In the Appellate Tribunal for Electricity, New Delhi
(Appellate Jurisdiction)

Appeal no. 192 of 2016 and I.A. Nos. 408 of 2016, 409 of 2016 and 410 of 2016

Dated: 3rd November,2016

Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I.J. Kapoor, Technical Member

In the matter of

Vidarbha Industries Power Limited
'H" Block, 1st Floor,
Dhirubhai Ambani Knowledge City,
Navi Mumbai, Maharashtra
400710 ... Appellant

Versus

1. **The Maharashtra Electricity Regulatory Commission,**
World Trade Centre No.1,
13th floor, Cuffe Parade, Colaba,
Mumbai, Maharashtra, 400001 ...Respondent No.1

2. **Reliance Infrastructure Limited**
'H" Block, 1st Floor,
Dhirubhai Ambani Knowledge City,
Navi Mumbai, Maharashtra, 400710 ...Respondent No.2

Counsel for the Appellant(s): **Dr. Abhishek M. Singhvi, Sr. Adv.**
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Mr Hasan Murtaza
Ms Malavika Prasad
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Mr Avishkar Singhvi
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Counsel for the Respondent(s): Mr. Buddy A. Ranganathan
Mr. Raghu Vamsy for R-1

Mr. Raunak Jain
Mr. Ghanshyam Thakkar
Ms. Mariya Mumtaz Hashmi for R-2

JUDGMENT

PER HON'BLE MR. I. J. KAPOOR, TECHNICAL MEMBER

1. The present Appeal is being filed by Vidarbha Industries Power Limited (hereinafter referred to as the **"Appellant"**) under Section 111 of the Electricity Act, 2003 against the Impugned Order dated 20.06.2016 passed by the Maharashtra State Electricity Regulatory Commission (hereinafter referred to as the **'State Commission'**) in Petition No. 91 of 2015 filed by the Appellant. In its Petition, the Appellant sought Final True-up of FY 2014-15, Provisional True-up for FY 2015-16 and determination of the Aggregate Revenue Requirement (ARR) for FY 2015-16 and Multi Year Tariff for FY 2016-17 to FY 2019-20 under Sections 61 and 62 of the Electricity Act, 2003 and the State Commission's Multi Year Tariff (MYT) Regulations 2011 and 2015.

2. The Appellant is a generating company within the meaning of Section 2 (28) of Electricity Act 2003 and is engaged in generation of electricity and has developed a 600 MW (2 x 300 MW) coal-fired Thermal Power Plant at the Maharashtra Industrial Development Corporation (MIDC) Butibori Industrial Area, District Nagpur, Maharashtra.

3. The Respondent No 1 is the Electricity Regulatory Commission for the State of Maharashtra exercising jurisdiction and discharging functions in terms of the Electricity Act 2003.

4. The Power from the Appellant's generating station is being supplied to Reliance Infrastructure Limited i.e. Respondent No. 2, which is a distribution licensee in a part of suburban Mumbai, under a long term PPA with effect from 01.04.2014 as approved by the State Commission.

5. Aggrieved by the Order 20.06.2016 passed by the State Commission, the Appellant has preferred the present appeal on following grounds:

a) Disallowance of fuel cost for the period FY 2014-15 and 2015-16 as set out inter alia, in paragraphs 2.10.30, 3.10 and 4.10 of the Impugned Order;

b) The consideration of actual Interest on Working Capital ("IWC") of Rs 33.43 crores for computing efficiency gain on the purported basis as held in paragraphs 2.23.6 and 2.23.7

c) Direction to refund the alleged surplus purportedly arrived at as set out in paragraphs 2.31 and 3.28 of the Impugned Order.

d) The computation of the amount of Rs 405.89 crores in paragraph 3.28 of the Impugned Order for FY 2015-16 and directing refund of the same.

e) Approval of Auxiliary Energy Consumption of 9.05% for FY 2014-15 in paragraphs 2.5.9 to 2.5.19 of the Impugned Order as against 9.61% as proposed by the Appellant and the consequent computation of Availability in paragraph 2.3 of the Impugned Order of 84.83% as against 85.40% as proposed by the Appellant.

f) Approval of Gross Station Heat Rate of 2401 kcal/kWh in paragraphs 2.7 of the Impugned Order as against 2457 kcal/kWh for FY 2014-15 as proposed by the Appellant;

g) The computation of Income Tax as proposed by the Appellant instead of restatement of the same based on the Impugned Order.

h) Disallowance of Ash Utilization and Disposal Expenses and the findings in paragraph 3.14.10 of the Impugned Order for FY 2015-16.

i) Disallowance of Additional O&M expenses towards RO Plant as held in paragraph 4.18 of the Impugned Order.

6. Facts of the present Appeal:

a) The Appellant had in accordance with the State Commission's Multi Year Tariff Regulations, 2011 ("**Tariff Regulations 2011**") filed a petition on 10.07.2015 for (i) final truing up of tariff for FY 2014-15 and (ii) revised Aggregate Revenue Requirement ("ARR") for FY 2015-16. (Case No. 91 of 2015)

b) The State Commission on 8.10.2015 advised the Appellant to file a combined petition for Truing Up of tariff for FY 2014-15 and provisional Truing UP for FY 2015-16 along with Multi Year Tariff for FY 2016-17 to FY 2019-20.

c) A revised Petition was filed by Appellant on 31.01.2016 which was further revised on 03.03.2016 considering various data gaps and queries raised by the State Commission.

d) The State Commission on 20.06.2016 passed the Impugned Order in Case No.91 of 2015.

e) Aggrieved by the Impugned Order, the Appellant preferred the present Appeal.

7. QUESTIONS OF LAW

As per Appellant, following questions of law arise in the present Appeal:

a) Whether the Appellant, is entitled to claim the fuel costs incurred by it due to delay in execution of Fuel Supply Agreement (FSA) with Coal India Limited ("CIL") and its subsidiaries for reasons not attributable to the Appellant in its tariff to Respondent No.2, with whom there is a valid, duly approved Power Purchase Agreement, in accordance with the applicable Tariff Regulations of the State Commission?

b) Whether Respondent No.1 has ignored the inordinate delay on part of various Government Authorities and Public Sector Companies which are not within the control of the Appellant and /or are force majeure events which in turn has delayed execution of the FSA between the Appellant and WCL despite all efforts on part of the Appellant?

c) Whether the 1st Respondent could have disallowed such cost of fuel incurred by reason of there being no FSA in favour of the Appellant?

d) Whether the Impugned Order could have been passed disallowing fuel costs, since the 1st Respondent has at all times been kept informed since seeking approval of the PPA, determination of

Provisional & Final Tariff for FY 2014-15 and 2015-16 as well as at the time of final True up and provisional True up for the aforesaid years respectively, including filing of Fuel Adjustment Charge (`FAC') petitions with regard to the cost incurred for procurement of coal in absence of an FSA and such costs, were admittedly incurred with the knowledge of the 1st Respondent?

e) **Whether the Impugned Order has been passed in breach of principles of natural justice?**

f) **Whether the Impugned Order could have been passed when admittedly the 1st Respondent has repeatedly in its earlier two Orders dated 17.01.2014 and 09.03.2015 also relating to determination of Tariff (Provisional/Final) directed the Appellant to make efforts to expedite execution of the FSA, thus having acquiesced to the fact that not only is such execution beyond the control of the Appellant and the Appellant cannot be held responsible, but the costs so incurred were for compliance of the Appellant's obligations under the PPA with Respondent No.2 and that such costs would be claimed from Respondent No.2 to which at all points of time no objection of whatsoever nature has been raised by Respondent No.1?**

g) **Whether the 1st Respondent ought to have passed the Impugned Order in accordance with the provisions of Section 62 of Electricity Act 2003 ?**

h) **Whether the Impugned Order is illegal by reason of non-consideration of relevant and germane facts and/or the submissions made on behalf of the Appellant? Whether the Impugned Order has been passed on conjunctures and surmises?**

i) Whether the 1st Respondent in passing the Impugned Order has failed to appreciate that Section 62 determination is guided by the principles enumerated in Section 61 and warrant 1st Respondent in fixing the Tariff of a generating company to balance the interest of the Generator by protecting its investment vis-a-vis protect the interest of consumers?

j) Whether the 1st Respondent in the Impugned Order has acted contrary to the National Tariff Policy, 2016 wherein it has been mandated that for shortage of coal, any coal imported by the generator from other sources must be given a pass through?

k) Whether the 1st Respondent in passing the Impugned Order has failed to appreciate the true import behind Tariff determination under Section 62 of the EA03?

l) Whether the 1st Respondent in passing the Impugned Order has failed to consider the foundation behind a regulated regime where the Regulator such as the Regulatory Commission is mandated under law to balance the interest of the Consumer as well as the private generator to protect the investment in the Power Sector?

m) Whether the 1st Respondent in passing the Impugned Order has failed to consider the impact thereof which has made the entire project of the Appellant completely commercially unviable and would resultantly lead to the asset becoming non-operational which would not only be a loss to the Appellant but would also be a loss to the State of Maharashtra?

n) Whether the 1st Respondent has failed to appreciate that in terms of the PPA signed between the Appellant and Respondent No.2, the Appellant in the absence of an FSA was not barred from sourcing

coal from other sources to meet its supply obligation to Respondent No.2 which was also duly accepted by the Respondent No.2 ?

o) Whether the 1st Respondent ought to have exercised its powers under the provisions of the relevant Tariff Regulations regarding "Power to amend" and "Power to remove difficulties" and granted to the Appellant in the Impugned Order the Auxiliary Energy Consumption as well as Gross Station Heat Rate as proposed by it, specifically in view of the fact that the Appellant's Generating Station was in the 1st and 2nd year of operations after its Commercial Date and the Appellant had produced sufficient material before Respondent No.1 for exercise of such powers?

p) Whether on a true and proper interpretation of the provisions of Regulation 35 read with Regulation 14, the 1st Respondent ought to have computed Efficiency Gain on IWC including the internal accruals deployed by the Appellant?

q) Whether the 1st Respondent ought to have exercised its powers under the provisions of the relevant Tariff Regulations regarding "Power to amend" and "Power to remove difficulties" and granted to the Appellant in the Impugned Order, Ash Utilization and Disposal Expenses and O&M expenses incurred for Reverse Osmosis Plant as proposed by it in view of supporting data and details given by the Appellant to the 1st Respondent?

r) Whether the 1st Respondent has correctly computed Income Tax in accordance with Regulation 34 of the Tariff Regulations, 2011 for FY 2014-15?

s) Whether Respondent No.1 has the power, authority or jurisdiction to pass an order of refund as has been done in the present case?

8. We have heard at length the learned senior counsel for the Appellant and the learned counsel for Respondent and considered the arguments put forth by the rival parties and their respective written submissions on various issues identified in the present Appeal. Gist of the same is discussed hereunder.

Issue No 1: Disallowance of fuel cost for the period FY 2014-15 and FY 2015-16

A-I. On this issue raised in the present Appeal, the learned senior counsel for the Appellant has made the following submissions for our consideration;

i. The Appellant has set up a coal based generating station of 600 MW comprising of Unit I and Unit II for generation of power at its power plant at Butibori, Nagpur in the State of Maharashtra. It was originally contemplated that one unit would supply to industries within the area being a Group Captive Power Plant, ("GCPP") and one unit would be an Independent Power Plant "(IPP").

ii. The Government of India, Ministry of Coal by an Office Memorandum dated 18.10.2007 issued the New Coal Distribution Policy ("NCDP"). The NCDP contemplated issuance of a Letter of Assurance (LoA) to applicants including Captive Power Plants as well as Independent Power Plants requiring such allottees to fulfil certain stipulated conditions and meet the milestones within the specified period and thereafter approach

the coal company for entering into a Fuel Supply Agreement (FSA) covering the commercial arrangement for supply of coal. It was contemplated that such FSA would be executed within a period of three months on fulfilment of the said stipulations for supply of the entire normative quantity of coal either domestically or by import on achievement of milestones set out therein.

iii. The Standing Linkage Committee - Long Term (SLC) comprising of representatives of Ministry of Coal, Ministry of Power, the Central Electricity Authority and others on 06.11.2007 approved issuance of LoA for the Appellant's Unit I. An LoA was issued by Western Coal fields Limited (“WCL”) on 24.06.2008. The LoA contemplated, inter alia, execution of a Fuel Supply Agreement (FSA) as set out there in between the Appellant and WCL.

iv. Thereafter, the Appellant contemplated augmentation of the capacity of the Project by setting up an additional 300 MW unit being Unit II which was to be set up as an IPP. An LoA dated 12/13.07.2010 was issued by WCL to the Appellant for 11,10,800 TPA of Grade E coal to be supplied for Unit II on terms and conditions set out therein.

v. The Appellant's intense efforts to market the concept of Unit I as GCPP to industrial consumers in Maharashtra was of no avail and on account of certain concerns envisaged by such industrial consumers, they refrained from opting for the Group Captive option. Thus Unit I was to be converted from GCPP to IPP.

vi. The Appellant filed a Petition being Case No. 2 of 2013 filed before the State Commission for approval of Power Purchase Agreement (PPA) signed for 600 MW entered into between the Appellant and Respondent No.2, the distribution licensee in the suburbs of Mumbai. The State

Commission by an order dated 20.02.2013 approved the PPA for 300 MW from Unit-II (IPP) for supply of power to Respondent No 2 on long term basis after incorporating the modifications required to be carried out as per said order. In course of hearing of the said Case No.2 of 2013, Respondent No.2 gave the rationale for entering into a PPA with the Appellant. It pointed out, inter alia, that in Case-1 Bid Process called by the Uttar Pradesh Power Corporation Ltd. the weighted average levelised Tariff discovered was Rs.5.89 per unit for a period of 25 years. Paragraph 3 (m) of the said order which recorded Respondent No.2's submission reads as follows:

3 (m) "As regards competitiveness of VIPL's proposal, RInfra-D submitted the comparison of Capital Cost of VIPL's Project with Paras Unit 4 and Parli Unit 7 of Maharashtra State Power Generation Company Limited (MSPGCL) and the comparison of levelised Tariff of Rs. 3.90/kWh of VIPL's project with recent Case 1 Tariffs discovered through competitive bidding and mentioned that VIPL's offer is competitive compared to the Case 1 Tariffs recently discovered in India. Rinfra-D has submitted that its analysis has proved the cost-competitiveness of VIPL with Tariffs relied in Case 1 competitive bids. RInfra-D submitted the comparison of levelised Tariff of VIPL with the Levelised Tariffs realized in Case- 1 bids in the State of Maharashtra (assuming that escalable components of case-1 Tariff quoted by the bidders are escalated till FY 2012-13 based on payment escalation rates published by CERC and thereafter, escalated on current CERC evaluation escalation rates.

