CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 14/MP/2013

Coram:
Shri V. S. Verma, Member
Shri M. Deena Dayalan, Member

Date of hearing: 10.10.2013
Date of order: 21.02.2014

In the matter of

Petition under Section 79 of the Electricity Act, 2003 read with statutory framework governing procurement of power through competitive bidding and Articles 13.2.(b) of the Power Purchase Agreement dated 07.08.2007 executed between Sasan Power Limited and the procurers for compensation due to unprecedented, unforeseen and uncontrollable depreciation of the Indian Rupees.

And
In the matter of

Sasan Power Limited
3rd Floor, Reliance Energy Centre,
Santa Cruise East,
Mumbai ….**Petitioner**

Vs

1. MP Power Management Company Ltd.
   Shakt Bhawan, Jabalpur-462 008, Madhya Pradesh

2. Paschmianchal Vidyut Vitran Nigam Limited
   Victoria Park,
   Merrut-250 001, Uttar Pradesh

3. Purvanchal Vidyut Vitran Nigam Limited
   Hydel Colony, Bhikaripur,
   Post-DLW, Varanasi-221 004
   Uttar Pradesh

4. Madhyanchal Vidyut Vitran Nigam Limited
   4-A-Gokhale Marg,
   Lucknow-226 00, Uttar Pradesh

5. Dakshinancial Vidyut Vitran Nigam Limited
   220 kV Vidyut sub-station,
   Mathura Agra By-Pass Road,
   Sikandra, Agra-282 007, Uttar Pradesh

6. Ajmer Vidyut Vitran Nigam Limited
Hathi Bhata, City Power House,
Ajmer-305 001, Rajasthan

7. Jaipur Vidyut Vitran Nigam Limited
Vidyut Bhawan, Jaipur-302 005, Rajasthan

8. Jodhpur Vidyut Vitran Nigam Limited
New Power House, Industrial Area,
Jodhpur-342 003, Rajasthan

9. Tata Power Delhi Distribution Limited
Grid sub-station Building, Hudson lines,
Kisngsway Camp, New Delhi-110 009

10. BSES Rajdhani Power Limited
BSES Bhawan, Nehru Place,
New Delhi-110 019

11. BSES Yamuna Power Limited
Shakti Kiran Builidng,
Karkardooma, Delhi-110 096

12. Punjab State Power Corporation Limited
The Mall, Patiala-147 001
Punjab

13. Haryana Power Purchase Centre
Room No. 239, Shakti Bhawan, Sector-6,
Panchkula-134 109

14. Uttarakhand Power Corporation Limited
Urja Bhawan, Kanwali Road,
Dehradun-248 001 **Respondents**

The following were present:

Shri J.J.Bhatt, Senior Advocate, SPL
Shri Vishrov Mukherjee, Advocate SPL
Ms. Ritika Arora, Advocate, SPL
Shri P.Venkatarao, SPL
Shri Arun Dhillon, SPL
Shri N. K. Deo, SPL
Shri Raj Verma, SPL
Shri Sandeep S. Mysetty, SPL
Shri Mayank Gupta, SPL
Shri Srikant, SPL
Shri Vivek Kejirwal, SPL
Shri R.S.Johri, SPL
Shri G.Umpathy, Advocate, MPPMC

Shri M.G.Ramchandran, Advocate, HPPC
Shri Poorva Saigal, Advocate, HPPC
Shri Apoorve Karol, Advocate, HPPC
Shri Padamjit Singh, PSPCL
Shri T.P.S. Bawa, PSPCL
Ms. Shobana Masters, Advocate, BRPL and BYPL
Shri Himanshu Chauhan, BRPL
Shri Alok Shankar, Advocate, TPDDL
Shri S.S.Barpanda, NLDC
Ms. Jyoti Prasad, NLDC

ORDER

The petitioner, Sasan Power Limited is a special purpose vehicle which was incorporated by M/s Power Finance Corporation Limited (PFC), the nodal agency of Government of India for implementation of its Ultra Mega Power Project initiative on 10.2.2006 for the development and implementation of a coal fired, ultra mega power project based on linked captive coal mine using super-critical technology with an installed capacity of 4000 MW (plus/minus 10%) at Sasan, District Singrauli, Madhya Pradesh (hereinafter referred to as "Sasan UMPP"). The project was conceived by Government of India to be implemented by a developer to be selected through tariff based international competitive bidding process.

2. Based on the competitive bidding carried out by Power Finance Corporation as the Bid Process Coordinator, Reliance Power Limited(hereinafter referred to as "RPower") having quoted the lowest bid was declared as successful bidder for execution of the project. Accordingly, Letter of Intent (LoI) was issued to RPower on 1.8.2007 which was accepted. Consequently, in terms of the provisions of the Request for Proposal (RfP), R Power acquired 100% shareholding of the SPV on 7.8.2007. A PPA dated 7.8.2007 was executed between the petitioner and 14 procurers who are the distribution companies in the State of Madya Pradesh, Uttar

Pradesh, Rajasthan, Punjab, Haryana, Uttarakhand and Delhi. On 15.10.2008 a Supplemental Power Purchase Agreement (SPPA) was entered into between the petitioner and the procurers primarily to pre-pone the scheduled date of commercial operation (CODs) of the various units of the Project. In the Joint Monitoring Committee meeting held on 17.9.2010, the date of commercial operation of the various units of the project was revised by mutual consent. The dates of commercial operation of various units of Sasan UMPP as per the PPA and the SPPA are as under:-

Srl. No.	Unit	COD as per PPA	COD as per SPPA
1	First	7.5.2013	31.12.2011
2	Second	7.12.2013	31.3.2012
3	Third	7.7.2014	30.6.2012
4	Fourth	7.2.2015	30.9.2012
5	Fifth	7.9.2015	31.12.2012
6	Sixth	7.4.2016	31.3.2013

According to the petitioner, the COD of the first unit at the time of filing of the petition was expected to be by 31.3.2013 subject to the completion of procurer's condition subsequent and other procurers obligations set out in the PPA.

3. The petitioner has filed the present petition under section 79(1)(b) and 79(1)(f) of the Electricity Act, 2003 (hereinafter "2003 Act"), Article 17 of the PPA read with Paragraph 5.17 of the Competitive Bidding Guidelines and Regulations 82, 93 and 113 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 seeking relief on account of depreciation in the Indian Rupee (INR) vis-a-vis the US Dollar (USD). The petitioner has submitted that the INR depreciation is unforeseeable and unprecedented and is result of force majeure and the depreciation of INR has adversely impacted the project economics for no fault of

the petitioner. The petitioner has submitted that this is a fit case for the Commission to exercise its regulatory power to devise a mechanism to compensate the petitioner for the financial impact on account of depreciation of INR.

4. The petitioner has submitted that the Bidding Guidelines prescribe that the Commission is required to issue various escalation rates from time to time for the purpose of bid evaluation. One of the components which the Commission is required to issue escalation rates for is the USD-INR exchange rate. This escalation rate provides a benchmark against which submitted bids are evaluated in order to determine the lowest bid. The petitioner has submitted that the Commission has arrived at projected depreciation rate of 0.74% per annum based on the trend of previous 9 calendar years starting from 1998 to 2006 (both inclusive) using 3 years moving average rate and in spite of adoption of a very sound and logical approach in determining and prescribing the depreciation rate, in reality the depreciation of INR vis-à-vis USD after July, 2007 has been nearly 6% per annum and could not have been predicted. The petitioner has submitted that the benchmark index (a justified rate based on the then prevailing circumstances) which is used for bid evaluation could not predict the steep depreciation of the INR, thus making it an unforeseeable event beyond the contemplation of the parties. The petitioner has explained that at the time of submission of revised offer in July 2007, the foreign exchange rate was Rs 40.27/USD and it was on the basis of the prevailing foreign exchange rate and estimated escalation, the capacity charge was worked out by R Power in quoting the tariff in the revised offer. The petitioner has submitted that though at the time of revised offer in July 2007, the INR was showing trends of appreciation, the value of the Indian Rupee has depreciated by an unprecedented 37% from ₹ 40.27/USD to

about ₹ 55/USD at present. The compounded annual growth rate ("CAGR") in depreciation of the INR has been about 6% per annum since July 2007 while as per the prevailing trend at the time of bid submission, the Commission had appropriately provided for a projected depreciation of 0.74% per annum. The petitioner has submitted the comparison between the actual rate of depreciation of INR vis-a-vis USD and the expected rate of depreciation ascertained from the Notification dated 4.4.2007 issued by this Commission as under:-

Date/Year	Average rates prevailing during the period	Average rates as per CERC adjustment rate
2005	44.11	--
2006	45.33	--
Jan 01, 2007 to Jul 25, 2007	42.35	--
Jul 26, 2007	40.27	40.27
Jul 27, 2007 to Dec 31, 2007	39.93	40.33
2008	43.42	40.55
2009	48.35	40.85
2010	45.74	41.15
2011	46.67	41.46
Jan 1, 2012 to Jun 30, 2012	52.28	41.69
Jul 1, 2012 to Dec 17, 2012	54.69	41.83

5. The petitioner has submitted that at the time of submission of the bid, it was envisaged that the total project cost would be around ₹19600 crore which was based on the computation of project cost in terms of USD and INR and factored in the foreign exchange exposure of the petitioner. It has been submitted that at the time of submission of the bid, the exchange rate was ₹40.27 per USD and the average rate during the construction period of 57 months worked out to approximately ₹40.99 per USD assuming 0.74% per annum depreciation of INR vis-à-vis USD. The petitioner has submitted that the project cost was to be funded through a mix of debt and equity. The petitioner has submitted that the total debt for the project was capped at

₹14,550 crore by the lenders based on their assessment of DSCR after taking into account the levelised tariff ₹1.196/kWh. The petitioner is stated to have entered into the following agreements with the lenders for financing the debt element:-

(a) The petitioner entered into a Rupee and LC Facility Agreement (Facility Agreement) with certain lenders which included nationalised banks, private banks and financial institutions like PFC and REC for ₹10.862 crore on 21.4.2009. Subsequently, Union Bank was inducted with a sum of ₹750 crore taking the aggregate amount to ₹11,612 crore.

(b) The petitioner entered into a Foreign Currency Facility Agreement (FCF Agreement) with India Infrastructure Finance Company (UK) Limited and State Bank of India on 21.4.2009 for USD 486 Million.

(c) The petitioner entered into a Credit Agreement on 30.9.2011 (Credit Agreement) with Deutche Bank Trust Company Americas and Export-Import Bank of the United States for a credit limit of USD 650 million.

(d) The petitioner entered into a facility agreement on 1.11.2011(Sinosure Agreement) with the Export-Import Bank of China, China Development Bank, Bank of China Limited and Standard Chartered Bank for a total loan facility of USD 1,109 billion.

(e) The petitioner entered into a credit agreement(Secured Facility Agreement) on 30.9.2011 with Standard Chartered Bank, Mizuho Corporate Bank Limited and DBS Bank Limited for a credit limit aggregating to USD150 million.

