uphold the sanctity of the agreement despite the fact that there is no consensus

ad idem as to the variance in the ROE after the findings of the CAG Audit report.

f) The present petition is barred by limitation as the petitioner was pursuing the same subject matter before the wrong court, in spite of having information that the Regulatory Commission is the competent authority to adjudicate disputes between licensees and generators relating to PPA. The time spent in pursuing the matter before the High Court cannot be excluded for computation of limitation period because it cannot be said that the petitioner was prosecuting his case under the bonafide mistake that the High Court had jurisdiction to entertain the petition. Thus the present petition deserves to be dismissed since barred by limitation.

g) For the aforesaid reasons the Commission may be pleased to dismiss the petition and allow the respondent to recover the excess ROE amounting to Rs. 20.84 crs.

6. The brief averments of reply filed by the petitioner are as follows:

a) The respondent has acted in a high handed and unilateral manner in coming to the conclusion that the petitioner is not entitled to the ROE agreed upon in the PPA and, thereafter, deducting the alleged excess amount from future energy bills. The respondents contend that the decision was not unilateral as the decision was taken in a COPU meeting. This is a surprising stand as the petitioner was not party to the COPU meeting and not even a notice has been issued to the petitioner in regard to the COPU meeting.

b) It is settled law that when a grievance is pursued before a wrong forum but in a bonafide manner, the period during which the said grievance is pursued before the wrong forum ought to be excluded for the purposes of computation of the period of limitation. Further, no preliminary objection regarding limitation was raised by the APERC before numbering the present petition. In view of the above, the respondents' contention in regard to limitation ought to be rejected.

c) When a petition filed in relation to the same issue by M/s. Spectrum Power Generation Ltd., was dismissed by the Commission on the

ground of limitation (O.P. No. 39 of 2009), the Appellate Tribunal for Electricity by its order dated 10.08.2011 passed in Appeal No. 90 of 2011 has set aside the said order passed by this Commission and remanded the matter to this Commission for fresh consideration on merits. In so doing the Appellate Tribunal held that Section 14 of the Limitation Act, 1963 applied and the period during which the petitioner bonafidly pursued the matter before the High Court is to be excluded in computing limitation. The said judgment is binding on this Commission. It was categorically held by the Appellate Tribunal that the finding by this Commission in relation to limitation is not legally sustainable. It was held that the petition filed before this Commission was within limitation in view of the benefit that the petitioner is entitled to u/s 14 (2) of the Limitation Act.

d) Hence it is prayed to allow O.P. No. 15 of 2010 and pass such further order(s) as this Hon'ble Court deems fit and proper in the circumstances of the case.

7. The learned advocate for the petitioner mainly argued on the following points:

(i) The Commission dismissed OP No.39/2009 as well IA No. 17/2009. Against that order, the petitioner filed an appeal before the Hon'ble APTEL and the Hon'ble APTEL set aside the order of the Commission. The delay caused by the petitioner in filing W.P.No.19316/2003 before the Hon'ble High Court is not barred by limitation by virtue of the judgment in Appeal No. 90 of 2011 by Hon'ble APTEL dated 10.08.2011.

(ii) The respondent issued a notice through a letter for adjustment of the amount of Rs.20.48 Crores on the ground that the CAG submitted a report about the excess payment made by the respondents.

(iii) Against that letter the petitioner filed the above said writ petition and obtained stay and finally writ petition was withdrawn with a liberty to file a petition before the Commission and in pursuance of the said direction, the petitioner filed the above said petition.

(iv) The very letter dated 20.08.2003 itself is incorrect and the calculation and methodology adopted by CAG at 17.17% is incorrect and the Return on Equity as paid by the respondents prior to the said letter at 16% is on correct lines and therefore the impugned letter dated 20.08.2003 is liable to be set aside.

8. Whereas, the learned advocate for the respondent submitted his arguments projecting mainly the following grounds:

(i) the respondents have initiated the proceedings basing on the report of CAG.

(ii) The calculation and methodology as mentioned in the report are on correct lines.