Table : Levelised Tariff comparison of Bids received in Maharashtra

Distribution Licensee	*Bidding year*	*Bidder*	*Capacity in MW*	*Levelised Tariff (Rs/ kWh)*
MSEDCL	*2009*	*Adani Power*	*1200*	*4.15*
MSEDCL	*2009*	*EmcoWarora*	*200*	*3.74*
MSEDCL	*2009*	*Indiabulls Power*	*1200*	*4.31*

RInfra	*2011*	*VandanaVidyut*	*150*	*5.15*
RInfra	*2011*	*Dhariwal Infrastructure Ltd.*	*200*	*5.82*
RInfra	*2011*	*PTC -MB Power*	*200*	*5.82*
RInfra	*2011*	*RKMPowerGen Pvt. Ltd.*	*300*	*4.49*
RInfra	*2011*	*Indiabulls Power Ltd.*	*490*	*6.55*
RInfra	*2011*	*PTC -DB Power*	*150*	*7.22*
RInfra	*2011*	*Reliance Power Ltd.*	*1000*	*4.16*
RInfra	*2011*	*VIPL Proposal*		*3.9*

vii. It was further held by the State Commission that, for the purpose of determination of Provisional Tariff, the provisions of Section 64 of EA 03 would be required to be followed and that the Appellant and Respondent No.2 would seek approval of Provisional Tariff at a later stage. The State Commission further held as follows:

"30. It has been noted at Para 3(g) that the distribution licensee has submitted that once the power plant achieves commercial operation date and when the audited accounts are finalized, then only the determination of final Tariff would arise. Accordingly, the present Petition does not seek the determination of final Tariff for supply of power from the generating company to the distribution licensee. Admittedly, the present Petition is for the purpose of expediting the fulfilment of the condition of an approved power purchase agreement in order to secure a fuel supply agreement from the Ministry of Coal. ....."

"34. RInfra-D, in its Petition in Case No. 158 of 2011, submitted that for the purpose of MYT Business Plan, it has assumed that about 500 MW of power would be procured for FY 2014-15 and FY 2015-16

and the rate of procurement for the same has been assumed at Rs. 3.90 per unit, which has been considered by the Commission in its Order dated 23.11.2012 in Case No. 158 of 2011.

35. Based on the above, the Commission is of the view that the quantum of 300 MW to be tied up under long-term PPA from VIPL's Unit 2 (IPP) appears to be justified considering the overall quantum of 500 MW approved by the Commission while approving the Business Plan of Rinfra-D."

"40. The Commission has taken note of the competitiveness of VIPL's proposed tariff with the Tariffs observed in Case 1 competitive bids in the State of Maharashtra, as submitted by Rlnfra-D and observed that VIPL's tariff has been computed by considering the Coal India Limited rate for domestic coal linkage. The Commission directed the Petitioners to submit the scenario analysis taking into consideration the guaranteed supply in the new standard Fuel Supply Agreements of CIL, prices of CIL's coal under FSA route, prices of domestic E-Auction market coal, imported coal and domestic washery rejects and submit the likely impact on Energy Charges for VIPL's Butibori Generating Station. VIPL, in its response submitted that the new standard FSAs of CIL are under revision. VIPL further submitted that the Cabinet Committee on Economic Affairs (CCEA) has given in-principle approval on 5th February 2013 for pooling of coal prices and as VIPL has more than one year before the supply starts to Rinfra-D, price pooling mechanism will be implemented by then and VIPL would be able to meet its coal requirements from CIL. VIPL submitted that the four scenarios in this regard as summarized below:

Table: Energy Charges (Rs/kWh) under various scenarios as submitted by VIPL.

Scenario	*FY 14-15*	*FY 15-16*
Optimistic (Entire Annual contracted quantity of E grade coal from coal India)	*1.32*	*1.4*

Realistic Scenario with 100% Annual Contracted quantity delivery from Coal India but price changed to pooling principles	*1.43*	*1.53*
Realistic Scenario with 80% Annual Contracted Quantity Delivery from Coal India at price charged on pooling principles and VIPL to arrange the remaining coal from market sources such as E-Auction/Imports	*1.64*	*1.75*
Pessimistic Scenario with Coal India supplying 65% of the committed coal in FY 15 and 70% in FY 16 and VIPL has to arrange remaining coal from market sources such as E-Auction/Imports	*1.74*	*1.79*

As discussed earlier, the Commission has not analyzed the details of Tariff and its competitiveness as submitted by the Petitioners in this order.

41. Based on the above and considering Rinfra-D's submissions regarding the numerous challenges in the overall bidding scenario including, prices likely to be higher if the bidding is conducted on a long-term basis in the present industry circumstances and competitiveness of VIPL, tariff as submitted by the Petitioners, the Commission is prima facie of the view that the PPA between Rinfra-D and VIPL with Tariff to be determined by the Commission in accordance with the MERC MYT Regulations, on Cost-plus basis by applying critical prudence checks while examining the tariff proposal, will help RInfra-D to meet the energy requirement of its consumers. As the PPA between. RInfra-D and VIPL provides for determination of Tariff in accordance with MERC MYT Regulations, the Petition submitted by RInfra-D and VIPL for

approval of PPA complies with Regulation 25.2(c) of MERC MYT Regulations, 2011."

"45. In view of the above, the Commission hereby accords its in-principle approval to the Power Purchase Agreement (PPA) between RInfra-D and VIPL for procurement of 300 MW power on long-term basis from Unit 2 (IPP) of VIPL's Power Station as submitted by the Petitioner on 15.02.2013 with modifications to be made in the PPA as per the directions given by the Commission in Para 44 of the Order. The Commission directs the Petitioners to submit the final PPA executed between Rinfra-D and VIPL for procurement of 300 MW power on long-term basis from Unit 2 of VIPL's Power station after incorporating the above-stated modifications, as compliance of this order within one month from the date of this Order".

viii. The Appellant made an application to MIDC for obtaining their No Objection Certificate to convert of Unit I to an IPP on 18.01.2013. MIDC issued its No Objection Certificate dated 28.05.2013 for conversion of Unit I to IPP from GCPP. After the receipt of the NOC from MIDC, the Appellant entered into a PPA with Respondent No.2 for supply of power generated by Unit I. The Appellant, thereafter, filed a Petition being Case No.76 of 2013 on 05.06.2013 in which it sought approval of the PPA for Unit I as well as a Consolidation Agreement executed between the Appellant and Respondent No.2 for supply under the two PPAs for Units I and II to be treated as supply from Power Station as a whole, and such approval was given by the State Commission by an Order dated 19.07.2013 and directed the Appellant to submit a final PPA after incorporating the modification as set out in the said order. The Consolidation Agreement was also approved by the State Commission by the said order. A further direction was given by the State Commission as :

"The Commission advised VIPL to accordingly intimate the concerned authorities/departments and obtain the approval from concerned authorities/ departments regarding the conversion of status of Unit-1 from Group Captive to IPP. The Commission further directs VIPL to submit the status of the same within one month from the date of this Order. Further, the Commission also directs VIPL to submit the half-yearly status report of LoA/FSA of Unit-1 as IPP till FSA is signed, and also submit the copy of signed FSA of Unit 1 and Unit 2 of VIPL within one month of signing the FSA to the Commission."

ix. In the meantime due to acute shortage in availability of domestic coal, the Cabinet Committee on Economic Affairs (CCEA) on 21.06.2013 approved the mechanism for supply of coal to power producers, which, inter alia, permitted CIL to import and supply coal to willing Thermal Power Plants on cost-plus basis and also permitted such Thermal Power Plants to import coal themselves.

x. By a letter dated 23.07.2013 the Appellant wrote to Government of India, Ministry of Power, inter alia, requesting for recommending to Ministry of Coal for change of category of Unit I from GCPP to IPP for the purpose of signing of FSA and also for advising the said Ministry, CIL and WCL to expeditiously sign the FSA and commence supply immediately.

xi. On 24.07.2013 the Appellant filed Case No.91 of 2013 for determination of Provisional Tariff for 600 MW plant for FY 2014-15 and FY 2015-16 which was disposed of by the State Commission through an order dated 17.01.2014. By the said order, in so far as the status of the FSAs, the State Commission held;

"Fuel Supply Agreement VIPL's submission

4.6.42 VIPL submitted that it envisages use of domestic coal as the primary fuel for power generation. VIPL, submitted that it has

signed LoAs with WCL for supply of 2.34 MMTPA of coal with GCV band of G9 for Butibori Power Plant. VIPL submitted that quantum of coal required for achieving normative PLF is around 2.29 MMTPA. VIPL submitted that it is taking all necessary steps for expediting signing of FSAs. VIPL submitted that PPA for Unit # 2 as approved by the Commission was submitted to WCL on 1 April, 2013.VIPL submitted that MoP has included Unit # 2 in the list of projects for signing of FSA. VIPL submitted that FSA for Unit # 2 is expected shortly.

4.6.43 VIPL submitted that based on the Commission's order dated 19 July 2013 in Case No.76 of 2013 for approval of PPA for Unit # 1, it has submitted letter to MoP on 23 July 2013 with request for recommending VIPL's case to Ministry of Coal (MoC) for conversion to IPP category and expeditious signing of FSA thereafter. VIPL submitted that CEA has also been requested to provide necessary inputs to recommendations to MoC. VIPL submitted that WCL would sign FSA for Unit # 1 once directions from MoC are received.

Commission's Analysis

4.6.44 The Commission observes that FSAs for the project have not been executed. The Commission directs VIPL to expedite the process of executing the FSAs so as to ensure the availability of linkage coal by the date of commencement of supply under the regulated business from 1 April, 2014".

"Summary of Findings

v) The Commission observes that FSAs for the project have not been executed. The Commission directs VIPL to expedite the process of executing the FSAs so as to ensure the availability of linkage coal by the date of commencement of supply under the regulated business from 1 April, 2014.

viii) The Commission observes that the FSAs for the project are yet to be executed. The Commission, at this stage, has computed the Energy Charge for VIPL considering 100% domestic coal for FY 2014-15 and FY 2015-16 as submitted by the Petitioner in its Petition. The Commission directs VIPL to submit the FSAs executed for the project along with its Petition for determination of final Tariff

ix) The Commission has considered the calorific value of fuels as submitted by VIPL. The Commission has considered the landed fuel prices of fuels as submitted by VIPL for FY 2014-15. The Commission has not considered the escalation in fuel prices for projecting the fuel prices for FY 2015-16, as any variation in actual fuel prices shall get adjusted in the fuel cost adjustment mechanism.

xi) ***Any variation in Price and Gross Calorific Value of coal vis-a-vis approved values for computing the provisional Energy Charge shall be recoverable through Adjustment of rate of energy charge (REC)(Fuel surcharge Adjustment)in accordance with the provisions of Regulation 49.6 of MERC MYT Regulations, 2011."***

xii. By a letter dated 04.03.2014, Government of India, Ministry of Coal forwarded inter alia to CIL the minutes of meeting of SLC-LT dated 21.02.2014. A perusal of the said Minutes shows that the conversion of Unit I of the Appellant from GCPP to IPP was approved, as below:

"MoP has stated that it had recommended the proposal for conversion of GCPP to IPP. Developer stated that MIDC as well as MERC had agreed. There are no other issues related hereto. Under these circumstances SLC (LT) agreed for conversion of VIPL from GCPP to IPP category. Necessary documents required for fulfilment of consequential changes in the milestones shall be submitted by the VIPL within two months. Delay in achieving milestones thus far is condoned."

xiii. In the meanwhile, an FSA for Unit II was executed between the Appellant and WCL on 10.03.2014 for supply of coal to the extent of Annual Contracted Quantity (ACQ) of 11,10,800 tons as per model draft of CIL. The said FSA was submitted by the Appellant to State Commission vide letter dated 26.03.2014.

xiv. Pursuant to signing of the FSA for Unit II, WCL offered to supply coal to the Appellant from cost-plus mines and required the Appellant to execute

mine specific FSAs. However, Appellant continued to pursue WCL to supply coal under the said FSA at notified price which was cheaper than the coal offered from cost plus sources. Pending the resolution of the matter, WCL offered to supply coal under a Memorandum of Understanding (MoU) dated 30.09.2014 for the period between October 2014 to December 2014 for a Monthly Scheduled Quantity (MSQ) based on Annual Contracted Quantity (ACQ) of 11,10,800 tons of coal as an interim arrangement. The Appellant had no choice in view of acute shortage in supply of domestic coal and agreed to sign the said MoU as an interim arrangement. Further, after ascertaining that there was no possibility of WCL offering coal to Appellant at notified price, the Appellant agreed to execute a mine specific FSA with WCL on 06.01.2015 for supply of coal from cost-plus mine being New Majri Sector-IA and Sector-IIA Extn OC for an ACQ of 6,00,000 tons out of the total quantity of 11,10,800 tons. The balance 5,10,800 tons continued to be supplied under the said MoU dated 30.09.2014 as revised and amended MoU on 02.01.2015 and further revised on 17.04.2015.

xv. The Appellant commenced supply of power to Respondent No.2 with effect from 01.04.2014. Coal supply commenced from WCL from October 2014 onwards in respect of Unit II and till then the Appellant arranged coal for generation from alternate sources.

xvi. As far as Unit I is concerned, there was no FSA and supply to Respondent No.2 was by procuring coal from alternate sources. However, the Appellant continued its efforts by following up with the relevant authorities for execution of the FSA in respect of Unit-I.