6. The petitioner has submitted that as per the provisions of FCF Agreement, Credit Agreement, Sinosure Agreement and Secured Facility Agreement, all payments are to be made by the petitioner in USD. The petitioner has submitted that since the lenders have stipulated the debt cap of ₹14,450 crore, the petitioner can only drawdown from the aforesaid loans in compliance the debt cap. The petitioner has submitted a table showing the details of debt service outflow of the petitioner and likely impact of debt servicing of foreign currency from the year 2013 till 2017. The petitioner is stated to suffer on account of debt servicing obligations of its foreign currency loans due to depreciation of INR vis-à-vis USD for an amount of ₹3821 crore as per the details given:-

	Total Outflow (in USD million)	Total Outflow (in ₹ Crore) (@bid exchange rate of ₹40.27/USD)	Total Outflow (in ₹ In crore) (@ actual exchange rate of ₹.55/USD)	Difference in outflow in ₹ In crore (Exchange rate @ ₹.55 and ₹40.27)
Repayment	2118	9393	12316	2923
Interest	664	2884	3782	898
Total	2782	12277	16098	3821

7. The petitioner has submitted that due to non-availability of supercritical technology equipment and mining equipment in India, the petitioner had no option but to import equipment and necessarily incur expenditure in USD in order to complete the project in a time bound manner. The petitioner entered into EPC contract with a consortium of Reliance Infrastructure Limited and Reliance Infra Projects (UK) Limited which in turn has placed the order for Boiler Turbine Generator

on Shanghai Electric Company Limited. The petitioner has submitted that the payment under the EPC contract and to the suppliers of imported mining equipment is denominated in USD which has affected the project economics due to unprecedented, unforeseeable and uncontrollable steep depreciation of INR vis-à-vis USD by about ₹ 2,800 Crores. As a result, the total project cost has increased from ₹19600 crore to ₹22,400 crore. The petitioner has submitted the details of the equipments imported and consequent USD denominated expenditure incurred by the petitioner as under:-

(a) Boiler turbine Generator : USD 1286 million

(b) Coal Mining Equipment : USD 444 million

(c) Consultancy Services for architectural design : USD 1.27 million

(d) Interest During Construction : USD 307 million

Total : USD 2.038 million

8. The petitioner has submitted that if the exchange rate of the INR vis-a-vis the USD existing at the time of submission of the bid is taken and adjusted as per the INR depreciation index issued by the Commission, the aggregate project cost would be about ₹ 19,600 Crores. Against this, due to unprecedented, unforeseen and uncontrollable depreciation of the INR vis-a-vis the USD, the aggregate impact on the project cost has exceeded by ₹2800 crore as per the details given below:-

Project Cost Parameters	**USD (Million)**	**₹ in crore**	**INR Equivalent (in crore) for varied Exchange Rate**	
			40.99	55
Land	Nil	632	632	632
Power Plant EPC Cost	1287	7762	13038	14841
Coal Mining Cost	149	902	1923	2273
Coal Mining cost (incurred)	195	-	798	974
Preliminary	Nil	565	565	565
Margin Money	Nil	173	173	173
IDC & Financing cost	307	828	2085	2514

Contingency	Nil	345	345	345
Total Project Cost	**2037**	**11206**	**19558**	**22316**
Increase in Project cost (to be funded by equity)			**2758**	
Debt			14668	14550
Equity			4889	7766
Additional equity			**2876 (i.e. approx. 2900)**	

9. The petitioner has submitted that since the debt has been capped by the lenders at ₹14,550 crore based on the levelised tariff of ₹1.19616/kWh, additional equity of ₹2800 crore is required to be infused. The petitioner has submitted that since additional equity amount could not have been factored into the bid submitted by RPower, return on such additional equity which needs to be infused to tide over the increased project cost needs to be permitted.

10. The petitioner has submitted that this Commission has jurisdiction and is empowered under the legal/regulatory framework as well as under the PPA to regulate the tariff and interfere with the quoted tariff under PPA. The petitioner has submitted as under:-

(a) The power to regulate under section 79(1)(b) of the 2003 Act is wide and plenary. In this connection, the petitioner has relied upon the following judgements of the Hon'ble Supreme Court:

(i)Jiyajirao Cotton Mills Ltd. Vs. M.P. Electricity Board {1989 Sup (2) SCC 52}

(ii) DK Trivedi & Sons Vs. State of Gujarat {1986 Supp SCC 20}

(iii)K Ramanathan Vs. State of Tamil Nadu & Anr {(1985) 2 SCC 116}

(iv) Central Power Distribution Co & Ors Vs. CERC & Anr {(2007) 8 SCC 197}

(v) UP Power Corporation Ltd. Vs. NTPC Ltd.{(2009) 6 SCC 235}

(b) The power of tariff determination is a part of the power to regulate and exercise of the power to determine tariff under either section 62 or section 63 of the 2003 Act does not preclude the Commission from exercising its power to regulate under section 79(1)(b) of the 2003 Act. In this connection, the petitioner has relied upon the following judgements of the Supreme Court and Appellate Tribunal for Electricity:

(i) Tata Power Company Limited vs. Reliance Energy Limited {(2009) 7 SCALE 513}

(ii) Appeal Nos. 106 and 107 of 2009 BSES Rajadhani Power Ltd & BSES Yamuna Power Ltd. Vs. DERC & Ors {2010 ELR APTEL 0404}

(iii)Appeal No. 179 of 2010 Patkari Power Ltd. Vs. Himachal Pradesh Electricity Regulatory Commission.

(c) Notwithstanding the fact that the tariff is determined by way of a transparent bidding process, the Commission has the power under section 79(1)(b) of the 2003 Act read with Conduct of Business Regulations of the Commission to review and revise the tariff if it is established that the tariff adopted pursuant to section 63 of the 2003 Act are no longer feasible or workable.

11. The petitioner has submitted that in view of the above legal propositions, the petitioner has to be compensated for the financial impact on the project on account of steep depreciation in the INR vis-à-vis USD either by way of tariff adjustment or in any other manner as may be determined by the Commission.

12. The petitioner has further submitted that the steep depreciation of the INR vis-à-vis USD is unforeseeable and unprecedented event which is akin to force majeure event within the meaning of Article 12.3 of the PPA for which the petitioner needs to be compensated. The petitioner has submitted that Article 12.3 of the PPA defines 'force majeure event' as an inclusive all-encompassing definition that will include any event which (a) has affected the performance of its obligations under the PPA; (b) is not within the reasonable control of the affected party; (c) could not have been avoided if the affected party had taken reasonable care. The petitioner has submitted that there is unprecedented, unforeseen and uncontrollable steep depreciation in the value of the INR vis-a-vis the USD which (a) has had a financial impact on the petitioner; (b) is beyond the control of the petitioner since depreciation of the INR is something over which the petitioner has no control; (c) could not have been anticipated by the petitioner at the time of bidding nor could the same have been avoided by the petitioner since the depreciation in value of the INR is unprecedented; (d) was not foreseeable as evidenced from the fact that the actual depreciation of the INR over the intervening period has been far greater than the depreciation rates declared by CERC; and (e) there is no mechanism either in the PPA or the Bidding Guidelines which provide for any adjustment on account of such unforeseeable and unprecedented depreciation in the value of the INR.

13. The petitioner has relied upon certain judgements of international courts and Indian courts to plead that the depreciation of INR vis-à-vis USD has rendered the PPA commercially impracticable and it would be in the interest of all parties concerned to renegotiate the PPA in order to ensure that the petitioner is duly compensated. The petitioner has submitted that notwithstanding the fact that the foreign exchange risk is that of the bidder as per the guidelines, no bidder contemplated or imagined such a drastic depreciation of INR and as a corollary, no bidder agreed to absorb such foreign exchange fluctuation risk. The petitioner has submitted that the Bidding Guidelines are silent on two essential issues, viz. project financing which may have a foreign exchange element to it and the procurement of equipment from abroad both of which significantly impact the project economics. The petitioner has submitted that the unprecedented and unforeseen depreciation of INR vis-à-vis USD and its consequent impact on debt servicing and project economics has not been dealt with in the statutory scheme including the Bidding Guidelines and the PPA and nothing contained in these documents can limit the Commission's power to look into the issue and pass suitable directions for compensation on account of the depreciation of INR. The petitioner has also relied upon the UNIDROIT Principles of International Commercial contracts and studies by John Stern, J.L. Guasch, Jean Tirole in support of its contention that the international practices provide for and allow readjustment of terms of contract in comparable situation.

14. The petitioner has submitted that even after adjusting the tariff to account for the depreciation in INR vis-à-vis USD, the tariff of Sasan UMPP will be amongst the lowest tariff in the country. The petitioner has submitted that the average tariff of four generating stations of NTPC, namely, Shimadri STPS-II, Rihand STPS-II, Farakka

and Sipat-II (₹2.88/kWh, ₹3.10/kWh and ₹2.91/kWh for the years 2012-13, 2013-14 and 2014-15 respectively) are significantly higher than the Sasan UMPP's levelised tariff of ₹1.196/kWh. The petitioner has also relied upon the latest winning tariff under Case I bids to contend that the levelised tariff of Sasan UMPP is more attractive. The petitioner has submitted that even after allowing the tariff adjustment for depreciation of INR, the tariff of Sasan UMPP will remain amongst the lowest in the country, thereby safeguarding consumer interest and ensuring availability of low cost power.

15. The petitioner has made the following prayers:-

(a) Declare that unprecedented, unforeseeable and uncontrollable depreciation of Indian Rupee vis-a-vis the US Dollar as a Force Majeure event under the PPA.

(b) Restitute the petitioner to the same economic condition as if the Force Majeure Event never occurred, including regarding the additional equity outlay and debt service obligations.

(c) Pass any such other and further reliefs as this Commission deems just and proper in the nature and circumstances of the present case.

16. The petitioner is stated to have taken up the matter with the procurers in its letter dated 15.12.2012 setting out the impact of the depreciation of INR on the financing arrangement as well as the total project cost and exhorting the procurers to devise a mechanism to revise the tariff to address the situation. A meeting of the petitioner with the procurers was held on 29.12.2012 in order to discuss the issues raised by the petitioner in its letter dated 15.12.2012. The petitioner has submitted

that instead of discussing the issues, the procurers have disputed the letter dated 15.12.2012 as a notice under Article 17.2.1 of the PPA. The petitioner in its letter dated 31.12.2012 wrote to the procurers confirming that the letter dated 15.12.2012 was in fact a notice under Article 17.2.1 of the PPA. The lead procurer, MP Power Management Company Limited (MPPMCL) in its letter dated 7.1.2013 wrote to the petitioner refusing to acknowledge the notice dated 15.12.2012 as a notice under Article 17.2.1 of the PPA. The petitioner in its letter dated 14.1.2013 reconfirmed to the procurers that the letter dated 15.12.2012 crystallised its claim for compensation for depreciation of INR vis-a-vis USD. The petitioner has submitted that though the procurers had called for a meeting on 27.2.2013, the procurers did not take any decision with regard to the claims raised in the letter dated 15.12.2012. The petitioner has submitted that since the period of 30 days prescribed under Article 17 of the PPA has expired without any amicable solution, the petitioner has approached the Commission for resolution of the dispute between the petitioner and procurers that has arisen on account of depreciation of INR vis-a-vis USD.

17. The Commission after hearing the learned counsel for the petitioner and procurers and their representatives on 16.4.2013, admitted the petition and directed the parties to file their replies and rejoinders. Replies to the petition have been filed by MPPMCL, UPPCL, Tata Power Delhi Distribution Company Limited, AVVNL/JVVNL/JoVVNL, BRPL, BYPL, Haryana Power Purchase Centre and PSPCL. The replies of the respondents are discussed in brief as under:

(a) MPPMCL, the lead procurer in its affidavit dated 26.8.2013 has submitted that on account of the depreciation of INR vis-s-vis USD which has resulted in

the increase of the project cost by ₹ 2800 crore, the petitioner has approached the Commission for determination of tariff which is not permissible as the Commission while adopting the tariff under section 63 of the 2003 Act has not determined the tariff but has only examined whether the bidding process as specified has been followed or not. As regards the contention of the petitioner regarding depreciation of 37% of INR vis-à-vis USD from the date of submission of the bid till the date of filing of the petition, MPPMCL has submitted that the Bidding Guidelines provides that foreign exchange risk, if any, shall be borne by the supplier and therefore the petitioner should have factored in the foreign exchange rate variation while determining the cost of the imported equipments in quoting tariff at the RfP stage which is supposed to be an all inclusive tariff. MPPMCL has conceded that depreciation of INR vis-à-vis USD is unprecedented but has submitted that the same does not translate into tariff since exchange rate variation is not covered under force majeure conditions under the PPA and 'change in the cost of plant' is clearly covered under force majeure exclusion under Article 12.4.c of the PPA. MPPMCL has submitted that if the Commission decides to exercise its power under section 79(1)(b) of the 2003 Act, tariff regulation under the said provision would work both ways i.e. to cover increase and decrease in the input cost of the project for which all details should be available with the regulator and purchasers for all the projects.

(b) UPPCL has filed the reply vide affidavit dated 15.7.2013 on behalf the Paschimanchal Vidyut Vitaran Nigam Limited, Purvanchal Vidyut Vitaran Nigam Limited, Madhyanchal Vidyut Vitaran Nigam Limited and Dakshinanchal Vidyut

Vitaran Nigam Limited. UPPCL has submitted that the claim of the petitioner to declare the unprecedented, unforeseeable and uncontrollable depreciation of INR vis-à-vis USD as a force majeure event under the PPA is not tenable as the same is not covered under force majeure conditions under Article 12.3 of the PPA but is clearly covered under force majeure exclusion under Article 12.4 of the PPA. As regards the claim of the petitioner for financial restitution on account of depreciation in the value of INR vis-à-vis USD, UPPCL has submitted that there was no component linked with foreign exchange rate variation in the evaluated levelised tariff of ₹1.19616/kWh as per the LOI dated 1.8.2007 in favour of RPower and hence the claim is not maintainable. With reference to the claim of the petitioner for financial restitution on account of debt service obligations in USD, UPPCL has submitted that all loans were taken subsequent to the issue of the LOI dated 1.8.2008 and therefore, the petitioner should have brought to the notice of the Commission and the procurers that the capital cost includes USD 2.118 billion, the payment of which has to be made in USD which is subject to foreign exchange rate variation and it should have obtained the approval of the Commission for the same. UPPCL has submitted that the RfP document which was issued to all the bidders for the project provided that tariff would be expressed in INR and there was no element linked with USD and FERV and therefore, if the facility of financial restitution to the petitioner on account of unprecedented rise in cost of USD vis-à-vis INR is granted by the Commission, it would amount to discrimination other bidders on the principle of equal opportunity and spirit of section 62(3) of the 2003 Act. UPPCL has prayed to disallow the prayers of the petitioner.