(iii) The impugned letter is valid and the respondents are entitled to adjust the said amount in future bills and the petition filed by the petitioner is liable to be dismissed.

9. Now the two issues for consideration of the Commission are as hereunder:

(1). whether the calculation and methodology adopted by the Comptroller and Auditor General (CAG) in arriving at effective RoE of 17.17% being paid to the Developer on account of monthly payment, pursuant to which the letter dated 20-08-2003 was issued by the respondent is correct?

(2). whether the letter issued by the respondent dated 20-08-2003, is consistent with the statutory Notification dated 30-03-1992 as well as the provisions of the PPA?

10. While addressing the issue at (1) above, it is necessary in the first place to examine the calculation and methodology adopted by the CAG in respect of M/s. Spectrum Power General Limited (SPGL), since, the same is sought to be applied in this case also by the respondent(s). For that purpose, the relevant extract of the audit para in respect of M/s. SPGL is given below:

"The payment of RoE to investors is normally an annual feature. The payment of RoE by the Board every month on pro-rata basis would leave un-utilized cash balance with the Developer. It would have been financially

beneficial, had the board negotiated for payment of RoE on annual basis as is the case with the payment of taxes on income to the Developer. Payment of RoE on the entire equity of Rs.224.53 Crores at 16% (Rs.35.92 Crores) on monthly basis proportionally works out to 17.17% per year (Rs.38.55 Crores) a gain of Rs.2.63 Crores every year to the Developer. The GoI guidelines also did not preclude the Board from negotiating better terms and conditions..... In view of savings involved, in payment of RoE on annual basis, the Board should have negotiated for its payment on annual basis".

11. In order to understand and appreciate the import of the audit para of CAG in respect of M/s.SPGL, the following illustrative table as applicable for M/s. GVK Industries needs to be consulted:

Month	**RoE @ 16% p.a. on Equity of Rs.748.43 Crores**	**1/12th of RoE paid monthly (Rs. Crores) (Rs.119.75 Crs / 12)**	**Interest @ 16% p.a. accrued due to monthly payment (Rs. Crores)**	**TOTAL Amount said to have been received on account of RoE due to monthly payment (Rs. Crores)**	**Effective RoE (128.52/748.43*100) (Rs. Crores) (%)**
1	119.75	9.98	0.00	9.98	17.17
2		9.98	1.46	11.44	
3		9.98	1.33	11.31	
4		9.98	1.20	11.18	
5		9.98	1.06	11.04	
6		9.98	0.93	10.91	
7		9.98	0.80	10.78	
8		9.98	0.66	10.64	
9		9.98	0.53	10.51	
10		9.98	0.40	10.38	
11		9.98	0.27	10.24	
12		9.98	0.13	10.11	
TOTAL Amount	**119.75**	**119.75**	**8.77**	**128.52**	**17.17**

12. As can be seen from the above table, it is clear that, on account of monthly payment of RoE at the rate of 1/12th of Rs.119.75 Crores (16% on Rs.748.43 Crores), instead of the same being paid at a time annually, would leave un-utilized cash balance with the Developer as rightly pointed out by CAG in their Audit

Report in respect of M/s.SPGL and applied to the instant case. However, the computation that the additional benefit to the developer on account of monthly payment would translate to Rs.8.77 Crores per annum, thus, resulting in an effective RoE of 17.17% need not necessary be true since, it depends upon the Rate of Interest; the developer would have got at the relevant point in time.

13. While addressing the issue at (2) above, it is necessary in the first place to examine the relevant provisions contained in the statutory Notification dated 30th March, 1992 and the provisions of the PPA signed by parties.