Considering that coal at notified price of WCL was not available, the Appellant requested WCL for change in the source of supply for Unit-I. By a letter dated 11.11.2014, WCL addressed a letter to South Eastern Coalfields Ltd. (SECL) with regard to change of source of coal from itself to SECL, which states as under :-

"It is hereby certified that the LOA holder has achieved the milestones of the LoA consequent upon change of category from GCPP to IPP. However, verification of achievement of special milestones of Synchronization and COD as well as PPA may please be ensured by SECL."

Thus, even with regard to Unit I, apart from following up the execution of the FSA with the relevant authorities, the Appellant was making its best efforts to procure even linkage coal at notified price as against coal at cost plus price from WCL.

xvii. In the meantime, on 30.05.2014 the Appellant filed a Petition being Case No.115 of 2014 for Determination of Capital Cost and Final Tariff for FY 2014-15 and FY 2015-16 for the generating station. The State Commission asked to submit the actual revenue billed by the Appellant to Respondent No. 2 from 01.04.2014 onwards, which was compiled by the Appellant. The State Commission by an order dated 09.03.2015 determined the capital cost and final Tariff for FY 2014-15 and FY 2015-16 for the Appellant. Even in the said order in the State Commission observed that the Appellant has signed FSA on 10.03.2014 for supply of coal to Unit II, however, FSA for Unit I was not signed and the Appellant should continue efforts to expedite the execution of FSA so as to ensure availability of linkage coal for Unit-I.

xviii. The Appellant from July, 2014 commenced filing Fuel Adjustment Charge Submissions before the State Commission under the relevant MYT Regulations.

xix. The Appellant thereafter filed Case No.91 of 2015 for Final Truing-UP for FY 2014-15 and revised Aggregate Revenue Requirement (ARR) and Tariff for FY 2015-16. The said Petition was filed on 10.07.2015 and subsequently revised on 3.3.2016. In the revised Petition, the Appellant gave elaborate details with regard to FSA for Unit II as well as Fuel Cost incurred and efforts made by the Appellant to execute the FSA for Unit-I. The Appellant has stated in the said Petition that subsequent to the Presidential Directive dated 17.07.2013 whereby power plants aggregating to 78,000 MW capacity were to have FSAs, GoI is in the process of taking a policy decision for supply of coal to power plants which are commissioned have long term PPA and are part of capacity 30,000 MW which were not originally considered in the said Directive. The Appellant enclosed the CEA's letter dated 03.12.2015 by which CEA had clarified that the Appellant's Unit I has been commissioned and is covered in the firm LoA holders by the Ministry of Coal and accordingly is also covered in the balance 30,000 MW capacity (Out of total capacity of 1,08,000 MW from which 78,000 MW were covered under the Presidential Directive dated 17.07.2013). The Appellant also gave all necessary particulars of LoA and Work Orders for procurement of coal from spot e-auction and forward e-auction, open market and import in the said Petition.

xx. The State Commission by the Impugned Order has, for the purposes of Truing-Up of Fuel Cost for FY 2014-15 and for Provisional Truing-Up of Fuel Cost for FY 2015-16 notionally considered 100% supply of coal on

cost-plus basis from WCL for Unit II for the period April 2014 to October 2014 and 100% supply of linkage coal from SECL for Unit I. This basis has been followed for the purpose of determining the Multi-Year Tariff for FYs 2016-17 and 2019-20. The State Commission has thus for the aforesaid period disallowed all procurements done or to be done from e-auction of WCL, through domestic open market and by importing coal for Units I and II. Such procurement of coal other than through linkage was by reason of the absence of FSA with SECL and the delayed supply from October 2014 from WCL despite Unit I having started supply of power to Respondent No.2 from 01.04.2014.

xxi. At the time of seeking approval of the PPA, the Appellant had categorically submitted that LoAs for Units I and II were in place. This fact has been recorded in the order dated 20.02.2013 by which "in principle" approval for the PPA then executed for Unit II was given. The State Commission had approved the PPA wherein the determination of Tariff would be under Section 62 of EA03. While approving the PPA , the State Commission has taken following factors into consideration:

a) Requirement of Respondent No.2 based on its Power Procurement Plan.

b) Petition was for approval of the PPA that would enable the Appellant to expedite the fulfillment of the condition of an approved PPA in order to secure an FSA from the CIL/ WCL (thereby clearly having knowledge of the fact that while there was an LoA issued by WCL the FSA at the relevant time was not executed in so far as Unit II is concerned. The said order also records the facts relating to the position then existing for conversion of Unit I from GCPP to IPP.

c) The Provisional Tariff would be approved by the following prescribed procedure under Section 64 of EA03 and that approval of the PPA would expedite execution of the FSA since following of the procedures for determination of Provisional Tariff would be time consuming.

xxii. MoU route for entering into a PPA was a well recognized route considering the response through competitive bidding process and the then cost of power procurement projected by Appellant was lower than the levelised Tariff discovered through bidding, details whereof were given in Case No.2 of 2013. In the said Order, it was specifically held that based on the said criteria and considering the numerous challenges in the overall bidding scenario, the PPA between the Appellant and the Respondent No.2 with Tariffs determined in accordance with MYT Regulations on cost-plus basis by applying critical prudence check while examining the Tariff proposals would help Respondent No.2 to meet the energy requirement.

xxiii. Even a perusal of the order dated 17.01.2014 passed in Case No.91 of 2013 which related to determination of Provisional Tariff for FY 2014-15 and 2015-16 which has been Trued-Up in the order impugned in the present Appeal, in paragraphs 4.6.42 and 4.6.43 the Appellant had specifically submitted that it was taking all necessary steps for expediting the signing of the FSA. At the relevant time when the order dated 17.01.2014 was passed there was no FSA in place even for Unit II. Thus the submission of the Appellant that it had submitted the PPA as approved by the State Commission to WCL on 01.04.2013 and that the FSA is expected shortly is also recorded in the said order. The submissions with regard to the process of conversion of Unit I from

GCPP to IPP have also been recorded. In this regard the State Commission's findings are as follows:

"Commission's Analysis

4.6.44 The Commission observes that FSAs for the project have not been executed. The Commission directs VIPL to expedite the process of executing the FSAs so as to ensure the availability of linkage coal by the date of commencement of supply under the regulated business from 1 April, 2014. "

Thus at the time of approval of the Provisional Tariff, the State Commission was aware of the fact that approval was sought for by the Appellant for the PPAs to expedite the FSA and had approved the Energy Charge on a provisional basis based on 100% domestic coal. It specifically held that any variation in the price and the Gross Calorific Value (GCV) of coal as against the provisional Energy Charge would be recoverable through adjustment i.e. by levying Fuel Adjustment Charges (FAC) in accordance with the relevant Regulations. At the time when the said order dated 17.01.2014 was passed, the State Commission was aware that the supply of power to the Respondent No.2 was to commence from 01.04.2014 and that none of the FSAs were in place.

xxiv To the knowledge of State Commission, such approvals for FAC were sought by the Appellant on a monthly basis on commencement of supply to Respondent No.2 by filing a Petition under Regulation 49.6 of the MERC (MYT) Regulations 2011 for the respective monthly Tariffs. First such Petition was filed in July 2014 and the Appellant has from time to time filed such Petitions. The Appellant has, at all points of time,

intimated to the State Commission about procurement of coal from alternate sources since supply from the generating stations i.e. Unit I and II to Respondent No.2 began in April 2014. However, supply under the FSA for Unit II from WCL began only in the third week of October 2014. Thus for such period where there was no supply under an FSA to the knowledge of the State Commission coal was being procured in the manner set out in the FAC submissions with all necessary particulars and details being given by the Appellant to the State Commission. The FAC submissions are still pending before the State Commission.

xxv The State Commission in passing the Impugned Order has failed to appreciate that Section 62 determination is guided by the principles enumerated in Section 61 and warrant Appropriate Commission in fixing the tariff of a generating company to balance the interest of the Generator by protecting its investment vis-a-vis protect the interest of consumers. Determination of tariff under Section 62 is completely different from the discovery of competitively bid tariff under Section 63 of the Act. The State Commission under Section 62 Tariff Determination is bound by the principles enumerated under Section 61 of the EA03 which are required to be incorporated under the Tariff Regulations of the State Commission prior to actual determination of Tariff. The relevant extracts of Section 61 are being reproduced as follows: -

"61. The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;

b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;

c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;

d) safeguarding of consumers interest and at the same time, recovery of the cost of electricity in a reasonable manner;

e) the principles rewarding efficiency in performance;

f) multi year tariff principles;

g) that the tariff progressively reflects the cost of supply of electricity and also, reduces and eliminates cross-subsidies within the period to be specified by the Appropriate Commission;

h) the promotion of co-generation and generation of electricity from renewable sources of energy;

i) the National Electricity Policy and tariff policy:"

From the perusal of the above it is abundantly clear that the State Commission is bound to determine tariff which would encourage optimum investment, ensure recovery of cost of electricity in a reasonable manner. Clearly in the facts of the present case, due to non-signing of FSA (which is in any case admittedly beyond the powers of the Appellant), the Appellant was compelled to seek supply of coal from other sources to meet its primary obligation under the PPA i.e. to supply power to Respondent No.2. The non-signing of the FSA was at all times

disclosed to the Respondent No.2 procurer. In the absence of any inefficiency and imprudence on the part of the Appellant the State Commission has acted in complete contravention of Section 61 read with Section 62 by disallowing the actual cost of coal sourced by the Appellant. It is an accepted principle that tariff under Section 62 is a reflection of cost and any prudent expenditure made by the generator must be compensated.

xxvi The State Commission in the Impugned Order has acted contrary to the National Tariff Policy, 2016 wherein it has been mandated that for shortage of coal, any coal imported by the generator from other sources must be given a pass through. In such a scenario the State Commission has erred by not passing through the actual cost of coal incurred by the Appellant. The relevant extracts of the Policy are as follows:-

"1.3. It is therefore essential to attract adequate investments in the power sector by providing appropriate return on investment as budgetary resources of the Central and State Governments are incapable of providing the requisite funds. It is equally necessary to ensure availability of electricity to different categories of consumers at reasonable rates for achieving the objectives of rapid economic development of the country and improvement in the living standards of the people.

4.0 OBJECTIVES OF THE POLICY : The objectives of this tariff policy are to:

- *a) Ensure availability of electricity to consumers at reasonable and competitive rates;*
- *b) Ensure financial viability of the sector and attract investments;*
- *c) Promote transparency, consistency and predictability in regulatory approaches across jurisdictions and minimise perceptions of regulatory risks;*
- *d) Promote competition, efficiency in operations and improvement in quality of supply;*
- *e) Promote generation of electricity from Renewable sources;*

f) Promote Hydroelectric Power generation including Pumped Storage Projects (PSP) to provide adequate peaking reserves, reliable grid operation and integration of variable renewable energy sources;

g) Evolve a dynamic and robust electricity infrastructure for better consumer services;

h) Facilitate supply of adequate and uninterrupted power to all categories of consumers;

i) Ensure creation of adequate capacity including reserves in generation, transmission and distribution in advance, for reliability of supply of electricity to consumers.

.....

Multi Year Tariff

.....