(c) Haryana Power Purchase Centre in its affidavit dated 3.6.2013 has

submitted that as per the terms and conditions of the tariff based competitive bidding held pursuant to which the petitioner was selected and the PPA was signed, the foreign exchange rate variation was entirely to the account of the petitioner and any depreciation of the INR cannot be a ground for seeking any adjustment in tariff or otherwise any compensatory relief from the procurers. Since the Guidelines provided that foreign exchange risks, if any, shall be borne by the supplier, it was for the petitioner to make appropriate financial arrangement including hedging of foreign exchange variation entirely at the cost and risk of the petitioner. As regards the claim on the ground of force majeure, HPPC has submitted that the petitioner can claim force majeure in terms of Article 12 of the PPA only if the event or circumstance or combination of events or circumstances wholly or partly prevents or unavoidably delays the performance of the petitioner's obligations under the PPA. Foreign Exchange rate variation does not in any manner prevent or delays the performance of obligations by the petitioner. It has the result of increased or decreased outflow of Indian Rupee in the project cost based on the increase or decrease in the value of USD to INR and such increase or decrease in INR spending is the risk assumed by the petitioner without any reservation or condition or limitation. HPPC has submitted that it is well settled that the increase in price or terms and conditions of an agreement making the performance onerous or difficult cannot be said to be an event making the performance under force majeure within the meaning of Article 12.3 of the PPA or otherwise the agreement to be considered as frustrated under section 56 of the Indian Contract Act, 1872. In this connection following judgements have been relied:

(i) Continental construction Company Limited Vs State of Madhya

Pradesh {(1998) 3 SCC 82}

(ii) Ocean Tramp Tankers Corporation Vs Soveracht {(1964) 1 All E.R. 161}

(iii)Seaboard Lumber Company and Capital Development Company Vs. United States {308 F.3d 1283}

(iv) Coastal Andhra Pradesh Limited Vs. Andhra Pradesh Central Power Distribution Company Ltd. (judgement by Delhi High Court dated 2.7.2012 in OMP No.267 of 2012}

HPPC has further submitted that the judgements and authorities relied by the petitioner have no application in the present case as the parties had clearly intended that the risk of unexpected occurrence under the foreign exchange rate variation is to be allocated to the bidder. As regards the exercise of regulatory power under section 79 of the 2003 Act, HPPC has submitted that reopening the tariff determined by competitive bidding process under section 79(1)(b) would be to convert a tariff based competitive bidding to a determination of tariff under section 62 of the Act which would be a mockery of the entire competitive bidding process.

(d) Ajmer Vidyut Vitaran Nigam Limited, Jaipur Vidyut Vitran Nigam Limited and Jodhpur Vidyut Vitaran Nigam Limited in their common reply filed vide affidavit dated 2.5.2013 have submitted that it is everybody's knowledge that prices of USD change almost daily and the petitioner while bidding should have considered the risk on this account. The petitioner's prayer to determine increase in tariff under section 62 of the Act is not correct as the Commission

while adopting the tariff under section 63 does not determine the tariff but only examines whether the bidding process as specified has been followed or not.

(e) BSES Yamuna Power Limited and Tata Power Delhi Distribution Company Limited have filed their replies to the petition. However, perusal of the replies reveals that they pertain to certain claims under change in law which is subject matter of another petition and not to the relief claimed for depreciation of INR Vis-à-vis USD.

18. The petitioner has filed rejoinders to the replies of the respondents. The petitioner has submitted that the value of INR has depreciated by an unprecedented 62% from ₹40.27/USD at the time of the bid to about ₹65.4207/USD as on 19.8.2013. Consequently, capital cost of the project has increased by about ₹4, 679 crore as on that date. The petitioner has contended that notwithstanding the fact that as per the bidding guidelines, foreign exchange risk is that of the bidder, no bidder could have contemplated or imagined such a drastic devaluation of INR and as a corollary, no bidder agreed to absorb such foreign exchange rate fluctuation risk. The petitioner has submitted that hedging would not have avoided the losses since the hedging cost is also determined by market forces and have increased significantly since the time of the bid. As regards the power under section 79(1)(b) of the 2003 Act, the petitioner has relied upon the order of this Commission dated 15.4.2013 in Petition No.159/MP/2012- Coastal Gujarat Power Limited Vs. GGujarat Urja Vikas Nigam Limited.

19. The petition was heard on merit on 10.10.2013. During the hearing the learned senior counsel for the petitioner submitted that this Commission has the

power to entertain this petition and grant relief to the petitioner due to the following reasons:-

(a) Under section 79(1)(b) of the Act, the Commission has the power to regulate the tariff of the generating company of the petitioner which has a composite scheme to generate and sell power in more than one State.

(b) The Supreme Court has interpreted in a number of judgments that the term ‘regulate’ is wide and plenary. Therefore, the Commission’s power to regulate is wider than the power to determine tariff under Section 62 and 63 of the Act.

(c) The Appellate Tribunal in Appeal Nos.106 and 107 of 2009 (BSES Rajdhani Power limited vs BSES Yamuna Power Ltd) has held that the Commission has the power to re-determine the tariff under Section 62 of the Act.

(d) The Commission has the power to review and revise the tariff under Regulation 92 of the Central Electricity regulatory Commission (Conduct of Business) Regulations, 1999 which has been upheld by the Supreme Court in UP Power Corporation Limited Vs NTPC Limited.

(e) PPA is a regulated contract and the Commission is obliged and empowered under section 79 read with sections 61 and 63 of the Act to regulate tariff whenever a situation arises warranting exercise of regulatory powers to secure tariff principles even if tariff is determined by competitive bidding process.

(f) This Commission can take into consideration the impact of unprecedented, unforeseen and uncontrollable steep depreciation of INR vis-à-vis USD and other factors and regulate the tariff in such a manner that the increase in project cost is absorbed in tariff/supplementary bill and the petitioner is restored to the same economic position as existed prior to depreciation of INR.

(g) The depreciation of INR vis-à-vis USD is a force majeure event as per Article 12.3 of the PPA as the petitioner has no control over the depreciation of INR. The petitioner could not have foreseen such depreciation in the value of INR at the time of submission of the bid, and there is no mechanism in the PPA which provides for any adjustment on account of such unforeseeable and unprecedented depreciation in the value of INR. Learned senior counsel relied upon the judgments in Smt Sushila Devi and Another Vs. Hari Singh and Others [(1971) 2 SCC 288], Govindbhai Gordharnbhai Patel and others Vs. Gulam Abbas Mullah Allibhai and others [(1977) 3 SCC 179] etc. to highlight commercial hardship as the basis of force majeure.

20. Learned senior counsel submitted that due to unprecedented and unforeseen depreciation of the INR vis-à-vis USD, the aggregate impact on the project on account of import of equipment has exceeded the project valuation of ₹19,600 crore by ₹2800 crore. Since the debt is capped at ₹14,550 crore, the petitioner can only fund the additional capital cost through equity unless the relief prayed for in the petition is granted. Learned senior counsel further submitted that since additional equity requirement was unforeseen at the time of submission of the bid, the

additional cost on account of equity has not been built into the project and the return on additional equity is nil. Since the requirement of infusion of additional equity is a direct consequence of depreciation of INR vis-à-vis USD, a suitable mechanism will have to be devised in order to provide reasonable return on equity to the petitioner.

21. In response to the Commission's query as to whether any refinancing loan was taken, it was explained by the learned senior counsel for the petitioner that at the stage of bid submission what was contemplated was a mix of Rupees and Dollar financing. At the time of financial closure, because of slow down, dollar financing was not available and therefore, Sasan went for Rupee financing as a transit strategy. However, since the equipment procurement was in dollar term, financing in dollar was arranged subsequently. Learned senior counsel further clarified to the query of the Commission "as whether the dollar loan was on fixed rate of interest or floating rate of interest" that loan from US EXIM Bank was on fixed interest while other loans are on floating rate of interest.

22. In response to a query regarding hedging, learned senior counsel for the Petitioner submitted that the petitioner did not hedge because the cost of hedging would have been higher. Shri Pushkar from KPMG made a presentation on behalf of the petitioner regarding hedging on an analysis of the impact of Dollar Rupee volatility on the project. The gist of presentation of KPMG is as follows:-

(a) Rupee was depreciating by about 2 to 5% and post 2007, Rupee was appreciating nearly 3% which was unprecedented. Various reputed agencies had given the forecast that value of Rupees would range from ₹33 to ₹41 per US Dollar upto 2011. Since the Rupee was appreciating at the time of the bid

and there was expectation that Rupee would appreciate and considering the CERC index of 0.74% depreciation, quotation of the bidder on the basis of cost of the project for ₹19600 crore was reasonable.

(b) Due to global financial crisis and unwinding of short dollar position, Rupee depreciated from 2008 onwards reaching to ₹51 in a very short time. As regarding hedging cost which was ruling at 1% in 2008 rose to 7% in 2011 in short term and became very expensive to hedge, especially for longer period. Therefore, on account of volatility, there would not have been any material difference in the position, if the USD exposures had been hedged at the time of drawal and in some cases losses would have increased.

23. Learned counsel for MPPMCL submitted that as per para 4.3 of the competitive bidding guidelines, tariff should be designated in INR only and foreign exchange risk shall be borne by the seller. Article 12 of the PPA dealing with force majeure does not cover the foreign exchange risk. Learned counsel further submitted that as per the bid document as well as the PPA, the foreign exchange risk was to be borne by the seller himself. He further submitted that even if there is an unprecedented crisis in terms of foreign exchange variation, it is unreasonable for the petitioner to expect that the entire burden would be borne by the respondents. The petitioner should bear part of the burden by accepting lower rate of return. In reply to our query whether MPPMCL was prepared to bear part of the foreign exchange risk, learned counsel submitted that the respondent's main submission remained that foreign exchange risk is not admissible and in case, the Commission

holds that the petitioner is entitled for it, then the entire burden should not be passed on to the procurers and should be shared by the petitioner.

24. Learned counsel for HPPC submitted that Para 4.3 of the competitive bidding guidelines provides that tariff shall be designated in Indian Rupees and foreign exchange risk if any shall be borne by the supplier. The only exception is that the foreign exchange rate variation will be permitted in payment of energy charges for the fuel increase if the procurer mandates the use of imported coal for case 2 bidding. Sasan not being a coastal project, the case of the petitioner is not covered under this provision. Learned counsel further submitted that in a competitive environment, the procurers are not concerned with the loan portfolio of the petitioner or the impact of foreign exchange rate variation on such loan. Learned counsel relied upon Supreme Court judgment in the matter of Transport Corporation of Andhra Pradesh Limited and Another Vs. Sai Renewable Power Private Limited [(2011) 11 SCC 34] and submitted that circumstance obtaining at the time of bidding has not changed. Learned counsel further submitted that reliance placed by the petitioner on the orders in Adani Case (Petition No.155/MP/2012) and CGPL Case (Petition No.159/MP/2012) regarding compensatory tariff is not applicable in the present case as the Commission has not dealt with foreign exchange variation in those cases. Moreover, commercial impossibility as the basis for force majeure has been rejected by the Commission in Adani case and CGPL case.

25. The representative of PSPCL submitted that RPower has quoted on the basis of the extant guidelines which required the submission of bids in INR only. The petitioner has also admitted in the petition that the tariff quoted by the petitioner did not have any foreign exchange element. The petitioner has quoted very aggressively

to get this project and having bagged the project, the petitioner cannot be allowed to claim the relief which the petitioner has not factored in the bid.

26. Learned counsel for Tata Power Delhi Distribution Company submitted that the developer is in the best position to take care of the foreign exchange risk. Neither the procurers nor their authorized representative made any representation on the estimated cost of the project and therefore, any risk associated with the cost of the project is the responsibility of the petitioner.

27. Learned counsel for BRPL and BYPL supported the claims of the petitioner and submitted that the definition for 'Force Majeure' as per the PPA is exhaustive and this deprecation on the Indian rupee is of unprecedented, unforeseen and uncontrollable nature. The petitioner needs to be suitably compensated for the adverse impact. Learned counsel further submitted that petitioner's grievances need to be addressed at the earliest so that the respondents have a clarity regarding the economic position of the petitioner and have certainty in aspect of financial implication to the respondents to be included in the ARR.