The relevant provisions in the notification dated 30-03-1992 are hereunder:

1. Thermal Power Generating Stations:

*The two-part tariff for sale of electricity from Thermal Power Generating Stations (including Gas based stations) shall comprise the recovery of annual fixed charges consisting of interest on loan capital, depreciation, operation and maintenance expenses (excluding fuel), taxes on income reckoned as expenses, **Return on Equity (RoE)** and Interest on Working Capital at a normative level of generation, and energy (variable charges) covering fuel charge recoverable for each unit (kWh) of energy supplied and shall be based on the following norms.*

: : : : : : :

1.5. *The annual fixed charges shall be computed on the following basis:*

a. Interest on loan capital

.....

b. The rates of depreciation

....

c. Operation and Maintenance Expenses

....

d. Taxes on Income

....

e. ***Return on Equity*** *shall be computed on the paid-up and subscribed capital relatable to the generating unit, and shall be 16% of such capital.*

Explanation:

For the purpose of this paragraph, the generating company shall, in regard to subscribed equity brought-in foreign exchange, have the option to compute the Return on Equity not exceeding 16% in the currency of the subscribed capital.

f. Interest on working capital

....

***1.6**. Full fixed charges shall be recoverable at generation level of 6000 hours/kW/year. Payment of fixed charges below the level of 6000 hours/kW/year shall be on pro-rata basis. There shall not be any payment for fixed charges for generation level above 6000/kW/year. For generation of above 6000 hours/kW/year, the additional incentive payable shall not exceed 0.7% of Return on Equity, for each percentage point increase of Plant Load Factor above the normative level of 6000 hours/kW/year. While computing the level of generation, the extent of backing down as ordered by the regional electricity board, shall be reckoned as generation achieved. **The payment of fixed charges shall be on monthly basis**, proportionate to the Electricity drawn by the respective boards and other person. Necessary adjustment based on the actual shall be made at the end of each year.*

14. As per clause 1 of the Notification, the two-part tariff for sale of electricity from Thermal power Generating Stations (Including Gas based stations) shall comprise the recovery of annual fixed charges consisting, inter-alia Return on Equity. Further, as per clause 1.5, the annual fixed charges shall be computed on the basis of certain parameters indicated therein, including Return on Equity of 16% and as per clause 1.6, the payment of fixed charges shall be on monthly basis.

15. A combined reading of above three clauses clearly indicates that, the Return on Equity of 16% is to be taken into account while computing the Annual Fixed Charges, which are to be paid by way of tariff (fixed cost component of two-part tariff) and on monthly basis.

16. In view of the above finding, it cannot be said that the existing method of computing the Return on Equity at 16% per annum and paying the same by way of a tariff on monthly basis cannot be said to be in-contradiction with the Notification dated 30th March, 1992. Interestingly, the Comptroller and Auditor General (CAG) also did not anywhere state that, the existing practice is in-contradiction with the Notification dated 30th March, 1992, though observed that in view of the savings

involved in payment of Return on Equity on annual basis, the Board should have negotiated for its payment on annual basis.

17. Having examined the provisions of the Notification dated 30th March, 1992, the provisions of the PPA are being examined as hereunder. For that purpose, the relevant provisions in the PPA are extracted as hereunder:

> **Article 1.1 (lxxvii) – Return on Equity** means in relation to a specified period a return on the Equity during such period at a per annum rate of 16% and, in the case of Foreign Equity, converted to Rupees at the relevant Current Rate of Exchange.
>
> **Article 3.2 Fixed Charge**
> **Article 3.2.1 Beginning on and after the Combined Cycle COD:**
>
> **(a)** The "Fixed Charge" component of the Tariff for each Billing Month in a Tariff Year shall be a lump-sum amount equal to the product of (a) the sum of the following amounts, provisionally calculated in accordance with Article 3.3.1 assuming a Tariff Year of 365 days and (b) a fraction, the numerator of which is the number of days in such Billing Month and the denominator of which is 365, which amount shall be adjusted pursuant to the provisions of Articles 3.3.2. and 3.3.3 hereof:
>
> (i). ...
>
> (ii). Return on Equity for such tariff year, calculated in accordance with Article 3.3 hereof;
>
> : :
>
> : :
>
> (vii)
>
> **Article 3.3 – Provisional Tariff - Adjustments:**
>
> **Article 3.3.1 – Calculation of Payment:** Not later than 30 days prior to each Tariff Year, the Company will provisionally calculate the amount of each element of Fixed Charge Component which are payable by the Board with respect to such Tariff Year. The date on which such calculation is made, shall be referred to as the "Fixed Charge Computation Date". Such calculations shall be strictly in accordance with the terms of this Agreement and be made in consultation with the Board. The Board will make monthly

payments of Fixed charge (as adjusted pursuant to the terms of Article 3.3.2 and 3.3.3 hereof) in rupees in accordance with Article 6.1.