4) Uncontrollable costs should be recovered speedily to ensure that future consumers are not burdened with past costs. Uncontrollable costs would include (but not limited to) fuel costs, costs on account of inflation, taxes and cess, variations in power purchase unit costs including on account of adverse natural events.

.....

6.1 Procurement of power

As stipulated in para 5.1, power procurement for future requirements should be through a transparent competitive bidding mechanism using the guidelines issued by the Central Government from time to time. These guidelines provide for procurement of electricity separately for base load requirements and for peak load requirements. This would facilitate setting up of generation capacities specifically for meeting such requirements.

However, some of the competitively bid projects as per the guidelines dated 19th January, 2005 have experienced difficulties in getting the required quantity of coal from Coal India Limited (CIL). In case of reduced quantity of domestic coal supplied by CIL, vis-a-vis the assured quantity or quantity indicated in Letter of Assurance/ FSA the cost of imported/ market based e-auction coal procured for making up the shortfall, shall be considered for being made a pass through by Appropriate Commission on a case to case basis, as per advisory issued

by Ministry of Power vide OM No. FU12/ 2011-IPC (Vol-III) dated 31.7.2013."

The Impugned Order passed by the State Commission is in teeth of the National Tariff Policy, 2016 due to following reasons: -

a. The National Tariff Policy, 2016 at numerous places mandates that the investment in generation sector is required to be promoted as well as protected. The effect of the Impugned Order is in direct contravention of the said objective.

b. Further, the Amended National Tariff Policy also in unequivocal terms mandates that generators are to be compensated for any shortage in linkage coal if it is met though alternative sources. The word 'shall' has been used in Clause 6.1 of the said Policy making it mandatory upon the 1st Respondent to consider coal from other sources. Admittedly, in the facts of the present case the State Commission has disallowed all past and future proposed procurement of the Appellant's generating station.

A-II The learned counsel for the State Commission has made following submissions on the issue No 1 raised in the Appeal for our consideration;

i. The Respondent Commission, in its Impugned Order dated 20 June, 2016 has given the reasons for disallowance of fuel cost for FY 2014-15 and FY 2015-16 mainly attributable to procurement of fuel at a rate higher than and on a different basis from that considered while approving the PPA with RInfra-D. The relevant portions of the Impugned Order are reproduced below:

"2.10.13 The Commission had approved the PPA for supply of power to RInfra-D from Unit 2 of VIPL-G's Generating Station vide its Order dated 20 February, 2013 in Case No. 2 of 2013. Regarding the fuel for power generation, the Order stated as follows:

"30. ...Admittedly, the present Petition is for the purpose of expediting the fulfilment of the condition of an approved power purchase agreement in order to secure a fuel supply agreement from the Ministry of Coal.

Considering the fact that the request made by the Petitioners as the prayer to approve the provisional tariff may require publication of the details of the provisional tariff in newspapers, inviting suggestions and objections from the public and the holding of public hearings in the areas of supply of RInfra-D, the process of securing a fuel supply agreement from the Ministry of Coal may get delayed and may perhaps get defeated on account of the activities required to be followed under the provisions of Section 64 of the Electricity Act. These procedures are mandatory and are to be completed within 4 (four) months. During the hearing, the Petitioners have stated that the prayer for determination of a Provisional Tariff may not be taken up while issuing the order approving the power purchase agreement as this will help them to quickly secure the fuel supply agreement. It has also been stated that the Commission may grant an approval of the Provisional Tariff, separately...

At para. 36, the Commission has quoted an earlier Order in Case No. 64 of 2011, including the following:

"...the Electricity Act clearly specifies the two routes namely, the determination of tariff through MoU route as per Section 62 of the Act and the tariff discovery route through competitive bidding through Section 63 of the Act... The Commission is expected to examine the fairness, transparency and competitiveness of the terms, conditions and finally the price, as also the benefits of entering into a PPA, as against, alternatively following Competitive bidding route as recommended by the Electricity Policy."

In this background, para. 40 of the Impugned Order states as follows:

"40. The Commission has taken note of the competitiveness of VIPL's proposed tariff with the tariffs observed in Case I competitive bids in the State of Maharashtra, as submitted by RInfra-D and observed that VIPL's tariff has been computed by considering the Coal India

Limited (CIL) notified price, escalated at CERC escalation rate for domestic coal linkage. The Commission directed the Petitioners to submit the scenario analysis taking into consideration the guaranteed supply in the new standard Fuel Supply Agreements of CIL, prices of C'IL's coal under FSA route, prices of domestic E-Auction market coal, imported coal and domestic washery rejects and submit the likely impact on Energy Charges for VIPL 's Butibori Generating Station. VIPL, in its response, submitted that the new standard FSAs of C'IL are under revision. VIPL further submitted that the Cabinet Committee on Economic Affairs (CCEA) has given in-principle approval on 5 February, 2013 for pooling of coal prices and as VIPL has more than one year before the supply starts to InfraD, price pooling mechanism will be implemented by then and VIPL would be able to meet its coal requirements from CIL. VIPL submitted the four scenarios in this regard"

2.10.14 While approving the PPA through its Order in Case No. 2 of 2013, the Commission recorded VIPL-G's submission that the new standard ESAs of CIL were under revision; that the Cabinet Committee on Economic Affairs (CCEA) had given in principle approval for pooling of coal prices; and that, as VIPL-G had more than one year before starting supply to RInfra-D, the price pooling mechanism would be implemented by then and VIPLG would be able to meet its coal requirements from CIL.

2.10.15 In their Petition for approval of PPA, RInfra-D and VIPL-G had submitted that, even in the pessimistic scenario of CIL supplying only the minimum guaranteed supply of committed coal in FY 2014-15 and FY 2015-16 and VIPL-G having to arrange the balance from market sources such as e-auction and/or imports, the Variable Charges would be Rs. 1.74 per kWh.

2.10.16 Considering these submissions, the commission, vide its subsequent Order dated 19 July, 2013 in Case No. 76 of 2013 had also approved the PPA for supply of power from Unit 1 (earlier envisaged as a Group CPP) of VIPL-G's Generating Station to RInfra-D and the Consolidation Agreement for supply under the two PPAs for Unit 1 and Unit 2 to be treated as supply from the Generating Station as a whole.

2.10.17 Thereafter, vide Order dated 17 January, 2014 in Case No. 91 of 2013, the Commission had approved the provisional tariff for

VIPL-G's Generating Station for FY 2014-15 and FY 2015-16. Regarding the fuel for power generation that Order states as follows:

"4.6.74 The Commission observes that the LoAs issued to VIPL assure supply of 2.34 MMT of coal per annum against requirement of approximately 2.30 MMT of coal per annum at PLF of 85%. The Cabinet Committee on Economic Affairs (CCEA) vide its notification dated 21 June, 2013 approved the mechanism of supply of coal to power producers. In the said mechanism, CCEA formulated that FSAs to be signed for domestic coal quantity of 65%, 65%, 67%, and 75% of Annual Contracted Quantity for the remaining four years of 12th five year plan.

4.6.75 The Commission has taken note of V1PL's submission. The Commission observes that the FSAs for the project are yet to be executed. The Commission, at this stage, has computed the Energy Charge for VIPL considering 100% domestic coal for FY' 2014-15 and FY 2015-16 as submitted by the Petitioner in its Petition. The Commission directs VIPL to submit the FSAs executed for the project along with its Petition for determination of final Tariff.

...The Commission observes that FSAs for the project have not been executed. The Commission directs VIPL to expedite the process of executing FSAs so as to ensure the availability of linkage coal by the date of commencement of supply under the regulated business from 1 April, 2014.

...The Commission approves the provisional Energy Charge of Rs. 1.23/kWh for FY 2014-15 and FY 2015-16 based on 100% domestic coal.

...Any variation in Price and Calorific Value of Coal vis-a-vis approved values for computing the provisional Energy Charge shall be recoverable through Adjustment of rate of Energy Charge (REC) (Fuel Surcharge Adjustment) in accordance with the provisions of Regulation 49.6 of MERC MYT Regulations, 2011."

2.10.18 Thus, with regard to the provisional Tarifff or FY 2014-15 and FY 2015-16, the Commission had approved the Energy Charge of Rs. 1.23/kWh considering 100% domestic coal, based on the submissions of V1PL-G, as against the Energy Charge of Rs 1.25/kWh and Rs 1.32/kWh for FY 2014-15 and FY 2015-16 proposed by VIPL-G based on 100% domestic coal.

2.10.19 In the above Case No. 91 of 2013, VIPL-G had also submitted the Energy Charge of Rs 1.85/kWh and Rs 1.95/kWh considering 65% linkage coal, and the balance coal being met through imports and e-auction in the ratio of 50:50.

2.10.20 Thereafter, VIPL-G filed a Petition on 30 May, 2014 (Case No, 115 of 2014) for approval of Capital Cost and final Tariff or FY 2014-15 and FY 2015-16 in which it projected the Energy Charge at Rs. 1.91/kWh considering linkage coal and cost-plus coal. Vide its Order dated 9 March, 2015, the Commission approved the Capital Cost and final Tariff for FY 2014-15 and FY 2015-16. Regarding the fuel for power generation, the Order states that:

"4.11.7. The Commission directed VIPL to submit the status of coal supply agreements. Units 1 and 2 and a detailed note on the coal procurement for these Units in order to achieve the variable cost estimated in the Petition. VIPL submitted that the FSA for Unit 2 for 1.11 MTPA was signed with WCL on.10 March, 2014 along with a Side Agreement. Under the FSA, the supply of coal has started at the cost-plus price from October, 2014.*

4.11.8. VIPL has submitted that, though the Letter of Assurance (LOA) was for the supply of coal at the WCL notified price, it was compelled to sign the FSA and the Side Agreement for coal from cost-plus sources at the cost-plus price. WCL had refused to sign the FSA at notified price with any new consumer. However, in its Order dated 27 October, 2014 in the matter of M/s Wardha Power Co. Ltd. (Case No. 88 of 2013), the Competition Commission of India (CC1) has questioned the cost-plus pricing methodology of WCL, which has been asked to rework it. Accordingly, WCL's coal prices are expected to reduce substantially.

4.11.9. As regards the FSA for Unit 1, VIPL submitted that the conversion of Unit 1 from GCPP to IPP was approved by the SLC-LT at its meeting on 12 February, 2014. With WCL's insistence for signing of FSA for coal supply for Unit 2 at cost-plus price, VIPL made elfin-is to transfer the LOA of Unit 1 to South Eastern Coalfields Ltd. (SELL) from WCL.

4.11.10. VIPL has submitted that, based on these efforts, the transfer of linkage of Unit 1 from WCL to SECL, assuring supply of coal at notified price, has been approved by CIL on 11 November, 2014. Once the FSA

with SECL for supply of coal for Unit 1 is executed, which is expected by January, 2015, and with the commencement of coal supply at notified price from February, 2015 onwards, the landed cost of coal to VIPL will come down further.

4.11.11 The Commission observes that V1PL has signed FSA on 10 March,2014 for supply of coal to Unit 2. However, the FSA for Unit 1 has not yet been signed. VIPL should continue elfin-is to expedite the execution of FSA so as to ensure the availability of linkage coal for Unit I.

4.12.5. The Commission observes that the basic cost of coal has been considered by VIPL as per CIL 's notification for the respective Calorific values. The Commission asked VIPL to submit reconciliation of freight charges considered for coal supply from WCL and SECL. VIPL submitted that, for the freight charges, it has considered the Deepika mine rail loading facility of SECL as the loading point and the Butibori power plant as the delivery point. Accordingly, the distance of 577 km has been considered for transportation of coal from SECL mines. VIPL has considered the Wani mine of WCL us the loading point, and the distance of 150 km to the Butibori plant has been considered for transportation of coal from WCL. The Commission has referred to the freight charges computations and relevant documents submitted by VIPL. The Commission notes that VIPL has submitted freight charges of Rs. 978/MT for SECL coal and Rs. 405/MT for WCL coal.

4.12.6. For the computation of Energy Charge for FY 2014-15, the Commission has considered the landed price of all fuels as submitted by VIPL..."

2.10.21 In that Order, the Commission approved the Energy Charge of Rs. 1.91/kWh for FY 2014-15 and FY 2015-16 considering the fuel prices and GCV as proposed by VIPL-G. Importantly, though VIPL-G filed its Petition in that Case on 30 May, 2014, i.e., two months after the commencement of power supply under the regulated business and despite linkage coal not being available as directed by the Commission, it proposed in its Petition Energy Charge of Rs 1.91/kWh for FY 2014-15 considering a substantial part of the coal requirement to be met from linkage coal.

2.10.22 From the above Orders, it is clear that, in all these proceedings and its Petitions, including approval of Capital Cost and Final Tariff for FY 2014-15 and FY 2015-16, VIPL-G had projected the Energy Charge for those years considering a substantial proportion of linkage coal although it was aware of the status of fuel arrangements for its Generating Station.