28. In response to the submission of learned counsel for MPPMCL regarding non-applicability of force majeure in the present case, learned senior counsel submitted that force majeure has been defined in Article 12.3 of the PPA as "any event or circumstances or combination of events circumstances including those stated below which wholly or partly prevents or unavoidably delays the aggrieved party from performance of its obligations under the agreement." What have been enumerated below are illustrative and the petitioner is not covered under any of them but under

the main definition of force majeure as it is prevented on account of unprecedented depreciation in INR to complete the project. Learned senior counsel submitted that the judgment of the Supreme Court in the Transmission Corporation of Andhra Pradesh is not applicable in the case of the petitioner. Learned senior counsel relied upon the judgment of Supreme Court in Tarapore and Company Vs. Cochin Shipyard Ltd. and Another [(1984) 2SCC 680}] in support of the petitioner's case for relief.

29. Since KPMG had considered the data of only 5 years i.e. from 2002 to 2007 whereas for the feasibility report of a project, the data for past 100 years is considered, we had directed the petitioner to submit the following:-

(a) The debt-equity ratio and the foreign and domestic loan components remained the same as at the time of submission of the bid;

(b) Data of INR vis-à-vis USD movement for the past 20 years (1987-2007)

30. The petitioner in its affidavit dated 8.11.2013 has submitted that at the time of bid that debt equity ratio envisaged was 75:25. The project cost in Rupee terms has increased since the bid time due to the factors such as unprecedented, unforeseen and uncontrollable depreciation of INR vis-a-vis USD and change in law during construction period, which are beyond petitioner's control. The debt equity ratio of the project on completion is expected to be in the range of 70:30 which is also in line with the power sector norms. The petitioner has confirmed that at the time of completion of the project, the foreign currency debt component will remain the same as at the time of submission of the bid. The petitioner in its additional submission

filed on 16.1.2014 has submitted that for implementation of ultra mega power project with an installed capacity 4000 MW using the mandated supercritical technology and the need to deploy large-sized, state-of-the-art mining equipment, USD capital expenditure was inevitable since domestic manufacturing capacity for such equipment was/is not available. The petitioner had to import the same from USA and China incurring capital expenditure in USD. The petitioner has submitted that considering the large size of the debt funding to the tune of approximately ₹15000 crore and limited capacity of Indian banking System to finance such a debt requirement due to the prescribed exposure norms by Reserve Bank of India, debt funding using both INR and USD components were inevitable in order to mitigate the funding shortfall risk during the construction period. The petitioner has submitted that at the time of first financial closure which was achieved on April, 2009 the debt financing included a mix of Rupee and USD components but USD component was less than originally envisaged. However, at the time of its second financial closure by the end of 2011, the Petitioner was able to get sufficient sanction of the USD denominated loans to arrive at the envisaged levels of loans as in the bid submission i.e. on the basis of Rupee as well as USD. The petitioner has submitted a table containing the financing details as envisaged at the time of submission of the bid vis-a-vis the first and the second financial closures as under:-

Heading	As envisaged at the time of Bidding (July, 2007)	April, 2009- 1st Financial closure	End of CY 2011- 2nd Financial closure
Rate of Exchange (Rs/USD)	40.27	43	45
Combination of Rupee and Forex Debt	Re: Fx debt ~40:60 (i.e. nearly USD ~2.1 Bn at an construction period average exchange rate of ₹ 40.99/USD)	Sanction available: ₹ 11612 Crs + USD 486 Mn Overall debt ceiling of ₹ 14,550 Cr.	Sanction available: ₹11612 Crs + USD 2395 Mn Overall debt ceiling of ₹ 14,550 Cr.
Interest cost on	Rupee debt: ~9.75%	Rupee debt: ~12.5%	Rupee debt:

Rupee debt and forex debt	p.a. Forex Debt: ~7.5% p.a. Weighted Average interest cost: ~8.4% p.a.	to 13% p.a. Forex Debt: ~6.5% p.a. Weighted Average interest cost: ~11.8% p.a.	~12.75% to 13% p.a. Forex Debt: ~6.5% p.a. Weighted Average interest Cost: ~8.7% p.a. (assuming USD debt of USD 2.1 Bn and balance by Rupee debt)
Savings in interest cost Weighted Average interest cost vis-a-vis Bid Case	N.A.	Loss	Loss

31. The petitioner has submitted that due to non-availability of external commercial borrowing at the time of first financial closure, the weighted average rate interest rate was substantially higher than the bid assumptions. With the sanction at the time of second financial closure, the petitioner is stated to have brought down the interest rate closer to the envisaged level at the time of bidding. The petitioner has further submitted that if the project was funded entirely by the Indian Rupee Loans, the project would have been even more adversely impacted due to increase in interest rate for rupee dominated loan which are contrarily prevailing at 14.5% per annum.

32. The petitioner has submitted the INR/USD exchange rate movement for the 20 years period (1987-2007) as under:-

Year	Average Exchange rate for the year (INR/USD)	Variation from previous year (INR/USD)
2007	41.35	-3.97
2006	45.32	1.22
2005	44.10	-1.19
2004	45.29	-1.28
2003	46.57	-2.02
2002	48.59	1.41
2001	47.18	2.23
2000	44.95	1.88

1999	43.07	1.80
1998	41.27	4.94
1997	36.33	0.94
1996	35.39	2.98
1995	32.41	1.01
1994	31.40	0.19
1993	31.21	3.09
1992	28.12	5.40
1991	22.72	5.22
1990	17.50	0.00
1989	17.50	3.60
1988	13.90	0.95
1987	12.95	-

33. The petitioner has submitted that based on the above table, it is evident that at the time of bid in 2007, INR vis-a-vis USD had appreciated over the last 10 years i.e. since 1998 and almost all the financial experts were of the opinion that INR would appreciate. Despite an appreciating trend, RPower had taken a conservative view and had assumed a depreciating INR vis-a-vis USD @ 0.74% p.a., a fair assumption based on the then prevailing circumstances and analysis of past trends which was in line with the Commission's notification based on the trend of previous nine years starting from 1998-2006 (both inclusive) using three years moving average rates. The petitioner has further submitted that prior to 1993, Rupee exchange rate was officially determined by the Reserve Bank of India and was based on a weighted basket of currency of India's major trading partners. In 1993, a new framework for exchange rate discovery was adopted and the country moved to a single market determined rate system where all transactions would be priced at the prevailing market rates. The petitioner has submitted that the Compounded Annual Growth Rate (CAGR) of exchange rate movement from 1993 to 2007 is 1.83%.

34. The petitioner in its affidavit dated 8.11.2013 has submitted two alternative mechanisms for mitigation of the adverse affect caused by the depreciation of INR

vis-a-vis USD. In the first mechanism petitioner submitted that it will be same as the foreign exchange rate variation under Regulation 40 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 (2009 Tariff Regulations). Under this method, foreign exchange rate variation is provided only during debt servicing period with reference to exchange rate computed using INR depreciation rate assumed by the petitioner at the time of the bid. Under the second mechanism, the relief on account of project cost increased would be the same as provided under 2009 Tariff Regulations. However, suitable upfront tariff adjustment would be provided based on debt and equity mix of 70:30 used to financial increased in project cost and FERB would be provided during the debt servicing period but with reference to exchange rate on which upfront tariff adjustment is provided. The petitioner has submitted the likely tariff impact of both the mechanisms as under:-

	Anticipated Deprecation rate of 1.83% p.a. going forward during Debt Service Period with current Exchange rate as ₹ 61.581/ USD (as on 17.10.2013)			
	Total Impact (Base Exchange Rate= Bid time Exchange rate of ₹40.27/USD with no deprecation)	Tariff Impact borne by Procurers	Impact borne by Petitioner	New Revised total levelized tariff of the Petitioner (Base levelized tariff ₹1.196/ kWh)
	₹/ kWh	₹/ kWh	₹/ kWh	₹/ kWh
	(A)	(B)	(C) = (A) – (B)	(D) = 1.196 + (B)
Petitioner's bid time assumed INR	0.164	0.143	0.021	1.339

depreciation rate of 0.74% p.a. with base Exchange rate as ₹40.27/ USD				

	Anticipated Deprecation rate of 1.83% p.a. going forward during Debt Service Period with current Exchange rate as ₹61.581/ USD (as on 17.10.2013)			
	Total Impact (Base Exchange Rate= Bid time Exchange rate of ₹ 40.27/USD with no deprecation)	Tariff Impact borne by Procurers	Impact borne by Petitioner	New Revised total levelized tariff of the Petitioner (Base levelized tariff ₹1.196/ kWh)
	₹/ kWh	₹/ kWh	₹/ kWh	₹/ kWh
	(A)	(B)	(C) = (A) – (B)	(D) = 1.196 + (B)
Petitioner's bid time assumed INR depreciation rate of 0.74% p.a. with base Exchange rate as ₹ 40.27/ USD	0.279	0.268	0.012	1.463

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35. The petitioner has filed the Interlocutory Application seeking interim/provisional relief in tariff of the generating station pending disposal of the petition.

Analysis and Decision

36. We have considered the submissions of the petitioner and respondents and have perused the materials on record. On account of the depreciation of INR Vis-à-vis USD in the recent years particularly after the year 2008, the petitioner has stated that the project economics which formed the basis of the bid has been disturbed as a result of which it had to incur additional expenditure on account of project cost and debt service obligations. The petitioner has sought a declaration that the depreciation of INR Vis-à-vis USD is a force majeure event for which the petitioner needs to be compensated in terms of the PPA. The petitioner has also invoked the regulatory power of the Commission to seek relief in the form of a suitable mechanism to address the situation arising out of the depreciation of value of the INR. The respondents have opposed the claim of the petitioner on the ground that depreciation of INR is not covered under the force majeure conditions in the PPA and any relief by invoking the regulatory power would result I determination of tariff which is not permissible in a case where tariff has been discovered through the process of competitive bidding and adopted under section 63 of the 2003 Act. There are other issues which have been raised by the respondents such as proper notice has not been given under the PPA before approaching the Commission and the units of the generating stations have not been commissioned. In view of the discussions and submissions of the petitioner and respondents, the following issues arise for our consideration:-

(a) Whether the units of the generating station have been declared under commercial operation and whether relief can be sought in the PPA for force majeure events irrespective of the date of commercial operation?

(b) Whether the requirements of Article 17 of the PPA have been complied with before approaching the Commission?

(c) Whether the depreciation of INR vis-à-vis USD can be termed as unprecedented, uncontrollable and unforeseeable event?

(d) Whether depreciation of INR Vis-s-Vis USD in recent years constitutes a force majeure event under the PPA?

(e) Whether the petitioner is entitled to any relief under section 79(1)(b) of the Act?

A. Commercial Operation of the Generating Station and relief sought under conditions of PPA

37. The present petition alongwith three other petitions filed by the petitioner were heard together on 18.7.2013 and 27.8.2013 wherein the date of commercial operation of unit 3 of the generating station was raised. During the hearing on 27.8.2013, learned senior counsel appearing on behalf of the petitioner submitted that fresh commissioning test was carried out from 11.8.2013 to 14.8.2013 and the unit has completed successful testing for 72 hours and power is being scheduled to the procurers. Learned counsel for HPPC and representative of PSPCL submitted that COD has not been declared as per the PPA as the unit did not run continuously for 72 hours at 95% of the installed capacity and there was a dip in injection below 575 MW on 12.8.2013 at around 17.45 hours. However, the representative of WRLDC submitted that the unit has been tested for 72 hours from 11.8.2013 to 14.8.2013 and based on the acceptance by the lead procurer, scheduling has

commenced from 16.8.2013. The Commission had directed WRLDC to file complete details of the performance test which has been filed. The issue of commercial operation is being addressed in Petition No.6/MP/2013 and 85/MP/2013. The fact remains that the scheduling of power has started from 16.8.2013, pending decision of this Commission regarding date of commercial operation of the generating station. Therefore, commercial operation of the generating station no more remains an issue for consideration of the claims of the petitioner in this petition as the relief if granted will be serviced in tariff from the date of commercial operation as may be decided.