Article 3.3.2 – Exchange Rate Adjustments.

.....

Article 3.3.3 – Calculation of Interest for Variable Rate Loans.

.....

Article 6.1 – Monthly bills: On or before each billing date, commencing with the first billing date following Commercial Operation Date of the first generating unit, the company shall furnish a bill to the Board, in such form as may be mutually agreed by the Board and the Company, for the billing month, which bill will include monthly fixed charges and monthly variable charge payments. Each bill for a billing month shall be payable by the Board on or before the Due Date of the Payment.

18. A combined reading of all the above Articles of the PPA, would indicate that, on the Fixed Charge Computation Date, the company will provisionally calculate [strictly in accordance with the terms of the PPA and in consultation with the Board] the amount of each element of fixed charge component [including Return on Equity at a per annum rate of 16%] which are payable by Board with respect to such tariff year. Thereafter, the "Fixed Charge" component of the Tariff for each Billing Month in a Tariff Year shall be a lump-sum amount equal to the product of (a) the sum of the following amounts, provisionally calculated in accordance with Article 3.3.1 assuming a Tariff Year of 365 days and (b) a fraction, the numerator of which is the number of days in such Billing Month and the denominator of which is 365, which amount shall be adjusted pursuant to the provisions of Articles 3.3.2 and 3.3.3 hereof. Further, such fixed charge component of the tariff for each billing month is to be paid monthly.

19. In view of the above finding, it cannot be said that the existing method of computing the Return on Equity at 16% per annum and paying the same by way of a tariff on monthly basis cannot be said to be in-contradiction with the PPA. Interestingly, the Comptroller and Auditor General (CAG) also did not anywhere state that, the existing practice is in-contradiction with the PPA, though observed

that in view of the savings involved in payment of Return on Equity on annual basis, the Board should have negotiated for its payment on annual basis.

20. As can be seen from the above, the existing method of computing the Return on Equity at 16% per annum and paying the same by way of a tariff on monthly basis is neither in-contradiction with the statutory Notification dated 30th March, 1992 nor in-contradiction with the PPA signed by the parties. Further, the CAG also did not anywhere comment that, the existing method of computing the Return on Equity is in deviation either with the statutory Notification dated 30th March, 1992 or the PPA. The observations of the CAG are in the nature of what the Board should have done while entering the PPA. The deductions sought to be made by letter dated 20-08-2003 cannot be held to be valid specially when the present practice of payment of Return on Equity is in terms of the statutory Notification dated 30th March 1992 and the PPA executed in pursuance thereof. The Commission in the instant case, has to base its judgment on the concluded PPA entered pursuant to the statutory Notification dated 30th March, 1992 alone.

21. In the circumstances stated above, the impugned letter dated 20-08-2003 issued by the respondents to the petitioner purported to adjust the said amount in future bills has no legs to stand.

22. Hence, we are of the considered opinion that the impugned notice / letter issued by the respondents is liable to be set aside.

23. In the result, the petition is allowed directing the respondents not to make any adjustment as mentioned in the said notice / letter dated 20.08.2003. The same rate has to be paid in future bills also.

I.A No. 29 of 2010

24. In view of the findings given in the main O.P. itself the relief now sought is in-fructuous. Hence, the same is closed.

This order is corrected and signed on this 2nd day of March, 2013.

Sd/-	**Sd/-**	**Sd/-**
(R.Ashoka Chari)	**(C.R.Sekhar Reddy)**	**(A.Raghotham Rao)**
Member	**Member**	**Chairman**