As recorded in the Order in Case No. 2 of 2013, the PPA through Section 62 route was approved by the Commission considering also the projections of VIPL-G showing that, even in a pessimistic scenario (CIL supplying, out of the committed coal, 65% in FY 2014-15 and 70% in FY 2015-16, the rest being procured from the domestic open market and/or imports), the Energy Charge would still be competitive, at Rs 1.74 in FY 2014-15 and Rs. 1.79 in FY 2015-16. Had a higher tariff been envisaged, the Commission might well not have approved the PPA under Section 62 and asked Rlnfra-D to explore other options and modalities*. VIPL-G would not have been unaware and could not be oblivious to the prevailing situation and difficulties in securing linkage coal as projected in a series of regulatory proceedings before the Commission. Even in its Petition filed on 30 May, 2014 (two months after commencement of power supply), VIPL-G submitted the Energy Charge for FY 2014-15 and FY 2015-16 considering that linkage coal would meet a substantial proportion of its requirement, although the actual Energy Charge from fix! utilised during April and May, 2014 was substantially higher.*

2.10.23 As per the provisions of PPA approved by the Commission, one of the Conditions Subsequent to be met by VIPL-G was execution of a FSA and providing a copy to Rlnfra-D by April 3, 2014. As discussed earlier, the Commission notes that the important Conditions Subsequent of the PPA have not been fully complied even now, more than two years later. Out of the total LOA ACQ of 23,44,800 MT of coal, the mine-specific FSA has been executed only for ACQ of 6,00,000 MT of coal, and remains to be executed for almost 75% of the LOA quantum. Further, even the FSA for ACQ of 6,00,000 MT is for supply of coal on cost-plus basis and not for linkage coal.

2.10.24 In its Order dated 17 January, 2014 in Case No. 91 of 2013, the Commission had directed VIPL-G to ensure the availability of linkage coal by the date of commencement of supply under the regulated business from 1 April, 2014. Instead, VIPL-G started utilising fuel from other sources (at a higher cost) from April, 2014 onwards and began supplying power to Rlnfra-D. Before doing so, it did not approach or intimate the Commission regarding the impact of utilisation of such alternative coal on the Energy Charge.

2.10.25 The actual Energy Charge for FY 2014-15, as submitted by VIPL-G, works out to Rs 3.62/kWh, which is almost double the rate of Rs. I.23/kWh to Rs. 1.91/kWh put forward by VIPL-G in its various Petitions for approval of PPA and Tariff: Further, the basic premise of securing coal linkage on the basis of which the PPA was approved under the option provided under Section 62 of the EA, 2003 has not been achieved till now. At the Energy Charge of Rs. 3.62/kWh, procurement of power by Rlnfra-D from VIPL-G is not at all competitive vis-a-vis the prices discovered elsewhere through competitive bidding that were presented by the Parties while seeking PPA approval in Case No.2 of 2013. The actual Energy Charge of Rs 3.62/kWh claimed is more than double the rate of Rs 1.74/kWh projected by them (for FY 2014-15) under the pessimistic scenario presented during the PPA approval proceedings.

2.10.26 In the light of these facts and circumstances, the Commission does not find it prudent or otherwise appropriate to approve the actual fuel cost incurred by VIPL-G in FY 2014-15.

2.10.27 The Commission is Of the view that, since a basic premise of approval of the PPA was the availability of linkage coal from CIL and its facilitation, and VIPL-G in all its Petitions had also projected the Energy Charge based on utilisation of domestic coal, deviating from this underlying principle while approving the Energy Charge in the Truing up for FY 2014-15 cannot be justified.

2.10.28 In its Petition for approval of final Tariff for FY 2014-15, which was filed on 30 May, 2014, i.e., after the commencement of FY 2014-15 and of supply under the PPA, VIPL-G had also envisaged SECL linkage coal for Unit 1 and cost-plus coal from WCL for Unit 2. The Commission also notes that VIPL-G had got the linkage of Unit 1 transferred from WCL to SECL because of non-availability of linkage coal from WCL.

2.10.29 Although VIPL-G's Petition in that Case considered utilisation of 100% domestic coal from WCL for Unit 2 and 100% domestic SECL linkage coal, around 20% of the actual coal utilised during FY 2014-15 consisted of coal procured under the cost-plus FSA, around 63% was domestic coal from forward auctions and the open market, and 17% was imported coal, which is a significant deviation from the premise on the basis of which the final tariff was approved for FY 2014-15. The Commission notes that the process of Truing up is not intended merely for the approval of actual costs when these are at complete variance with the basic assumptions put forward at the time of approval of the PPA and the initial tariff

2.10.30 For the Truing up of fuel costs for FY 2014-15, the Commission has considered the same mix of coal, i.e., 100% of cost-plus coal from WCL for Unit 2 and 100% linkage coal from SECL for Unit 1, on the basis of which the tariff for FY 2014-15 was approved. The Commission has, however, considered the actual coal price (considering normative Transit Loss) and calorific value for the cost-plus WCL coal. As no linkage coal has been procured from SECL by VIPL-G for Unit 1, the actual coal price and calorific value data is not available. In its absence, for linkage coal the Commission has considered the coal price, after adjusting for the variation in statutory levies, taxes and duties and calorific value, as considered by VIPL-G in its Petition in Case No. 115 of 2014 for approval of final tariff "

ii. Taking into account the Commission's analysis of the fuel costs and other elements of the ARR, para. 31.1 of the impugned Order sets out the Summary of the approved True-up and the Revenue Surplus determined as Rs. 434.70 crore for FY 2014-15 and directed the Appellant to refund this surplus of Rs. 434.70 Crore to Rlnfra-D in six monthly instalments.

For the Provisional True-up for FY 2015-16, on the issue of Fuel cost the Commission, consistent with its approach in the True-up of FY 2014-15, after determining a Revenue Surplus of Rs. 405.89 Crore, taking into account its analysis of fuel costs and other elements, directed the

Appellant to refund the Revenue Surplus of FY 2015-16, to RInfra-D in 6 monthly instalments.

iii. The Appellant has contended that it had provided the details of actual fuel cost incurred through its Fuel Adjustment Charge (FAC) submissions to the State Commission. However, it is important to note that the FAC is intended only to enable recovery of that variation in fuel prices and calorific value which is legitimate and due as against the values considered in the Tariff Order. The objective of FAC is not merely to enable all or any variation in costs arising from departures from the basic premise underlying the operation of the generation plant as a part of a regulated business. In the present case, if the basic premise on the basis of which the PPA and Tariff have been approved by the Respondent Commission is altered by the Appellant, the increase in costs arising therefrom cannot be allowed to be recovered through FAC. The relevant extract of para 2.10.29 of the Impugned Order is reproduced below:

"The Commission notes that the process of Truing up is not intended merely for the approval of actual costs when these are at complete variance with the basic assumptions put forward at the time of approval of the PPA and the initial tariff:"

iv. The Appellant has contended that the PPA between the Parties clearly gives the Appellant the right to procure fuel from any available source to meet its obligations there-under to the extent that there is a shortfall under the FSA. In such an eventuality, the adjustment in the rates of Energy Charge based on the actual price / heat value of fuel is payable

by Respondent No.2 on a month to month basis in accordance with the Tariff Regulations as well as the Commission's Orders dated 17.01.2014 and 09.03.2015. Thus, the Appellant was clearly entitled to procure such coal, generate and supply power to Respondent No.2 and raise bills in accordance with Regulation 49.6 of the MYT Regulations, 2011. There is no bar in the PPA nor is there a cap on recovery of Variable Charge thereunder. The Appellant has duly complied with the procedure prescribed there-under by filing Petitions for approval of FAC on monthly basis post-facto. The Respondent Commission had approved in the PPA, the procurement of Coal to the extent to meet the shortfall in quantity of Coal supplied from WCL. The Relevant extract of the PPA is reproduced below:

"The Seller shall have the right to procure fuel from any available sources to meet its obligations under this PPA, to the extent of shortfall in quantity of coal supplied and/or deficient quality coal supplied, as the case may be, by Western Coalfields Limited under the Fuel Supply Agreements."

The Appellant has misrepresented the facts, since it is categorically mentioned in the PPA that the Appellant may procure coal to the extent of shortfall in quantity of coal supplied and/or deficient quality coal supplied, as the case may be, by WCL under the FSA.

v. While approving the PPA, the underlying premise was to get power at a lower cost on a longer term basis for Mumbai. In its Petition for approval of the PPA, the Appellant had stated that even in the pessimistic scenario of CIL supplying only the minimum guaranteed supply of committed coal in FY 2014-15 and FY 2015-16 and the Appellant having

to arrange the balance from market sources such as e-auction and/or imports, the Variable Charges would be Rs. 1.74 per kWh.

A-III After having a careful examination of all the aspects related to Issue No 1 i.e. **Disallowance of fuel cost for the period FY 2014-15 and 2015-16** brought before us for our consideration, our observations on the Issue No 1 are as follows:-

a) The State Commission vide its Order dated 20.02.2013 in Case 2 of 2013 had approved the Power purchase Agreement of the Appellant with Respondent No 2 for supply of 300 MW power from Unit-II (IPP) of the Appellant Power Plant. While approving the PPA, the State Commission had asked the Appellant about the Scenario Analysis considering various fuel supply scenario and its impact on Energy Charges during FY 14-15 and FY 15-16. After examining all the aspects including the price competitiveness of Appellant power, the State Commission accorded its in-principle approval for the PPA between Appellant and Respondent No 2 with Tariff to be determined by the State Commission in accordance with the MYT Regulations on cost plus basis by applying critical prudence checks while examining the Tariff proposal.

b) Further the State Commission has also approved the Power purchase Agreement for supply of 300 MW power from Appellants Unit-I to Respondent No 2 vide order dated 19.07.2013 in Case No 76 of 2013.

c) The State Commission has observed the non-signing of FSAs by the Appellant in its order dated 17.01.2014 in Case No.91 of 2013 for determination of Provisional Tariff for Appellant plant for FY 2014-15 and FY 2015-16. The State Commission determined the Energy Charges considering 100% availability of Domestic coal with the observation that Any variation in Price and Gross Calorific Value of coal vis-a-vis approved values for computing the provisional Energy Charge shall be recoverable through Fuel surcharge Adjustment mechanism as per the provisions of Regulation 49.6 of MERC MYT Regulations, 2011. The observations of State Commission were as follows:

"The Commission observes that FSAs for the project have not been executed. The Commission directs VIPL to expedite the process of executing the FSAs so as to ensure the availability of linkage coal by the date of commencement of supply under the regulated business from 1 April, 2014.
The Commission observes that the FSAs for the project are yet to be executed. ***The Commission, at this stage, has computed the Energy Charge for VIPL considering 100% domestic coal for FY 2014-15 and FY 2015-16 as submitted by the Petitioner in its Petition****. The Commission directs VIPL to submit the FSAs executed for the project along with its Petition for determination of final Tariff*
The Commission has considered the calorific value of fuels as submitted by VIPL.The Commission has considered the landed fuel prices of fuels as submitted by VIPL for FY 2014-15. The Commission has not considered the escalation in fuel prices for projecting the fuel prices for FY 2015-16, as any variation in actual fuel prices shall get adjusted in the fuel cost adjustment mechanism.

Any variation in Price and Gross Calorific Value of coal vis-a-vis approved values for computing the provisional Energy Charge shall be recoverable through Adjustment of rate of energy charge (REC) (Fuel surcharge Adjustment)in accordance with the provisions of Regulation 49.6 of MERC MYT Regulations, 2011."

d) The Appellant commenced supply of power to Respondent No.2 with effect from 01.04.2014 using coal from alternate sources as Coal supply commenced from WCL from October 2014 onwards in respect of Unit II.

e) In the Impugned Order, the State Commission has notionally considered 100% supply of domestic coal on cost-plus basis from WCL for Unit II for the period April 2014 to October 2014 and 100% supply of linkage coal from SECL for Unit I for the purposes of Truing-Up of Fuel Cost for FY 2014-15 and for Provisional Truing-Up of Fuel Cost for FY 2015-16. This basis has been followed for the purpose of determining the Multi-Year Tariff for FYs 2016-17 and 2019-20.

f) The State Commission has not allowed the actual fuel cost for FY 2014-15 and FY 2015-16 incurred by the Appellant on the ground that the procurement of fuel was done at a rate higher than and on a different basis from that considered while approving the PPA with RInfra-D.

g) The State Commission while giving in-principle approvals for the Power Purchase Agreements for Unit–II vide order dated 20.02.2013 as well as for Unit-I vide order dated 19.07.2013 has not put any specific conditions as far as Energy Charges are concerned. The State Commission has put its observations in Annexure-1 of the order on the PPA which also does not include any specific reference to the limitation/ capping/ outer limit of Energy Charges. Further, the State Commission also approved the Consolidation Agreement executed between RInfra-D and VIPL for supply under the two PPAs for Unit 1 and Unit 2 to be treated as supply from the Power Station as a whole.

h) As per the provisions of Electricity Act 2003, there are two specific modes of power procurement and tariff determination by the Appropriate Commission. The State Commission after going through its prudence check for analysing the options of power procurement by Respondent No 2 and ensuring competitiveness of the power proposed to be supplied by the Appellant had taken a conscious decision to grant in-principle approval of the Power Purchase Agreements between the Appellant and Respondent No 2. The said approval was to determine the Tariff under Section 62 of the Electricity Act, 2003 on cost plus basis.