B. Notice under the PPA and compliance of requirements of Article 17 of the PPA

38. The petitioner has submitted that it wrote to the procurers on 15.12.2012 setting out the impact of the unprecedented, unforeseen and uncontrollable depreciation of INR vis-à-vis USD on the project and requesting for a meeting with the procurers. The petitioner has submitted that the letter dated 15.12.2012 is a notice under Article 17.2.1 of the PPA. The petitioner has submitted that a meeting was held with the procurers on 29.12.2012; however the procurers instead of discussing the issues had taken an evasive posture with respect to the notice dated 15.12.2012 issued by the petitioner. On 31.12.2012, the petitioner wrote to the procurers informing them that the letter dated 15.12.2012 was a notice under Article 17.2.1 of the PPA. However, MPPMCL in its letter dated 7.1.2013 rejected the letter dated 15.12.2012 as a notice under Article 17.2.1 of the PPA and advised the petitioner to give a proper notice in accordance with the said article. The petitioner in its letter dated 14.1.2013 reconfirmed to the petitioner that its letter dated 15.12.2012

was a notice under Article 17.2.1 of the PPA and the meeting dated 29.12.2012 satisfies the requirement of meeting under Article 17.2.2 for amicable settlement within 30 days of the notice under Article 17.2.1. According to the petitioner, the effort towards amicable settlement has failed and accordingly, the petitioner has approached the Commission under Article 17.3 of the PPA.

39. MPPMCL in its reply has refuted that it has taken an evasive posture in it letter dated 7.1.2013. MPPMCL has submitted that since the notice of the claim was not given as per the requirement of Article 17.2.1 of the PPA and the same should be complied with. During the hearing on 14.3.2013, the representative of the PSPCL raised the point that the procedure laid down in Article 17 of the PPA had not been complied with and the petition was premature. Learned senior counsel refuted the submission of the representative of PSPCL. After hearing the parties, the Commission had directed the petitioner to give a concrete proposal to the procurers by 22.3.2013 in terms of Article 17 of the PPA and the lead procurer was directed to convene a meeting of procurers to discuss the proposal and file the outcome of the decision on affidavit by 10.4.2013. During the hearing on 16.4.2013, learned counsel for MPPMCL submitted that a meeting of all procurers was convened on 20.3.2013 and the dispute between the petitioner and procurers remained unresolved. MPPMCL has placed on record the minutes of the meeting dated 20.3.2013 vide affidavit dated 25.4.2013.

40. Articles 17.2.1, 17.2.2 and 17.2.3 of the PPA deal with amicable settlement of dispute and Article 17.3.1 of the PPA deals with dispute resolution by the Commission. The said Articles are extracted as under:

"**17.2 Amicable Settlement**

17.2.1 Either Party is entitled to raise any claim, dispute or difference of whatever nature arising under, out of or in connection with this Agreement including its existence or validity or termination (collectively "Dispute") by giving a written notice to the other Party, which shall contain:

(i) A description of the Dispute;

(ii) The grounds for such Dispute; and

(iii) All written materials in support of its claim.

17.2.2 The other Party shall, within thirty (30) days of issue of dispute notice issued under Article 17.2.1, furnish:

(i) Counter-claim and defences, if any, regarding the Dispute; and

(ii) All written material in support of its defences and counter-claim.

17.2.3 Within thirty (30) days of issue of notice by any Party pursuant to Article 17.2.1 or Article 17.2.2, both the Parties to the Dispute shall meet to settle such Dispute amicably. If the Parties fail to resolve the Dispute amicably within thirty (30) days of receipt of the notice referred to in the preceding sentence, the Dispute shall be referred to Dispute Resolution in accordance with Article 17.3.

17.3 Dispute Resolution

17.3.1 Where any Dispute arises from a claim made by any Party for any change in or determination of the Tariff or any matter related to Tariff or claims made by any Party which partly or wholly relate to any change in the Tariff or determination of any of such claims could result in change in the Tariff or (ii) relates to any matter agreed to be referred to the Appropriate Commission under Articles 4.7.1, 13.2, 18.1 or clause 10.1.3 of Schedule 17 hereof, such Dispute shall be submitted to adjudication by the Appropriate Commission. Appeal against the decisions of the Appropriate Commission shall be made only as per the provisions of the Electricity Act, 2003, as amended from time to time.

The obligations of the Procurers under this Agreement towards the Seller shall not be affected in any manner by reason of inter-se disputes amongst the Procurers.

17.3.2 If the Dispute arises out of or in connection with any claims not covered in Article 17.3.1, such Dispute shall be resolved by arbitration under the Indian Arbitration and Conciliation Act, 1996 and the Rules of the Indian Council of Arbitration, in accordance with the process specified in this Article. In the event of such Dispute remaining unresolved as referred to in Article 17.2.3 hereof, any party to such Dispute may refer the manner to registrar under the Rules of the Indian Council of Arbitration."

41. From the above provision, it is apparent that a party making a claim or raising a dispute under the PPA is required to give a notice under Article 17.2.1 to the other

party indicating therein a description of the dispute, ground for such dispute and all written materials in support of such dispute. The petitioner and the procurers are in disagreement that the letter dated 15.12.2012 was a notice under Article 17.2.1 of the PPA. While the procurers insist that the claim or dispute should be in accordance with the provisions of Article 17.2.1 of the PPA, the petitioner has maintained that even though the articles have not been quoted in the letter dated 15.12.2012, the said letter is in fact a notice under Article 17.2.1 of the PPA. It is not necessary for us to go into this question at this stage as the Commission during the hearing on 14.3.2013 had directed the petitioner to give a concrete proposal of its claim to the procurers and the lead procurer was directed to convene a meeting to discuss the proposal and submit the outcome of the discussion. The lead procurer has placed on record the minutes of the meeting held on 20.3.2013 under the Chairmanship of MD MPPMCL of to discuss the claim of the petitioner. The decision in the meeting as recorded in the minutes is extracted as under:-

> "20. The Chairman concluded that all procurers were of the view that the issue had to be seen in the context of the provisions of the PPA, which did not provide for any nexus between the foreign exchange rate and the price bid of the successful bidder and hence, SPL could not claim any tariff increase on account of change in foreign exchange rate. As against that SPL was of the view that it is entitled for compensation."

In view of the above outcome of the meeting between the petitioner and the procurers, we are of the view that the amicable settlement in terms of Article 17.2.3 of the PPA has failed and the dispute can be considered by the Commission in terms of article 17.3.1 of the PPA.

C. Whether the depreciation of INR vis-à-vis USD in recent years is an unprecedented, unforeseeable and uncontrollable event?

42. The petitioner has submitted that on account of depreciation of INR over which it has no control, its project economics has gone haywire and it is unable to discharge its obligations under the PPA. The petitioner's consultant, KPMG during the hearing submitted that from 2002-2007, the INR was appreciating @ 2% to 5% and after 2007, INR depreciated nearly 3% which was unprecedented. The Commission had directed the petitioner to place the data for at least 20 years i.e. 1987-2007 regarding INR/USD exchange rate movement. The petitioner has submitted the data which has been extracted in Para 31 above. The Commission has considered the time series data for about 40 years on foreign exchange rate of INR vis-a-vis USD along with the annual percentage change for the calendar years 1970-2013 as under:

Table-1: Exchange Rate of the Indian Rupee vis-à-vis the US Dollar, 1970-2013		
Year	(₹ per USD)	Annual % change
1970	7.57	
1971	7.52	-0.6%
1972	7.56	0.4%
1973	7.67	1.6%
1974	8.04	4.7%
1975	8.41	4.6%
1976	9.00	7.1%
1977	8.76	-2.7%
1978	8.21	-6.3%
1979	8.15	-0.8%
1980	7.88	-3.3%
1981	8.69	10.3%
1982	9.49	9.2%
1983	10.14	6.8%
1984	11.37	12.1%
1985	12.36	8.8%
1986	12.61	2.0%
1987	12.96	2.8%
1988	13.91	7.4%
1989	16.22	16.6%
1990	17.50	7.9%
1991	22.69	29.7%
1992	25.92	14.2%

1993	31.44	21.3%
1994	31.37	-0.2%
1995	32.42	3.3%
1996	35.43	9.3%
1997	36.32	2.5%
1998	41.27	13.6%
1999	43.06	4.3%
2000	44.94	4.4%
2001	47.19	5.0%
2002	48.60	3.0%
2003	46.58	-4.2%
2004	45.32	-2.7%
2005	44.10	-2.7%
2006	45.31	2.7%
2007	41.35	-8.7%
2008	43.50	5.2%
2009	48.40	11.3%
2010	45.73	-5.5%
2011	46.67	2.1%
2012	53.44	14.5%
2013	58.63	9.7%

43. The analysis of the above data shows that value of INR against the USD ranges from ₹7.57 in 1970 to ₹58.63 in 2013. Between the years 1981 to 2002, INR has consistently depreciated with the exception of marginal appreciation in the year 1994. The depreciation during this period ranges from ₹8.68 to ₹48.60, i.e. an average of 8.8%. However, appreciation of INR is observed in the years 2003 (4.2%), 2004 (2.7%), 2005 (2.7%), 2007(8.7%) and 2010 (5.5%). After 2007, INR has depreciated in 2008(5.2%), 2009(11.3%), 2011(2.1%), 2012(14.5%) and 2013 (9.7%). Out of the 40 year period, depreciation has been experienced in 29 years and appreciation of INR is noticed only in 11 years. Out of them, appreciation of INR is marginal in 8 years ranging from 0.2% to 3.3%. Only there is perceptible appreciation noticed in the years 1978(6.3%), 2007(8.7%) and 2010 (5.5%). Thus, the data shows a trend of depreciation of INR over the years with intermittent appreciation in a few years.

44. The petitioner has submitted that in the year 2007 INR was depreciating when it submitted the bid. The petitioner in its affidavit dated 11.11.2013 has submitted that the compounded annual growth rate (CAGR) based on the exchange rate for the period from 1993 to 2007 is 1.83%. It bears mention here that the bid for the project was submitted by the petitioner on 7.12.2006 and the financial bids were opened on 18.12.2006. Therefore, on the date of submission of the bid, INR was in fact depreciating and the depreciation rate for the year 2006 was 2.7%. Therefore, the petitioner could not have taken into account the exchange data for the year 2007 while quoting the bid in 2006. The exchange rate data till the year 2006 should be considered in order to assess the claim of the petitioner regarding unprecedented depreciation of INR vis-à-vis USD post 2007. If the exchange rate data for the period from 1993 to 2006 is used to calculate the escalation rate, then the average percentage of annual increase works out to 3.0% and the CAGR works out to 2.91%. If this CAGR is used as the basis for projecting the exchange rate for year 2012 and 2013, then the predicted value of exchange rate for the years 2012 and 2013 work out as under:

	In ₹
1993 (INR-USD Exchange Rate)	31.21
2006 (INR-USD Exchange Rate)	45.32
CAGR	2.8%
2012 predicted using CAGR of 2.8% from year 2006	53.49
Actual Value of INR-USD Exchange rate in year 2012	53.49
2013 predicted using CAGR of 2.8% from year 2006	54.99
Actual Value of INR-USD Exchange rate in year 2013	58.63
2014 predicted using CAGR of 2.8% from the year 2006	56.53
Actual value of INR-USD Exchange rate for 2014(as on 6.2.2014)	62.50

From the above, it emerges that had the petitioner based its assessment of the past 20 years data as on submission of its bid in December 2006 and factored the

escalation based on the CAGR of 2.8%, the exchange rate for 2012 would have the almost equal to the exchange rate predicted based on the said CAGR for 2012. However, for the year 2013, the exchange rate based on the CAGR of 2.8% would have been 54.99 as against the actual exchange rate of ₹58.63. Similarly, for the year 2014, the exchange rate has remained above ₹61.50/1 USD as against the predicted exchange rate of based on CAGR of ₹56.53/1 USD.

45. We have also considered the depreciation on the basis of average method of calculating the depreciation by using different time series data. One time series data considered is for 20 years period as on the year of submission of the bid i.e. from 1986 to 2006. The second time series data considered pertain to the period 1993 to 2006 since the liberalised exchange rate system (LERMS) was replaced by the unified exchange rate system based on market determined exchange rate in 1993. The third time series data pertain to the period 2007 to 2013 i.e. the period following the year of bid. The fourth time series data pertains to the period 2008 to 2013 i.e. after the petitioner was awarded the bid. The results are as under:

Period	Time series data considered	Average annual growth of depreciation (%)
Data of exchange rate of INR vis-à-vis USD	1970 to 2013	5.1
20 years data prior to bid submission	1986 to 2006	6.9
Data from the year of introduction of unified exchange rate till the year of submission of bid	1993 to 2006	3.0
Data for the period following award of bid till 2013	2008 to 2013	6.2

It is apparent from the above that the average rate of depreciation over the past 43 years is 5.1%. However, for past 20 years data as on the year of bid submission supports an average rate of 6.9% which is more than the average rate of depreciation for the period 2008-2013 which stands 6.2% respectively. However, the annual percentage of depreciation is much higher in the year 2009, 2012, 2013 and 2014 than the average rate of depreciation for the period 1986-2006.