i) The State Commission in the Impugned Order observed that ***"the PPA through Section 62 route was approved by the Commission considering also the projections of VIPL-G showing that, even in a pessimistic scenario (CIL supplying, out of the committed coal, 65% in FY 2014-15 and 70% in FY 2015-16, the rest being procured from the domestic open market and/or imports), the Energy Charge would still be competitive, at Rs 1.74 in FY 2014-15 and Rs. 1.79 in FY 2015-16. Had a higher tariff been envisaged, the Commission might well not have approved the PPA under Section 62 and asked RInfra-D to explore other options and modalities."*** We do not find any support to the observations of the State Commission in its earlier orders granting approval of the Power Purchase Agreement for Unit-I as well as Unit-II. The State Commission while examining the various fuel scenario may have identified any ceiling/ ratio of coal use as specified under various scenario, which is not the case under present consideration. Once the State Commission has approved the PPA under

Section 62, the basic principles of Tariff determination as per Section 62 have to be followed by the State Commission.

j) Even as per the provisions of the Tariff Policy 2016, in case of Competitively Bid projects under Section 63 of the Electricity Act, the cost of imported/ market based e-auction coal procured for making up the shortfall due to reduced quantity of domestic coal supplied by CIL, vis-a-vis the assured quantity or quantity indicated in Letter of Assurance/ FSA, has been made a pass through by the Appropriate Commission on a case to case basis.

k) The basic philosophy of allowing such additional coal cost as pass through in the Tariff is to deal with the situations where the shortfall in coal supply is beyond the control of the Developer/Generator. Here in the present case the Appellant, in absence of supply of Domestic coal at notified prices, was forced to use Cost Plus coal as well as use coal from other sources (e-Auction/ Imported) .To safeguard the interest of the consumers, the prudence check of the Appropriate Commission has also been well recognised. In the present case while deciding on the True Up petition filed by the Appellant, the State Commission ought to have considered the factors for arranging coal from other sources despite putting up best efforts to get coal from CIL/ WCL/ SECL sources by the Appellant. The State Commission while applying its prudence check must allow the actual fuel mix used by the Appellant while determining the Energy charges for FY 14-15 and FY 15-16. While giving this observation, we would like to underline the fact that it is the prime responsibility of the Appellant to ensure supply of domestic linkage coal

from CIL to have most competitive energy charges for the supply of its power to Respondent No 2. Further as the domestic coal availability position in the country has eased out, the Appellant as well as the State Commission has to ensure the supply and use of Domestic coal to the extent possible for supply of power under the current agreements.

l) It is abundantly clear that the prime responsibility of arranging coal is that of the Appellant. Inspite of all efforts put in by the Appellant, it could not get the FSA for Unit-I executed. As such the Appellant arranged/is arranging the coal through alternate sources for Unit-I. The Appellant should put in all possible efforts to get the FSA executed for Unit-I at the earliest. It is not at all a fair practice as adopted by the State Commission in the Impugned Order to restrict the actual fuel cost incurred/to be incurred by the Appellant based on the various considerations as detailed out in the Impugned Order for generation from Unit-I for the given period. In the meantime, the State Commission is directed to allow the Appellant the cost of coal supplied/being supplied in the intervening period till the FSA is executed by the Appellant for Unit-I limiting to the extent of the cost of coal what has been allowed/being allowed by the State Commission to the Appellant for Unit-II during the period from COD till the FSA for Unit-I is executed.

m) Having observed as above, we will decide the first issue i.e. **Whether the Appellant is entitled to claim the fuel costs incurred by it due to delay in execution of Fuel Supply Agreement (FSA) with Coal India Limited ("CIL") and its subsidiaries for reasons not attributable to the Appellant in its tariff to Respondent No.2, with whom there is a valid, duly approved Power Purchase Agreement, in accordance with the applicable Tariff Regulations of State Commission,** in

favour of the Appellant for allowing cost of coal for Unit-I limiting to the extent of what has been allowed/is being allowed by the State Commission for the corresponding period for the supply under FSA arrangement for the generation from Unit-II of the Appellant to Respondent No.2.

n) On the related issue at para 7 (b) above i.e. Whether Respondent No.1 has ignored the inordinate delay on part of various Government Authorities and Public Sector Companies which are not within the control of the Appellant and /or are force majeure events which in turn has delayed execution of the FSA between the Appellant and WCL despite all efforts on part of the Appellant, this issue gets covered as per our decision as above.

o) On the other related issue i.e. Whether the 1st Respondent could have disallowed such cost of fuel incurred by reason of there being no FSA in favour of the Appellant, this issue stands decided as per para m) above.

p) The next related issue i.e. Whether the Impugned Order could have been passed disallowing fuel costs, since the 1st Respondent has at all times been kept informed since seeking approval of the PPA, determination of Provisional & Final Tariff for FY 2014-15 and FY 2015-16 as well as at the time of final True up and provisional True up for the aforesaid years respectively, including filing of Fuel Adjustment Charge (`FAC') petitions with regard to the cost incurred for procurement of coal in absence of an FSA and such costs, were admittedly incurred with the knowledge of the State Commission, stands decided as discussed above.

q) Similarly Issues at 7 (e) to (n) as indicated above related to disallowance of Fuel Charge stand decided as discussed above.

B On Issue No 2: (a) Approval of Auxiliary Energy Consumption of 9.05% for FY 2014-15 in paragraphs 2.5.9 to 2.5.19 of the Impugned Order as against 9.61% as proposed by the Appellant and (b) The consequent computation of Availability in paragraph 2.3 of the Impugned Order of 84.83% as against 85.40% as proposed by the Appellant, our observations are as follows;

B-I On the Issue regarding **Auxiliary Power Consumption** raised in the present Appeal, the learned senior counsel for the Appellant has made the following submissions for our consideration;

i. Regulation 2.1 (6) of the Tariff Regulations, 2011 defines "Auxiliary Energy Consumption" as under:

"Auxiliary Energy Consumption" in relation to a period means the quantum of energy consumed by auxiliary equipment of the Generating Station and shall be expressed as a percentage of the sum of gross energy generated at the generator terminals of all the units of the Generating Station; Provided that for the purpose of these Regulations, auxiliary energy consumption for a thermal Generating Station shall include transformer losses within the Generating Station;

Provided further that colony consumption of a Generating Station shall not be included as part of the auxiliary consumption for the purpose of these Regulations.

ii. Regulation 44.5(a) of the Tariff Regulations, 2011 prescribe Auxiliary Energy Consumption for coal-based generating stations falling under the category of "Electrically driven boiler feed pumps" other than those belonging to MSPGCL to be 8.50% and to be higher by 0.5% with

induced draft cooling tower as compared to what is set out in the Table to the said Regulation.

iii. The COD of Unit I was declared on 04.04.2013 and Unit II on 28.03.2014. The State Commission by its Order dated 17.01.2014 in Case No. 91 of 2013 for approval of Provisional Tariff for FY 2014-15 and FY 2015-16 allowed additional Auxiliary Energy Consumption of 0.13% over and above the normative Auxiliary Energy Consumption of 9% for Reverse Osmosis (RO) Plant and additional water pumping system considering the installation of RO Plant to comply with the MoEF's direction for achieving zero effluent discharge system and additional water pumping system.

iv. By its order dated 09.03.2015 in Case No. 115 of 2014 while approving the Final Tariff for FY 2014-15 and FY 2015-16, the State Commission recorded the Appellant's submission that additional water pumping system was put to use from 01.04.2014 and that the RO Plant was at an advanced stage of commissioning and in absence of actual energy consumption pattern for these systems for a considerable stable operating period, the State Commission should consider normative auxiliary consumption of 9%. The said Order specifically stated that the State Commission would take a view in the matter at the time of truing up based on analysis of actual auxiliary consumption, so as to arrive at auxiliary power consumption for the aforesaid 2 systems over and above the normative auxiliary consumption.

v. The actual Auxiliary Energy Consumption in FY 2014-15 of the Plant was 9.61% which is higher than the normative Auxiliary Energy Consumption of 9% which was on account of operations at sub-optimal load due to backing down instructions of SLDC and initial teething

problems during stabilization. The outage hours for Unit I were 513.30 hours resulting in generation loss of 152.99 MU and 1388.64 hours for Unit II resulting in generation loss of 416.54 MU. The RO Plant was commissioned in FY 2015-16.

vi. The Appellant in the said Petition at the time of truing up of for FY 2014-15 sought relaxation of norms and approval of actual Auxiliary Energy Consumption of 9.61% which was due to backing down instructions by the SLDC as well as various factors like initial teething problems faced during stabilization. The State Commission in its Impugned Order considered Auxiliary Energy Consumption of 9.05% for truing up purposes and treated the difference between the same as efficiency loss for FY 2014-15 as per the Tariff Regulations, 2011.

vii. With reference to the plant having achieved a higher Auxiliary Energy Consumption during FY 2014-15, the auxiliary load can be divided in three groups as below:

Group A - The Copper losses of auxiliaries such as GT, UAT or Station Transformer is directly proportional to the loading on the set and as the iron losses are not very high, the Auxiliary Consumption, in % terms, almost varies along with the actual load.

Group B - These are auxiliaries such as CEP, ID fan, FD fan, BFP etc. where the current drawn varies with the load on the set. The efficiency is optimum for a design loading and in case of variation in the loading the

efficiency suffers, Thus, with reduction in load, in % terms, the auxiliary consumption slightly increases.

Group C - The consumption, in the ash system (Ash Slurry pumps), cooling water system (CW pumps, ACW pumps, ECW Pumps, LP/ HP pumps etc.), air system (Air Compressors, PA fan, SA fans etc.), Miscellaneous loads(lighting, AC & Ventilation, LOP of Stand By Auxiliaries, etc.) remain practically constant and have no relation with the actual load. Thus, in this category, backing down increases the auxiliary consumption, in % terms, significantly. During FY 2014-15 actual backing down received by VIPL was 11.01% of schedule generation which led to significant increase in percentage of auxiliary consumption.

viii. The Appellant had also submitted through additional submission that as per fourth amendment in IEGC dated 06.04.2016, CERC under clause 6.3B(ii) has also recognised the degradation of Auxiliary Power Consumption(`APC') due to partial loading and suggested correction for the various bands of PLF and as per the same correction 0.65% in APC is allowed for the Machine Loading Band of 65 -74.99% corresponding to the Appellant's actual PLF for FY 14-15.

ix. Considering the actual Auxiliary Energy Consumption as 9.61%, the availability for the year works out to be 85.40% which is more than the Target Availability and consequently, the Appellant is entitled for recovery of entire Annual Fixed Charges for FY 2014-15.

B-II On this Issue raised in the present Appeal, the learned counsel for the State Commission has made the following submissions for our consideration;

i. The Appellant has contended that higher Auxiliary Consumption of 9.61% during FY 2014-15 was due to backing down instructions by the State Load Dispatch Centre (SLDC) as well as various factors like initial teething problems faced during stabilization and since Auxiliary Consumption varies with the load, the Respondent Commission in the Impugned Order at para 2.5.13 has stated that

"As regards the higher Auxiliary Energy Consumption in percentage terms due to lower gross generation, the Commission is of the view that this would also be applicable when the actual generation is higher and the Auxiliary Energy Consumption is reported as lower in percentage terms, for which VIPL-G would be entitled for efficiency gains. In case the reasons given by VIPL-G are accepted for higher Auxiliary Energy Consumption, then the same would be applicable when generation has increased as compared to normative generation, and the mechanism of approving normative parameters and sharing of gains and losses for better/under performance will not have any sanctity."

ii. The Tribunal in its Judgments dated 18 September, 2015 in Appeal No.196 of 2014 (HPGCL V/s HPERC) on a similar issue of Auxiliary Consumption due to backing down has ruled that the reasons cited by the Appellant for invoking the power to relax have already been considered and rejected by this Appellate Tribunal. The relevant portion of para 15 of the Judgment is reproduced below:

"*That the appellant has prayed for relaxation of norms in respect of auxiliary consumption. Whereas this Appellate Tribunal has held in*

several cases that power of relaxation should be exercised with strict circumspection only in exceptional cases. The reasons being cited by the appellant for using power to relax have already been considered and rejected by this Appellate Tribunal in its judgment dated 12.12.2013 in the matter of Indraprastha Power Generation Company Limited Vs. Delhi Electricity Regulatory Commission & Ors. (supra). The same principle applies in respect of this norm as well."

In its judgement, the Tribunal has held that diluted or relaxed auxiliary norms would cast an additional burden on the end consumers. The relevant portion at para 16 (iii) of the judgement is reproduced below:

"In the case in hand if the contention of the appellant is allowed and norms for auxiliary are diluted or relaxed that would cost additional burden on the end consumers of the Discoms which should not be permitted considering the relevant provisions in this regard given in the Electricity Act,2003.Consequently this Issue No.c) is also decided against the appellant."

iii. The Appellant Citing the fourth amendment in Indian Electricity Grid Code (IEGC) dated 06 April, 2016, the Appellant has stated that the Central Electricity Regulatory Commission (CERC) in clause 6.3 B (ii), has also recognized the degradation of Auxiliary Power Consumption (`APC') due to partial loading and suggested correction for various bands of Plant Load factor (PLF) and as per the same correction of 0.65% in APC is allowed for Machine Loading band of 65 - 74.99% corresponding to the Appellant's actual PLF for FY 2014-15.