46. In 1993 Liberalized Exchange Rate Management System (LERMS) was replaced by the unified exchange rate system and hence the system of market determined exchange rate was adopted. However, the Reserve Bank of India (RBI) did not relinquish its right to intervene in the market to enable and control the Indian currency. Experts believe that the present depreciation of INR vis-à-vis USD is result of global as well as domestic factors. Firstly, due to turbulence in European markets, investors are considering dollars as a safe haven for their investments in the longer run. This led to an increased demand for USD vis-à-vis the supply for INR leading to depreciation of INR. Secondly, experts believe that the fall in rupee can be largely attributed to the speculations prevailing in the markets. Due to a sharp increase in the dollar rates, importers suddenly started gasping for dollars in order to hedge their position, which led to an increased demand for dollars. On the other hand exporters kept on holding their dollar reserves, speculating that the rupee will fall further in future. This interplay between the two forces further fuelled the demand for dollars while sequestering its supply from the market. Thirdly, there has been shift of FII's (Foreign institutional investors) from the Indian markets during the financial year 2011. As per a report, the share of India's FII in the developing markets has decreased considerably from 19.2 % in 2010 to 3.8% in the year 2011. As FII's are

taking their investments out of the Indian markets, it has led to an increased demand for dollars, further leading to a spiralling INR. Reserve Bank of India is intervening to control the downturn of INR, but no perceptible improvement has been noticed though it is expected that with the change in domestic and global factors, INR may stabilise vis-à-vis USD. The current depreciation of INR cannot be said as unprecedented as the INR has suffered severe depreciation in the past leading to the devaluation of INR several times. However, taking into account the trend of depreciation from September 2011 onwards, it cannot be denied that the depreciation of INR is unforeseeable and uncontrollable and has adversely affected the industries which are making payment for import or debt servicing in USD.

47. The rupee has been under pressure since August 2011 when US sovereign rating was downgraded and Euro zone crisis escalated. The currency went steadily downhill till the end of July 2012 except for intermittent respite and appreciation in January-February 2012 mainly due to European Central Banks Long Term Refinancing Operations (LTRO).

49. The risks inherent in the foreign currency borrowings by the corporates as deliberated in the Economic Survey 2012-13 published by Department of Economic Affairs, Ministry of Finance, Govt. of India, is extracted as under (Chapter 6):

> *"Corporate borrowers in India and other emerging economies are keen to borrow in foreign currency to benefit from lower interest and longer terms of credit. Such borrowings however are not always helpful especially in times of high currency volatility. During good times, domestic borrowers could enjoy triple benefits of (i) lower interest rates; (ii) longer maturity; (iii) capital gains due to domestic currency appreciation. This would happen when the local currency is appreciating due to surge in capital flows and debt service liability is falling in domestic currency terms. The opposite would happen when the*

domestic currency is depreciating due to reversal of capital flows during crisis situations as happened during the 2008 crisis.

48. A sharp depreciation in local currency would mean corresponding increase in debt service liability as more domestic currency would be required to buy the same amount of foreign exchange for debt service payments. This would lead to erosion in profit margin and have mark-to-market implications for the corporate. There would also be "debt overhang" problem as the volume of debt would rise in local currency terms. Together these factors could create corporate distress especially because the rupee tends to depreciate precisely when the Indian economy is also under stress and corporate revenue and margins are under pressure.

50. Foreign currency borrowings therefore, have to be contracted carefully, especially when 'natural hedge' is available. Such 'natural hedge' would happen when a foreign currency borrower also has an export market for its products. As a result, the export receivables would offset at least to some extent, the currency risk inherent in debt service payments. This happens because fall in value of rupee that leads to higher debt service payment is partly compensated by the increase in value of rupee receivables through exports. When export receivables and currency of borrowings is different, the prudent approach is for corporations to enter currency swaps to redenominate asset and liability in the same currency to natural hedge. Unfortunately, too many Indian corporations with little foreign currency earnings leave foreign currency borrowings unhedged so as to profit from low international interest rates. This is a dangerous gamble for reasons described above and should be avoided".

D. Depreciation of INR vis-à-vis USD: Whether Force Majeure under the PPA?

51. The petitioner has submitted that the recent depreciation of INR vis-a-vis USD was not in contemplation of the parties at the time of submission of the bid and has prayed for a declaration such depreciation in INR is a force majeure event under the PPA and for restitution of the petitioner to the same economic condition as if force majeure conditions never occurred. The Hon'ble Supreme Court in M/s Dhanrajmal Gobindram Vs. M/s Shamji Kalidas & Co. AIR 1961 SC 1285 has explained the importance of ''force majeure" provision in a contract in the following terms:

> "….An analysis of ruling on the subject into which it is not necessary in this case to go, shows that where reference is made to *''force majeure"*", the intention is to save the performing party from the consequences of anything over which he has no control."

In the context of section 56 of the Indian Contract Act, 1956, Hon'ble Supreme Court in M/s Alopi Pershad & Sons Ltd. Vs Union of India {AIR 1960 SC 588} has also observed as under:

> "The Indian Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate – a wholly abnormal rise or fall in price, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet, this does not in itself affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point – not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because of its true construction it does not apply in that situation,."

52. The above judgement of the Supreme Court makes it clear that rise or fall in price or sudden depreciation of currency itself does not result in frustration of contract. What is of relevance is whether the parties have never agreed to be bound by a fundamentally different position which has now emerged. In other words, it has to be gathered from the provisions of the PPA whether the parties to the PPA i.e. the seller and procurers had never considered the foreign exchange risk including depreciation of INR during the performance of their obligations under the PPA and the unexpected and unforeseeable depreciation has disturbed the very basis of the PPA. Therefore, it is necessary to examine the provisions of the PPA with regard to the foreign exchange risks.

53. The petitioner was awarded the bid to execute the Sasan UMPP after being selected as the lowest bidder on the basis of the competitive bidding carried out under section 63 of the 2003 Act. Para 4.3 of the Bidding Guidelines provides as under:

> "4.3 Tariffs shall be designated in Indian Rupees only. **Foreign exchange risks, if any, shall be borne by the supplier.** Transmission charges in all cases shall be borne by the procurer.

> Provided that the foreign exchange rate variation would be permitted in the payment of energy charges (in the manner stipulated in para 4.1 (iii) if the procurer mandates use of imported fuel for coastal power station in case-2.
>
> Provided further that the foreign exchange rate variation would also be permitted in the payment of energy charges (stipulated in para 4.11 (iii) if the bidder chooses to supply power using domestic gas of RLNG or both or imported coal for long term procurement under Case-1."

Thus, the Bidding Guidelines require that tariff shall be quoted in INR only except where the procurers mandate use of imported coal. In this case, there is no such mandate of the procurers to use imported coal. In fact, the procurers have arranged a captive coal mine which shall be developed by the successful bidder to meet the requirement of fuel and the bidder is required to quote its bid after taking into account all expenditures on the project including development of the captive mines. Thus as per the Bidding Guidelines, the procurers are insulated from any foreign exchange risk and it falls within the exclusive domain of the petitioner.

54. This is further reinforced by the provisions in Paras 2.4 and 2.7.1.1.3 of the RfP document which provide as under:

> "2.4 Tariff
>
> The tariff shall be as specified in the PPA and shall be payable in Indian Rupee only. The Bidder shall quote Quoted Tariff for each Contract Year during the term of the PPA as per Format 1 of Anneuxure-4.
>
> Each of the Procurers shall provide the Letter of Credit and Collateral Arrangement as per the terms of the PPA.
>
> 2.7.1.1.3The **Quoted Tariff in Format 1 of Annexure 4 shall be an all inclusive tariff and no exclusions shall be allowed. The Bidder shall take into account all costs including capital and operating costs, statutory taxes, duties, levies while quoting such tariff. Availability of the inputs necessary for generation of power should be ensured by the Seller at the Project Site and all costs involved in procuring the inputs (including statutory taxes, duties, levies thereof) at the Project Site must be reflected in the Quoted Tariff**."

The RfP document makes it mandatory for the bidder to quote an all inclusive tariff which shall reflect all cost including capital and operating cost and statutory levies, taxes and duties. It is also the responsibility of the seller (the successful bidder to execute the project and supply power) to ensure availability all inputs for generation of power at the project site and to reflect all cost in the quoted tariff. Thus the RfP document does not require a bidder to quote the different elements of tariff such as equity, interest on loan, depreciation, O&M expenses and interest on working capital, but to quote an all inclusive tariff taking into account all expenditure for building and operating the project. Since the tariff is all inclusive, the bidder is expected to factor in all possible expenditures including the expenditure on foreign exchange rate variation that may arise on account of depreciation of INR if the project has a component of imported equipment or foreign loan.

55. As per format 1 Annexure 4, the bidders are required to quote quoted non-escalable capacity charges, quoted escalable capacity charges, quoted non-escalable energy charges and quoted escalable energy charges in Rupees/kWh only. Therefore, both the bidding guidelines and the provisions of the RfP require the bidders to quote in the INR only. Further, the bidders have been granted liberty to quote escalable capacity charges and escalable energy charges. The purpose of such escalable charges is to enable the bidder to factor in the variation in the prices of equipments and machinery, exchange rate variation, variation in interest rates, and changes in taxes, duties and levies etc. Since the quoted tariff is invited in INR only, it is the clear intention of the Bidding Guidelines and bidding documents that the bidder should factor in the foreign exchange component of the project including foreign exchange rate variation in the bid while quoting in the Indian Rupees. The

foreign exchange risk, if any, has been exclusively assigned to the bidder and failure of the bidder to build in a sound economics cannot be passed on to the procurers.

56. The petitioner has submitted that the bidding guidelines are silent on two essential issues such as project financing which may have a foreign exchange component and procurement of equipment from abroad both of which significantly impact the project economics. As already noted in the preceding paragraph, it is within the exclusive domain of the bidder to factor in the foreign exchange risk if any while quoting the tariff. Since the foreign exchange risk is specifically assigned to the bidder, there is no requirement to provide for foreign exchange risk for project financing through foreign loan or import of equipment. Even while quoting in INR, the petitioner had the option to insulate itself from the foreign exchange rate variation by a pragmatic mix of escalable and non-escalable elements. At the cost of repetition, it is reiterated that the petitioner had the option of quoting capacity charges under two different heads, namely, escalable capacity charge and non-escalable capacity charge. The escalable capacity charge was indexed to a fixed ratio 60:40 for WPI and CPI to take care of the inflation rates. For the non-escalable component, the petitioner had to come up with his own calculation of capacity charges for each year of the 25 years period. The petitioner had quoted the entire capacity charge (about 99.18%) as non-escalable, thereby absorbing all the risks that may arise on account of price escalation including foreign exchange risk. It is pertinent to mention that the inflation rates and nominal exchange rates variations have had a positive trend. Had the petitioner quoted the capacity charges as escalable component, then the inflation index notified by this Commission from time to time would have provided a hedge for exchange rate variation. Since the petitioner had consciously not quoted escalable capacity charge, it is fair to assume that the petitioner must have relied on its own

inflation index while quoting non-escalable component of the capacity charges since inflation rate indexing provides an indirect way of hedging against INR depreciation. The inflation rates for escalable component of fixed charges based on composite index of WPI & CPI for the period 2001-13 are indicated in the table below:

Table-2: Inflation based on Composite Index of WPI and CPI				
Year	WPI for All Commodities	CPI for Industrial Workers	Composite Index using weight of 60% to WPI & 40% to CPI	Inflation based on Composite Index
2001	85.8	99	91.02	
2002	87.9	103	93.99	3.3%
2003	92.6	107	98.37	4.7%
2004	98.7	111	103.65	5.4%
2005	103.4	116	108.33	4.5%
2006	109.6	123	114.92	6.1%
2007	114.9	131	121.26	5.5%
2008	124.9	142	131.62	8.5%
2009	127.9	157	139.55	6.0%
2010	140.1	176	154.42	10.7%
2011	153.4	192	168.61	9.2%
2012	164.9	209	182.69	8.3%
2013	175.3	232	197.81	8.3%

Note: Figures for the year 2013 are provisional

It can be observed from the above table that during the period from 2008 to 2013, there was a positive trend of inflation ranging from 8.5% to 10.7%. Had the petitioner quoted escalable capacity charges, the petitioner could have substantially mitigated the impact of foreign exchange rate variation.

57. From the above discussion, we come to the conclusion that the petitioner and procurers had anticipated and agreed that any foreign exchange risk shall be the exclusive responsibility of the petitioner and therefore, recent depreciation in INR has not fundamentally changed the situation between the parties which would result in

frustration in contract unless the affected party is compensated for depreciation of INR.

58. Learned senior counsel appearing for the petitioner argued that depreciation of INR has posed commercial hardship to the petitioner for discharging its obligations under the PPA and has relied upon the following judgements in Smt Sushila Devi and Another Vs. Hari Singh and Others [(1971) 2 SCC 288], Govindbhai Gordharnbhai Patel and others Vs. Gulam Abbas Mullah Allibhai and others [(1977) 3 SCC 179] in support of his contention that commercial impracticability is a basis for frustration of contract under the PPA.

59. We have examined the judgements in relation to the facts in the present case as under:

(a) In the case of Sushila Devi supra, the appellants were legal representatives of the owner of a village. In January, 1947, the owner called for tenders for taking the property on lease for a period of three years. The respondents' tender was accepted and they deposited along with the tender earnest money and security for the payment of rent. The terms of the tender required that the lease deed should be got registered by the lessee and that the lessee alone would be personally responsible for taking possession of the lands. As a result of the partition of India the village became a part of Pakistan. Even before actual partition, because of serious communal troubles, it was not possible for the respondents to go to the village either to cultivate the lands or to collect the rent from those who were cultivating. No lease deed was executed or registered. Under those circumstances the respondents filed a suit claiming a decree for the refund of the amounts deposited and damages. The only issue

on which the parties went to trial was whether the contract was frustrated because of the supervening circumstances of partition and communal violence. The lower courts held that the contract had become impossible of performance and decreed the suit in part. In appeal, Hon'ble Supreme Court held as under:

> "……………..But in fact as found by the trial court as well as by the appellate court, it was impossible for the plaintiffs to even get into Pakistan. Both the trial court as well as the appellate court have found that because of the prevailing circumstances, it was impossible for the plaintiffs to either to take possession of the properties intended to be leased or even to collect rent from the cultivators. For that situation the plaintiffs were not responsible in any manner. As observed by this Court in Satyabrata Ghose v. Mugneeram Bangur and Co. and anr, the doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. The view that Section 56 applies only to cases of physical impossibility and that where this section is not applicable recourse can be had to the principles of English law on the subject of frustration is not correct. Section 56 of the Indian Contract Act lays down a rule of positive law and 'does not leave the, matter to be determined according to the intention of the parties. The impossibility contemplated by Section 56 of the Contract Act is not confined to something which is not humanly possible. **If the performance, of a contract becomes impracticable or useless having regard to the object and purpose the parties had in view then it must be held that the performance of the contract has become, impossible. But the supervening events should take away the basis of the contract and it should be of such a character that it strikes at the root of the contract.** From the facts found in this case it is clear that the plaintiffs sought to take On lease the properties in question with a enjoy those properties either by personally cultivating sub-leasing them to others. That object became impossible because of the supervening events. Further the terms of the agreement between the parties relating to taking possession of the properties also became impossible of performance. Therefore we agree with the trial court as well as the appellate court that the contract had become impossible of performance."

In the case under consideration, depreciation of INR vis-à-vis USD neither takes away the basis of the PPA between the petitioner and the procurers nor does it strike at the very root of the PPA. The parties to the PPA through a conscious decision have kept the foreign exchange risk out of the purview of the PPA as the tariff has been permitted to be designated only in INR and foreign exchange risk if any rests with the seller. In our view, the obligations under the PPA have not become impossible of performance on account of depreciation of INR.

(b) In the case of Govindbhai Patel and Others Vs Gulam Abbas Mulla Allibhai and Others, the respondents agreed to sell their agricultural land to the appellants. The title deeds and possession of the land were given to the appellants and both parties jointly applied to the District Deputy Collector, Thana Prant, under s. 63 of the Bombay Tenancy and Agricultural Lands Act, 1948, seeking permission for the sale. The permission was refused on the ground that the intending purchaser had failed to obtain a certificate from the Collector under Rule 36(f) of the Bombay Tenancy and Agricultural Lands Rules 1956, that he intended to take to the profession of agriculture and was capable of cultivating land personally. The appellants thereafter obtained the requisite sanction from the Additional Collector, Thana, in spite of the respondents' non-cooperation. A suit by the respondents for declaring the agreement void in law was decreed by the Trial Court. In appeal, the High Court opined that the Prant Officer's refusal to permit the sale had rendered the agreement impossible of performance. On appeal to the Supreme Court, it was held as under:

> "In the instant case, there is no term or condition in the agreement in question which stipulates that the agreement would be treated as having become impracticable on the refusal of the Prant Officer to grant the permission under section 63 of the Act. The parties are, therefore, governed purely by section 56 of the Contract Act according to which a contract becomes void only if something supervenes after its execution which renders it impracticable. On the contention advanced on behalf of the respondents, the question that arises is whether the above quoted order of the Prant Officer, Thana Prant, dated December 8, 1958, rendered the contract impracticable. The answer to this question is obviously in the negative. The said order, it will be noted, was not of such a catastrophic character as can be said to have struck at the very root of the whole object and purpose for which the parties had entered into the bargain in question or to have rendered the contract impracticable or impossible of performance. A careful perusal of the order would show that it was neither conclusive nor was it passed on the merits of the aforesaid application. The permission was refused by the Prant Officer only on the technical ground that the appellants had not obtained the requisite certificate

as contemplated by rule 36(f) of the Rules. It did not in any way prohibit the appellants from making a fresh application to the Collector, Thana Prant, who in view of the Phraseology of section 63 of the Act read with clause (f) of rule 35 of the Rules appears to be the only authority competent to grant the requisite certificate. The said order also did not put any fetter on the appellants to apply to the Collector or the Additional Collector for grant of the requisite permission for sale and purchase of the land after obtaining the aforesaid certificate. We, are, therefore, clearly of the opinion that no untoward event or change of circumstances supervened to make the agreement factually or legally impossible of performance so as, to attract section 56 of the Contract Act."

In our view, the above decision of the Supreme Court does not advance the case of the petitioner. In the present case, the depreciation of INR vis-à-vis USD has not rendered the PPA impracticable of performance. Apart from the fact that performance of the PPA was never premised on the basis of the imported equipment or foreign loan, the petitioner had the option for hedging the foreign exchange risk which the petitioner never did. Prudent Utility Practice demanded that the petitioner while quoting the tariff in INR should have factored the foreign exchange risk for imported equipment or foreign loan by appropriate instruments including hedging available in the market.

60. Next we consider the provisions of the PPA with regard to force majeure and consider whether the case of the petitioner falls within any of the circumstances covered under force majeure. The PPA defines that 'force majeure' shall have the same meaning as ascribed thereto in Article 12.3. Article 12.3 is extracted as under:

12.3 Force Majeure

A Force Majeure means any event or circumstance including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices.

i) Natural Force Majeure Events:

Act of God, including, but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the Site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred years.

ii) Non-Natural Force Majeure Events:

1) Direct Non-Natural Force Majeure Events

(a) Nationalization or compulsory acquisition by any Indian Government Instrumentality of any material assets or rights of the Seller or the Seller's contractors or

(b) The unlawful, unreasonable or discriminatory revocation of, or refusal to renew, any Consent required by the Seller or any of the Seller's contractors to perform their obligations under the Project Documents or any unlawful, unreasonable or discriminatory refusal to grant any other consent required for the development/ operation of the Project, provided that an appropriate court of law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down, or

(c) Any other unlawful, unreasonable or discriminatory action on the part of an Indian Government Instrumentality which is directed against the Project, provided that an appropriate court of law declares the renovation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down.

2) Indirect Non-Natural Force Majeure Events

(a) Any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action; or

(b) Radioactive contamination or ionising radiation originating from a source in India or resulting from another Indirect Non Natural Force Majeure Event excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the site by the affected party or those employed or engaged by the affected party; or

(c) Industry wide strikes and labor disturbances having a nationwide impact in India.

12.4 Force Majeure Exclusions

Force Majeure shall not include (i) any event or circumstances which is within the reasonable control of the parties and (ii) the following conditions, except to the extent that they are consequences of an event of Force Majeure:

(a) Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials spare parts, fuel or consumables for the projects;

(b) Delay in the performance of any contractor, sub-contractors or their agents excluding the conditions as mentioned in Article 12.2;

(c) Non-performance resulting from normal wear and tear typically experienced in power generation materials and equipments;

(d) Strikes or labour disturbance at the facilities of the Affected Party;

(e) Insufficiency of finances or funds or the agreement becoming onerous to perform; and

(f) Non-performance caused by or connected with the Affected Party's:

i. Negligent or intentional acts, errors or omissions;

ii. Failure to comply with an Indian Law; or

iii. Breach of or default under this Agreement or any Project Documents."

61. According to Article 12.3, an Affected Party can claim relief for a force majeure event under the PPA. An Affected Party has been defined as "any of the Procurers or Seller whose performance has been affected by an event of force majeure". The petitioner who is seller in this case claims to have been affected by force majeure event in the form of depreciation of INR vis-à-vis USD which has affected discharge of its obligations under the PPA. In the light of the provisions of Article 12.3 and 12.4 of the PPA, the following points need to be considered to examine whether depreciation of INR can be considered as 'force majeure' affecting the petitioner in discharge of its obligations under the PPA:

(a) Whether the depreciation of INR vis-a-vis USD is included under any of the events enumerated as force majeure under Article 12.3 of the PPA?

(b) Whether the depreciation of INR vis-à-vis USD is an event or circumstance which delays or unavoidably prevents the petitioner in performance of its obligations under the PPA?

(c) If so, whether such event or circumstance is not within the reasonable control of the petitioner and could have been avoided with reasonable care and prudent utility practice? and

(d) Whether such event or circumstance does not fall within any of the exclusions enumerated in Article 12.4 of the PPA?

62. Article 12.3 of the PPA enumerates certain events or circumstances as force majeure under the heads 'natural force majeure' and 'non-natural force majeure'. Depreciation of INR vis-à-vis USD does not fall within any of the events or circumstances enumerated under the said Article. As regards the point whether depreciation of INR has delayed or prevented the petitioner in discharge of its obligations under the PPA and if so whether it was not within the reasonable control of the petitioner and could not have been avoided if the petitioner had taken reasonable care or complied with Prudent Utility Practices, it is pertinent to note that under Article 4.1 of the PPA, the seller has the obligations to build, own and operate the project. One of the obligations under the said article is to execute the project in a timely manner so as to enable each of the units and the power station as a whole to be commissioned not later than the Scheduled Commercial Operation Date and to make available the contracted capacity to meet the procurers' scheduling and despatch requirement throughout the term of the agreement. The petitioner has submitted that it is executing the project by importing equipment for the power plant and the coal mines from China and USA for which payment has to be made under USD. Moreover, the petitioner has contracted loan from the foreign banks in view of the favourable interest rates and to facilitate payment in USD for imported equipment. According to the petitioner, depreciation of INR vis-à-vis USD post the

submission and acceptance of the bid has affected the project economics and consequently the execution of the project as a result of which the petitioner is required to incur liability in the form of additional equity of ₹2876 crore in capital cost of the project and ₹ 3821 crore for servicing the debt obligations for the foreign loan. In our view, depreciation of INR vis-a-vis USD has neither delayed nor prevented the petitioner from discharging its obligations under the PPA. It is not a case where on account of the adverse balance of payment situation, USD is not available for payment of imported equipment or for meeting debt service obligation for the foreign loan availed. USD is available in the market but at a higher price and the risks for exchange rate variation has been assumed by the petitioner by agreeing to the terms and conditions of the bid which assigns the foreign exchange risk to the successful bidder/seller.

63. Though the petitioner has no control over depreciation of INR, the question arises whether the petitioner could have avoided the impact of the event had it taken reasonable care or complied with prudent utility practice. To consider this aspect, it is necessary to look at the background leading to the contracting of loan in USD by the petitioner. The petitioner had initially taken a loan in INR from a consortium of banks and financial institutions for an amount ₹11,612 crore through the Facility Agreement on 21.4.2009 and a foreign loan of USD 486 million through PCF Agreement on 21.4.2009 from India Infrastructure Company (UK) Limited and State Bank of India. In the year 2009, INR was depreciating against USD @ 11.3% and therefore, the petitioner should have hedged the loan against further depreciation. The petitioner's consultant KPMG submitted during the hearing that the petitioner did not hedge because the cost of hedging would have been higher. As regarding hedging cost

which was ruling at 1% in 2008 rose to 7% in 2011 in short term and became very expensive to hedge, especially for longer period. It has not been explained as to why the debt of USD 466 million was not hedged when the hedging cost was lower and INR was depreciating. The petitioner has contracted foreign debt of USD 650 million, USD 1109 million and USD 150 million through the Credit Agreement dated 30.9.2011, Sinosure Agreement dated 1.11.2011 and Secured Facility Agreement dated 30.9.2011. We enquired from the learned senior counsel for the petitioner as to whether any refinancing of loan was taken. Learned senior counsel had replied as under (para 14 of the RoP dated 10.10.2013):

> "14. In response to the Commission's query as to whether any refinancing loan was taken, it was explained by the learned senior counsel for the petitioner that at the stage of bid submission what was contemplated was a mix of Rupees and Dollar financing. At the time of financial closure, because of slow down, dollar financing was not available and therefore, Sasan went for Rupee financing as a transit strategy. However, since the equipment procurement was in dollar term, financing in dollar was arranged subsequently. The Commission observed that since Rupee loan was replaced with dollar loan, Sasan has gone for higher risk and had Sasan continued with Rupee financing, the risk of volatility would not have been there. In response, learned counsel submitted that Sasan went for Dollar loan since the exposure was in dollar terms as any prudent project developer would have done. In reply to another query of the Commission whether the dollar loan was on fixed rate of interest or floating rate of interest, the representative of the petitioner clarified that loan from US EXIM Bank was on fixed interest while other loans are on floating rate of interest."