The Appellant is seeking retrospective effect of the above provision for relaxation of Auxiliary Consumption for FY 14-15. The Supreme Court in the matter of State of Madhya Pradesh vs. Tikam Das (1975) 2 SCC 100 held that subordinate legislation cannot be given retrospective effect unless specifically so authorized under the parent statute.

iv. The Respondent Commission in the Impugned Order has given the reasons for considering Availability as 84.83%, which is as certified by the SLDC. The relevant para 2.3.4 of the impugned Order is reproduced below:

"2.3.4 Thus, the appropriate authority to certify the Availability of the Generating Station is the MSLDC, which has certified the actual Availability for FY 2014-15 as 84.83%. The Commission does not find any merit in the submissions of VIPL-G regarding higher or lower Auxiliary Energy Consumption and the consequential impact on the Availability to be considered for Truing up in view of the standing of the certification of the actual Availability for Truing up. VIPL-G has not disputed the certification of MSLDC. Hence, the Commission has considered the actual Availability of 84.83% for FY 2014-15, as certified by MSLDC."

B-III After having a careful examination of all the aspects related to Issue No 2 i.e. **Disallowance of Auxiliary Energy Consumption at the rate of 9.61 % as proposed by Appellant and consequent computation of Availability at 85.40% for the period FY 2014-15** brought before us for our consideration, our observations on the Issue are as follows:-

i. The Appellant has sought approval of higher Auxiliary Consumption of 9.61% during FY 2014-15 which was as a result of the backing

down instructions by the State Load Dispatch Centre (SLDC) as well as certain initial teething problems.

ii. Further the reference has been made by the Appellant on the provisions of fourth amendment in Indian Electricity Grid Code (IEGC) dated 06 April, 2016 which are related to part load compensation on Auxiliary Power Consumption.

iii. The compensation as per IEGC amendments are described under Sub Regulation 6.3 B. Further as per Notification dated 6.4.2016, the IEGC fourth amendment Regulations shall come into force with effect from date of publication in Official Gazette except Sub-Regulation 6.3B which shall come into force on such date as the Commission may appoint by notification in the Official Gazette.

iv. Hence these Amendments related to APC have not come into effect. Hence the State Commission cannot allow such increase in Auxiliary Power Consumption due to part load compensation due to backing down instructions by SLDC. Consequent to this, there can be no change in the availability of the Power Station for the period FY 2014-15. This issue is decided against the Appellant.

C Issue No.3: Approval of Gross Station Heat Rate of 2401 kcal/kWh in paragraph 2.7 of the Impugned Order as against 2457 kcal/kWh for FY 2014-15 as proposed by the Appellant;

C-I On the issue regarding Station Heat Rate raised in the present Appeal, the learned senior counsel for the Appellant has made the following submissions for our consideration;

i. Based on the methodology to determine Station Heat Rate (`SHR') as per Regulation 44.3 of the Tariff Regulations, 2011, the SHR for the Appellant's generating station works out to 2401 kcal/kWh.

ii. At the time of passing its Order on Provisional Tariff for FY 2014-15 and FY 2015-16 in Case No.91 of 2013, by an Order dated 17.01.2014, the State Commission held that it would take a view with regard to the submissions of the Appellant for variation in the SHR from the design SHR based on the performance guarantee test report.

iii. The State Commission by its Order dated 09.03.2015 relating to the Final Tariff of FY 2014-15 and FY 2015-16 in Case No.115 of 2014 by its Order dated 09.03.2015 considered the Station Heat Rate on its computation as per the Tariff Regulations, 2011, i.e. 2401 kcal/kWh.

iv. The Appellant sought approval of actual Gross Station Heat Rate of 2457 kcal/kWh in view of the problems faced by the Appellant during first year of operation due to initial teething problems faced during stabilization, backing down of units due to low demand in the grid, tripping of units etc. .

v. It is submitted that the SHR is dynamic in nature and is affected by a number of parameters during operation of the plant like GCV of fuel, Steam Parameters, Condenser Vacuum, generator load etc. The Appellant faced with various issues, such as :

a) Part Load Operation due to Grid Restriction resulting into PLF loss of 4.84% in FY 2014-15 due to transmission capacity constraints against availability, backing down by SLDC and corresponding PLF loss was 8.56% against availability.

b) Turbine Single Valve Operation: Plant operated for first eight months with single valve operation as per OEM recommendations for uniform heating & expansion of turbine internals and subsequently shifted to sequential valve control which is desired mode. Single valve operation is inefficient than normal sequential operation mode operation as it has more throttling losses across the valve resulting into increase in heat rate.

c) Process Parameter Optimization: Process parameters variation has significant impact on heat rate. During initial operation of the plant most of the critical parameters need some stabilisation period to optimize and it took around six months to optimize all critical parameters listed below which resulted into adverse impact on heat rate.

vi. CERC in the fourth Amendment to CERC (Indian Electricity Grid Code) Regulations dated 06.04.2016 has provided the mechanism for compensation for SHR on account of part load operation.

vii. MYT Regulations, 2015, has already provided the enabling provisions for variation in the heat rate on account of part load operation. The relevant clause is reproduced as under:-

"44.10 In case a Generating Station or Unit is directed by MSLDC to operate below normative loading but at or above technical minimum schedule on account of grid security or due to the lower schedule given by the Beneficiaries, increase in Gross Station Heat Rate may be considered by the Commission on case to case basis at time of truing up, subject to prudence check."

C-II On the Issue No 3 regarding **Station Heat Rate** raised in the present Appeal, the learned counsel for the State Commission has made the following submissions for our consideration.

i. The Appellant had claimed relaxation on Station Heat Rate (SHR) of the Generating Station mainly due to the following reasons:
   a. Initial teething problems faced during stabilisation
   b. Backing down of Units due to low demand in grid and
   c. Tripping of Units

ii. In its Judgment dated 18 September, 2015 in Appeal No. 196 of 2014 and 326 of 2013 (HPGCL V/s HPERC) on the issue of SHR on account of backing down instructions from SLDC, the Tribunal has decided the issue against the Appellant. Relevant extract of the Judgment at para 13 (ii) is reproduced below:

"Order. Therefore, there is no merit in the contentions of the Appellant, regarding the issues of SHR, which deserves to be rejected."

iii. The Appellant has also contended that the Respondent Commission has accounted for transitional problems during the stabilization period for various new Plants commissioned by the Maharashtra State Power Generation Company Ltd (MSPGCL) in the Order dated 4 September, 2013 in Case No. 44 of 2013.

iv. The Respondent Commission has determined the Capital Cost and Tariff for the Appellant (VIPL-G) in accordance with the MYT Regulations, 2011 whereas in the cited Order dated 4 September, 2013 in Case No. 44 of 2013, the Respondent Commission has determined MSPGCL's Capital Cost and Tariff for Khaperkheda Unit No. 5, in accordance with the Commission's Tariff Regulations, 2005. The Tariff Regulations, 2005 and the MYT Regulations, 2011 have two distinct provisions regarding stabilisation period for generating Unit which are explained as below:

"In Regulation 33.1.3 of the Tariff Regulations, 2005, on the Gross SHR there was a provision for SHR during the Stabilisation period and the subsequent period, whereas the MYT Regulations, 2011 do not have any explicit provisions on relaxation during the stabilisation and subsequent period."

v. The Respondent Commission has also determined the Capital Cost and Tariff for MSPGCL's Bhusawal Unit 4 and 5 in its Order dated 20 April, 2015 in Case No. 201 of 2014. For Bhusawal Unit 5, the

Respondent Commission has determined the Tariff in accordance with the MYT Regulations, 2011. The Respondent Commission has taken similar approach on the issue of SHR as done for the Appellant's Unit. Hence, the Appellant is clearly misguiding and misleading the Tribunal by stating that the Respondent Commission has accounted for transitional problems during the stabilisation period for various new Plants commissioned by MSPGCL in Case No. 44 of 2013.

C-III Our observations on the Issue No 3 i.e. **Disallowance of Station Heat Rate of 2457 Kcal/Kwhr as proposed by Appellant for the period FY 2014-15**, are as follows:-

i. The State Commission in its Impugned order has mentioned that it is evident that the guaranteed performance parameters as submitted by VIPL-G have been achieved as per actual achievement according to the PG Test report as submitted by VIPL. Hence, the Commission has computed the normative Gross SHR in accordance with Regulation 44.3.

ii. On part load compensation, the State Commission has observed at para 2.7.10 as

"2.7.10 The Commission does not find merit in the submissions of VIPL-G regarding increase in SHR on account of part load operations. If the actual performance parameters, which are controllable in nature, are considered for True-up irrespective of whether they are better or worse in comparison to the normative performance parameters, it would result in VIPL-G and the consumers foregoing their legitimate share of any efficiency gain on account of better performance, and loading of any efficiency loss on the consumers on account of under-performance. Hence, the Commission had specified the mechanism of approving the

normative parameters and sharing of gains and losses for better/under-performance in the Tariff Regulations in final True-up. "

iii. Further the reference has been made by the Appellant on the provisions of fourth amendment in Indian Electricity Grid Code (IEGC) dated 06 April, 2016 which are related to part load compensation on Station Heat rate.

iv. The compensation as per IEGC amendments is described under Sub Regulation 6.3 B. Further as per Notification dated 6.4.2016, the IEGC fourth amendment Regulations shall come into force with effect from date of publication in Official Gazette except Sub-Regulation 6.3B which shall come into force on such date as the Commission may appoint by notification in the Official Gazette. Hence these IEGC Amendments related to SHR have not come into effect;

v. Hence considering our observations on Issue No 2 regarding Auxiliary Power Consumption and Issue No 3 regarding Station Heat rate, **the issue at para 7 (o)** i.e. **Whether the 1st Respondent ought to have exercised its powers under the provisions of the relevant Tariff Regulations regarding "Power to amend" and "Power to remove difficulties" and granted to the Appellant in the Impugned Order the Auxiliary Energy Consumption as well as Gross Station Heat Rate as proposed by it, specifically in view of the fact that the Appellant's Generating Station was in the 1st and 2nd year of operations after its Commercial Date and the Appellant had produced sufficient material before Respondent No.1 for exercise of such powers,** is decided against the Appellant.

D Issue No. 4 - The consideration of actual Interest on Working Capital (IWC) of Rs.33.43 Crore for computing efficiency gain on the purported basis as held in paragraphs 2.23.6 and 2.23.7.

D-I On the Issue regarding **Interest on Working Capital** raised in the present Appeal, the learned senior counsel for the Appellant has made the following submissions for our consideration;

i. The Appellant in the said Petition while truing up for FY 2014-15 had sought normative IWC as Rs. 79.91 Crore and actual IWC for FY 2014-15 as Rs. 78.34 Crore. As per Audited Accounts, IWC paid by the Appellant is reflected as Rs.33 crores which reflects the cost incurred by the Appellant for financing through external sources. However, in actual operations, the interest on working capital expenditure over and above Rs.33 crores (as per Audited Accounts) was financed through internal accruals and cost of which is not reflected in the Audited Accounts.

ii. The Appellant in the said Petition computed the working capital requirement for FY 2014-15 based on the parameters specified in Regulation 35.1 of the Tariff Regulations, 2011. The State Commission sought data gaps and the Appellant submitted month-wise cash flow statement, working capital requirement on monthly basis and working capital limit used from banks to substantiate that the internal accruals were utilized to meet the working capital.

iii. The Appellant was claiming IWC on such component of working capital which was deployed through internal accruals/sources. It is settled law that when such internal accruals are deployed, they carry a cost which a generating company or a licensee is entitled to.

iv. This Tribunal in various Judgments (e.g., Appeal No.173 of 2009,137 of 2008, 111 of 2008) has held that internal accruals utilized for working capital carry a cost and the Appellant is entitled to be compensated. The State Commission has erred in coming to the conclusion that the said judgments will not be applicable in the present case on the alleged ground that the said Judgments pertain to entities doing multiple business. These findings of the State Commission are ex-facie illegal as this Tribunal in the said judgments has not differentiated between entities doing multiple businesses and entities such as the Appellant, which are solely into Generation of Electricity. As long as an entity utilizes its internal accruals towards meetings its working capital requirements, it is entitled to costs on such capital utilized.

v. Once having recognized that there is a requirement of funds to manage operations in business, it cannot be implied that the same has been met through operational efficiency as has been held by the State Commission in the Impugned Order.