It appears to us that the petitioner has swapped the loan in INR with foreign debt in the year 2011. The prevailing exchange rate as on 29.9.2011 was ₹48.9253/USD and as on 30.11.2011, the prevailing rate was ₹52.1650/USD. The petitioner took the risk of going for the foreign debt of 15 year period without hedging especially when the trend of depreciation of INR had already set. KPMG submitted during the hearing that the prevailing hedging rate in 2011 was 7% and hedging would have been expensive for long period. In our view, the petitioner by following prudent practice could have hedged the loan and minimised the risk to a larger extent.

64. As regards the applicability of Article 12.4 in this case, we notice that "unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts, fuel or consumables for the projects" are not included under force majeure except to the extent they are consequence of an event of force majeure. Volatility of international currency market is a normal phenomenon and cannot be considered as a force majeure event. Therefore, change in the price of imported equipment on account of depreciation of INR cannot be considered as a direct consequence of force majeure. Therefore, the case of the petitioner cannot be covered under the exception to the exclusion provision under Article 12.4 of the PPA.

65. In the light of the discussion above, we conclude that the petitioner's case is not covered under any of the provisions of "force majeure" under Article 12 of the PPA.

(e) Whether a case is made out under section 79(1)(b) of the PPA?

66. Learned senior counsel for the petitioner has argued that the Supreme Court has interpreted in a number of judgments that the scope of the term 'regulate' is wide and plenary. Therefore, the Commission's power to regulate under section 79(1)(b) is wider than the power to determine tariff under Sections 62 and 63 of the Act. It was argued that this Commission can take into consideration the impact of unprecedented, unforeseeable and uncontrollable steep depreciation of INR vis-à-vis USD and other factors and regulate the tariff of the petitioner's generating station in such a manner that the increase in project cost is absorbed in tariff/supplementary bill and the petitioner is restored to the same economic position as existed prior to depreciation of INR. The respondents have rejected the argument on the ground that the Commission cannot in exercise of its power under section 79(1)(b) of the Act

convert the adoption of tariff under section 63 of the Act into determination of tariff under section 62 of the Act.

67. This Commission in its order dated 15.4.2013 in Petition No.159/MP/2012 (Coastal Gujarat Power Limited Vs. Gujarat Urja Vikas Nigam Limited & Others) has examined the power of the Commission under section 79 of the Act and has come to the following conclusion:

> "81. This Commission has been vested with the function under clause (b) of sub-section (1) of Section 79 of the Act to "regulate the tariff of the generating companies having a composite scheme for generation and sale of electricity in more than one State". It has been held by the Hon'ble Supreme Court in a catena of judgements that the power to "regulate" confers plenary power over the subject matter of regulation. Some of the judgements are extracted as under:
>
> (a) Jiyajeerao Cotton Mills Ltd. Vs. M.P.Electricity Board {(1989)SCC Supl (2) 52}
>
> "The word 'regulate' has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the relevant provisions, and the court while interpreting the expression must necessarily keep in view the object to be achieved and the mischief sought to be remedied."
>
> (b) D.K.Trivedi & Sons Vs. State of Gujarat {(1986) SCC Supl 20}
>
> "The word 'regulate' means 'to control, govern, or direct by rule or regulations; to subject to guidance or restrictions; to adapt to circumstances or surroundings."
>
> (c) V.S.Rice and Oil Mills & Others Vs. State of A.P. {AIR 1964 SC 1781}
>
> "The word 'regulate' is wide enough to confer power on the State to regulate either by increasing the rate, or decreasing the rate, the test being what is it that is necessary or expedient to be done to maintain, increase, or secure supply of the essential articles in question and to arrange for its equitable distribution and its available at fair prices".
>
> (d) K. Ramanathan Vs State of Tamil Nadu & Anr. {(1985) SCC(2)116}
>
> "It has often been said that the power to regulate does not necessarily include the power to prohibit and ordinarily the word 'regulate is not synonymous with the word 'prohibit'. This is true in a general sense and in the sense that mere regulation is not the same as absolute prohibition. At the same time, the power to regulate carries with it full power over the thing subject to regulation and in absence of restrictive words, the power must be regarded as plenary over the entire subject. It implies the power to rule, direct and control and involves the adoption of a rule or guiding principle to be followed, or the making of a rule with respect to the subject to be regulated, the power to regulate implies the power to check and may imply the power to prohibit under certain circumstances, as where the best or only efficacious regulation consists of suppression. It would therefore appear that the word 'regulation' cannot have any inflexible meaning as to exclude 'prohibition'. It has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the legislation, ………."
>
> 82. The principles enunciated in the above judgements establish that the Commission has the plenary power to regulate the tariff of the generating stations, which fall under its jurisdiction which shall extend beyond the determination of tariff, keeping in view the objects of the Act to promote competition, encourage investment in electricity sector and protect consumer interest. The power to regulate tariff will also extend to the tariff determined through the competitive bidding. Therefore, if the

> situation so demands, the Commission can fashion a relief even in case of the tariff of the generating stations, which have been discovered through the competitive bidding, by providing for suitable adjustment in tariff while retaining the sanctity of competitive bidding under Section 63 of the Act.”

68. The petitioner had initially quoted ₹1.29574/kWh as levellised tariff. Lanco-Globeleq Consortium was declared as successful bidder having quoted ₹1.19617/kWh. Due to change in the equity holding of the Consortium, Empowered Group of Ministers (EGoM) considered the issue and decided that since the Consortium was not qualified at RfQ stage and its response to the RfQ was void *ab-initio*, the procurers should cancel the LoI and hold renegotiation with the remaining bidders and seek their final bid for levellised tariff. The revised offers submitted by three bidders who had extended the validity of their bid till 4.8.2007 were M/s Jai Prakash Associates Limited (₹1.65032/kWh), M/s NTPC Limited (₹2.21615/kWh) and M/s Reliance Power Limited (₹1.19616/kWh). Accordingly, Reliance Power Ltd was issued the LoI for execution of the project.

69. The petitioner has taken steps to execute the project with imported equipment and a mix of foreign and domestic debt. The petitioner has swapped the domestic debt with foreign debt in order to reduce the impact of interest on loan. The project economics and financial viability of the project has been adversely impacted on account of depreciation of INR. Learned counsel for the lead procurer, MPPMCL submitted during the hearing that “even if there is an unprecedented crisis in terms of foreign exchange variation, it is unreasonable for the petitioner to expect that the entire burden would be borne by the respondents. The petitioner should bear part of the burden by accepting lower rate of return.” This view has not been shared by some of the other respondents. Also, as per analysis projected with data in earlier paragraphs, it has been shown that the petitioner has not taken prudent care and

appropriate projection of debt management taking into consideration the actual trends of foreign exchange rate variations and also the inflation prevailing at that time. The tariff conditions as mandated in the RfP documents have been clear and without any ambiguity have put the responsibility of meeting the foreign exchange rate variations on the bidder. Therefore, it would be difficult to pass on the burden to the procurers, who accepted the bid and left the entire responsibility of arranging the debt and equity to the bidder. Neither the terms and conditions nor the interest rate variations of the debt that is to be contracted were the concern of the procurers. As discussed earlier, there was apparently no consultation or concurrence mutually on these aspects between the petitioner and procurers.

70. In our order dated 2.4.2013 in Petition No.155/MP/2012, we have given our deep consideration of the prevailing power sector problems in terms of investment, price and economic recovery of cost by the developers and at the same time, making power available at competitive rates to the consumers. After study of different cases, we had come to the conclusion that long term contracts which run up to beyond 20-21 years, have many surprises in terms of cost increase and unforeseen events leading to non-performance of contracts. We have considered therein some of the relevant findings of Jon Stern, Centre for Competition and Regulatory Policy, Department of Economics, City Univeristy, London, UK and J. Luis Guasch, World Bank Institute, Washington. One of the findings was “in the long term contracts spreading over 21 years and above, prices need to be varied sharply in unpredictable ways because of major commodity price shocks and/or exchange rate crisis." Therefore, despite all points remaining against the petitioner, we are of the view that the unprecedented and unforeseen foreign exchange rate variations

beyond the control of the petitioner and beyond the normal expectations may need to be considered for quantification and compensation by the procurers appropriately.

71. The Commission is of the view that the petitioner being the first competitively bid project, had quoted aggressive price. The cost of power generated by other supercritical/ contemporary power project is shown in the following table:

NTPC Thermal Generating Stations	Vindhyanchal STPS Stage-I	Vindhyanchal STPS Stage-II	Vindhyanchal STPS Stage-III	Vindhyanchal STPS Stage-IV	Korba STPS Stage-I & II	Sipat STPS Stage-III	Sipat STPS Stage-II	Korba STPS Stage-III	Mauda
Total tariff as in December, 2014 (in ₹/kWh)	2.5390	2.4260	2.9180	2.2680	1.4750	2.6980	2.6490	1.4730	4.5250

It can be seen that the rate quoted by the bidder is the lowest amongst all. Even the cost of generation of Hydro Power Projects is higher generally.

72. Considering the extremely competitive rate at which the procurers are getting power from the petitioner's generating station, there may be a case for the procurers to share a part of the burden as compensation on account of depreciation of INR in order to make the project viable. The Commission considers it necessary to examine all the issues with reference to the base records of the petitioner in contracting debts for the project before taking a final view on intervening and giving any directions in this regard in exercise of its power under Section 79(1)(b) of the Act in the interest of the project developer as well as the consumers of the procurer States.

73. Therefore, we direct the petitioner to submit the following information on affidavit with copy to the procurers**:**

(a) Date of bid/Date of rebid;

(b) Bid assumptions (original and revised) for the levellised tariff of ₹1.19617/kWh containing the different elements including the escalations factored for each of the elements;

(c) Estimated project cost at the time of bid and rebid and actual project cost indicating specifically cost of equipment;

(d) Purchase of equipments envisaged at the time of bid/rebid and actual sourcing and reasons for change, if any;

(e) Was there any saving in cost of purchase of equipments from China and cost envisaged at the time of bid/rebid?

(f) ROE envisaged at the time of bid/rebid;

(g) Documents relating to the first and second financial closures of the project and details of components of debt and equity;

(h) All loan agreements pertaining to both the domestic and foreign debt with full details of debt contracted along with interest rates and period of repayment/moratorium;

(i) All documents relating to the procurement of equipments;

(j) Documents relating to customs duty exemption for import of equipments;

(k) Bids invited for the BTG package including the bid of BHEL and for the mining equipments;

(l) Agreements with the OEM and Mining Equipment Manufacturer clearly showing the cost of equipments;

(m) The milestones/PERT charts for completion of projects including financial closure with details of dates of imports of equipments and actual dates of imports;

(n) Year-wise position of debts contracted and effect of FERV on interest as well as repayment as compared to the position without considering FERV;

(o) If the debts were originally contracted in rupee terms, the reasons for swapping to foreign currency loans and interest gained from the same;

(p) Since the tariff was discovered through bid and FERV is to be given on account of increasing debt liabilities whether PPA permits such a situation?

(q) When the petitioner swapped the debt from domestic to foreign currency, was there any consultation from the procurers?

(r) Utilization of debt, i.e, purchase of equipments for payment in US $/other currencies need to be co-related with reference to documents;

(s) The agreement with the procurers on coal mining and its cost and terms and conditions for pass through items;

(t) The milestones/PERT chart for completion of the project including financial closure with details of dates of imports of equipments and the actual dates;

(u) Whether there was any delay on the part of developer due to which the cost has gone up on account of inflation/FERV.

74. The petitioner shall file the above information on or before 28.2.2014 with a copy to the respondents who shall file their response on or before 15.3.2014. The petition shall be listed for hearing on 17.4.2014.

Sd/-	sd/-
(M Deena Dayalan) **Member**	**(V S Verma)** **Member**