D-II On the Issue No 4 regarding **Interest on Working Capital** raised in the present Appeal, the learned counsel for the State Commission has made the following submissions for our consideration.

i. The Appellant has contended that it had deployed working capital through internal accruals/sources, and submitted that the internal accruals are not like some reserve which does not carry any cost.

ii. The State Commission had sought the month-wise cash flow statement to substantiate that the internal accruals were utilised to meet the working capital requirement. In reply, the Appellant had submitted the details of working capital requirement on a monthly basis and the working capital limit used from the Banks for funding it. The Appellant had submitted that as per the audited accounts, the actual Interest on Working Capital was Rs 33 Crore. The State Commission has considered this actual IWC as reflected in its books of accounts for the sharing of gains and losses. The relevant extract of the Impugned Order at para 2.23.6 is reproduced below:

"2.23.6 The Commission also does not find merit in VIPL-Gs contention regarding the cost of internal accruals used for working capital requirements, as such cost is a not a real amount incurred and the MYT Regulations do not provide for it. The actual IoWC can be lower than the normative because VIPL-G has efficiently managed its cash inflows and cash outflows such that its working capital requirement itself is reduced. The references cited by VIPL-G in this regard are not relevant as they pertain to entities doing multiple businesses.VIPL-G is a corporate entity engaged in the regulated businesses of electricity generation and transmission, and hence it would be appropriate to consider the actual IoWC as reflected in its books of accounts for the sharing of gains and losses. Accordingly, the Commission has considered the actual IoWC as Rs 33.43 Crore."

iii. The Tribunal in its Judgment dated 28 May, 2009 in Appeal No 111 of 2008 has ruled that

"When the Commission observed that the REL had actually not incurred any expenditure towards interest on working capital it should have also

considered if the internal accruals had to bear some costs themselves. The Commission could have looked into the source of such internal accruals and the cost of generating such accruals. The cost of such accruals or funds could be less or more than the normative interest. In arriving at whether there was a gain or loss the Commission was required to take the total picture into consideration which the Commission has not done. It cannot be said that simply because internal accruals were used and there was no outflow of funds by way of interest on working capital and hence the entire interest on working capital was gain which could be shared as per Regulation No. 19. "

In the Judgment cited for RInfra-G V/s MERC, the main contention of RInfra was it had not availed any loan for working capital and had funded such working capital through internal accruals. Hence, RInfra has not actually incurred any expenditure towards interest on working capital during FY 2006-07. The Tribunal in Judgement observed that the Commission could have looked into the source of such internal accruals and the cost of generating such accruals. Accordingly, the State Commission had sought the month-wise cash flow statement from VIPL-G to substantiate that the internal accruals were utilised to meet the working capital requirement. However, in the present matter, the Interest on Working Capital as per audited accounts was Rs 33 Crore. Therefore, the State Commission considered Rs 33 Crore as the actual Interest on Working Capital. The finding of the Tribunal in the cited Appeal will not be applicable to the present case.

D-III Our observations on the Issue No 4 regarding **Interest on Working for the period FY 2014-15**, are as follows:-

i. MYT Regulations 2011 Regulation 14 provides mechanism for sharing of gains or losses on account of controllable factors.

"14.1 The approved aggregate gain to the Generating Company or Transmission Licensee or Distribution Licensee on account of controllable factors shall be dealt with in the following manner:

(a) One-third of the amount of such gain shall be passed on as a rebate in tariff over such period as may be stipulated in the Order of the Commission under Regulation 11.6;"

ii. The State Commission in the Impugned Order has approved normative Interest on Working capital for FY 2014-15 as Rs 60.68 Crs. The sharing of gains on account of controllable factors for FY 14-15 has been decided by the State Commission in the para 2.28 of the Impugned Order as :

Rs Crs

Particulars	Actual	Normative	(Gain)/Loss	Entitlement of
	A	B	C=A-B	1/3 * C
Energy Charge	746.54	744.51	2.03	0.68
O&M expenses	76.86	105.00	(28.14)	(9.38)
Interest on Working Capital	33.43	60.68	(27.26)	(9.09)
Total	**856.83**	**910.20**	**(53.36)**	**(17.79)**

iii. Reference has been cited on this Tribunals Judgment dated 28.05.2009 in Appeal no 111 of 2008 wherein it was observed that

"14) In view of our above discussion, we allow the appeal in part. The Commission will have to allow the claim of the appellant towards efficiency gain on account of lower auxiliary consumption, ***treatment of interest on internal sources,*** *contributions and donations as well as income tax liabilities and incentives.*

In the case for above Judgment (RInfra-G V/s MERC) , the RInfra had not availed any loan for working capital and funded such working capital through internal accruals. Hence, RInfra has not actually incurred any

expenditure towards interest on working capital, however, in the current matter as per audited accounts the Interest on Working Capital was Rs 33 Crore which has been considered by the State Commission as the actual Interest on Working Capital for the purpose of sharing of gains. We do not find any infirmity in the decision of the State Commission in this matter.

iv. **Hence the issue (p) of para 7 i.e. Whether on a true and proper interpretation of the provisions of Regulation 35 read with Regulation 14, the 1st Respondent ought to have computed Efficiency Gain on IWC including the internal accruals deployed by the Appellant, has been decided against the Appellant.**

E On the Issue No.5: The computation of Income Tax as proposed by the Appellant instead of restatement of the same based on the Impugned Order for the period F.Y. 2014-15 onwards, we observe as follows;

E-I On the Issue No 5 regarding **computation of Income Tax** raised in the present Appeal, the learned senior counsel for the Appellant has made the following submissions for our consideration;

i. The State Commission in its Impugned Order had disallowed various costs such as fuel cost, etc. The State Commission ought to have allowed the Income Tax which the Appellant is entitled irrespective of such disallowance. However, the State Commission has erred in computation of Income Tax.

ii. The State Commission in the Impugned Order computed the Income Tax considering the disallowance such as fuel cost. The Appellant states that the State Commission should have allowed Income Tax as proposed by

the Appellant instead of restatement of the same based on the such disallowance.

E-II On the Issue No 5 regarding **computation of Income Tax** raised in the present Appeal, the learned counsel for the State Commission has made the following submissions for our consideration;

i. The State Commission has provisionally approved the Income Tax for FY 2015-16 based on the actual Income Tax paid for FY 2014-15, which is in accordance with Regulation 34.1 of the MYT Regulations, 2011 which reads as follows :

"34.1 The Commission, in its MYT Order, shall provisionally approve Income Tax payable for each year of the Control Period, if any, based on the actual income lax paid on permissible return as allowed by the Commission relating to the electricity business regulated by the Commission, as per latest Audited Accounts available for the applicant, subject to prudence check: ..."

ii. In accordance with Regulation 34.2 of MYT Regulations,2011, the difference between the actual and approved Income Tax, if any, shall be reimbursed at the time of True Up. Regulation 34.2 of MYT Regulations, 2011 is reproduced below:

"34.2 Variation between Income Tax actually paid and approved, if any, on the income stream of the regulated business of Generating Companies, Transmission Licensees and Distribution Licensees shall be reimbursed to/recovered from the Generating Companies, Transmission Licensees and Distribution Licensees, based on the documentary evidence submitted at the time of Mid-term Performance Review and MYT Order of third Control Period, subject to prudence check"

E-III Our observations on the Issue No 5 regarding **computation of Income Tax for FY 2015-16** are as follows:-

i. The State Commission has allowed the Income Tax for FY 2015-16 in accordance with the Regulation 34.1 of the MYT Regulations, 2011. The State Commission has considered the Income Tax for FY 2015-16 in the Impugned Order on provisional basis and the relevant para 3.24.2 of the Impugned Order is reproduced below;

"3.24.2 The Commission has considered Income Tax of Rs. 31.70 Crore for FY 2015- 16, as approved in the True-up for FY 2014-15, which shall be subject to final Truing up".

ii. Further the Regulation 34.2 of the MYT Regulation provides for the the reimbursement of difference between the actual and approved Income Tax at the time of final True –up. Therefore, the provisionally approved Income Tax for FY 2015-16 and the subsequent 3rd Control Period shall be subject to final truing up. Hence we are in agreement with the decision of the State Commission in this issue.

iii. The issue at Para 7 (r) i.e. **Whether the 1st Respondent has correctly computed Income Tax in accordance with Regulation 34 of the Tariff Regulations, 2011 for FY 2014-15, is decided against the Appellant.**

F. Issue No.6: Disallowance of Ash Utilization and Disposal Expenses and the findings in paragraph 3.14.10 of the Impugned Order for FY 2015-16.

F-I On the Issue No 6 regarding **Disallowance of Ash Utilization and Disposal Expenses** raised in the present Appeal, the learned senior counsel for the Appellant has made the following submissions for our consideration.

i. In accordance with the Ministry of Environment and Forestation (MoEF) Notification dated 03.11.2009 relating to utilization of ash, a generating station is required to achieve 100 % disposal of ash generated by it in its 4th year of operation. The ash pond of the Appellant is designed with an assumption that 100% utilisation of ash would be achieved after the 3rd year of operation and accordingly storage capacity of Ash pond had been designed.

ii. Coal fired power plants in India operate on coal having lower GCV and higher ash content as Indian coal has the GCV from around 3500 to 3700 kCal/kg and contains around 40% ash content. The Fly ash generated as a by-product of burning of coal is generally used in manufacture of cement, building and construction material, whereas the bottom ash generated is generally used for land filling and embankment. The unused ash (fly ash and bottom ash) is generally disposed to the ash pond in slurry form, which can be used later depending upon the requirement. As there are several power plants in the vicinity of Butibori, where the Appellant's power plant is situated, the limited potential of ash disposal in the area gets shared amongst all power plants.

iii. Cement plants, which are major source of ash utilization, are located far away from the power plants where transportation cost is the deciding

factor for disposal of ash from any particular plant. Building construction agencies are continuing to use clay bricks in spite of a directive issued by MoEF to use only fly ash bricks. Further, excise duty and toll tax on ash are acting as deterrents for ash utilisation.

iv. The Appellant, despite best efforts could achieve only 26% and 41% ash utilization in FY 2014-15 and FY 2015-16 respectively and rest of the unutilized ash was dumped into ash pond. The Ash pond which has limited capacity was almost exhausted thereby endangering the plant which would be required to shutdown. To avoid the above situation, the Appellant incurred additional expenditure for evacuating the ash from Ash pond and ash silo by (i) dumping ash into abandoned mines with due permission of Maharashtra Pollution Control Board (MPCB) and (ii) giving ash to cement plants by cross subsidising transportation cost.

v. The Appellant sought expenses and additional cost of Rs. 10 crores required to be incurred in ash disposal to achieve regulatory compliance which was not allowed by the State Commission in the Impugned Order on the ground that the design of the ash pond by the Appellant was inappropriate; the actual area of ash dyke was half the area considered in the DPR and as compared to the report of the CEA set out in the Impugned Order the area of 42 acres was inadequate.

vi. The Appellant had stated that despite the fact that the DPR contemplated 84 acres of area for ash disposal, the actual area constructed was only 42 acres and such a deviation from the design in the DPR was for the following reasons.

a) In the DPR, the Appellant had proposed 52 acres of Land for Phase-I and 32 acres of land for Phase-II.

b) Subsequently, the State owned transmission company, i.e. MSETCL requested MIDC to allot land for construction of proposed new 220 KV Receiving Substation for facilitating evacuation of Power from the Appellant plant.

c) In response to the request of MSETCL, MIDC allotted land to MSETCL approx 6 Acres from the said 52 acres identified for Phase-I and certain part of the 32 acres land identified for Phase-II.

d) Above allotment of land to MSETCL resulted into reduction of land availability to Phase-I ash dyke to 46 acres which was further reduced to 42 acres due to creation of green belt for complying MoEF norms and construction of approach road to ash dyke.

e) This resulted in availability of a small strip of approx only 50 Meters on MIDC land which could be used for development of ash dyke.

f) In lieu of land allotted to MSETCL, MIDC allotted additional land which included the 50 meters strip mentioned above and certain other areas. However, these two plots were not suitable for development of ash pond.

g) In view of the above, 42 acres could only be used to develop ash pond so as to accommodate ash from both the phases of the Power Plant as per the relevant MoEF Guidelines.

h) In view of the some of the area given by MIDA being hilly, the same was developed as a green belt.

vii. MoEF vide its Notification dated 25.01.2016 notified after the filing of the Petition as under -

a) The cost of transportation of ash for road construction projects or for manufacturing of ash based products or use as soil conditioner in agriculture activity within a radius of hundred kilometres from a coal or lignite based thermal power plant shall be borne by such coal or lignite based thermal power plant and the cost of transportation beyond the radius of hundred kilometres and up to three hundred kilometres shall be shared equally between the user and the coal or lignite based thermal power plant.

b) The coal or lignite based thermal power plants shall within a radius of three hundred kilometres bear the entire cost of transportation of ash to the site of road construction projects under Pradhan Mantri Gramin Sadak Yojna and asset creation programmes of the Government involving construction of buildings, road, dams and embankments.

F-II On the Issue No 6 regarding **Disallowance of Ash Utilization and Disposal Expenses** raised in the present Appeal, the learned counsel for the State Commission has made the following submissions for our consideration;

i. The Appellant has contended that the Respondent Commission has ignored the fact that the Appellant is not able to dispose the ash generated due to exhaustion of its existing ash dyke. The Respondent Commission had sought the following details with regard to ash disposal expenses.

a) Details of ash disposal envisaged in the Detailed Project Report (DPR) of the Project

b) Actual area of the ash dyke at the Generating Station

c) Copies of agreements for supply of ash to cement plants

d) Supporting documents substantiating ash disposal expenses claimed for FY 2015-16.

ii. In its reply, the Appellant submitted that, as per Section 5.4 of the DPR, the entire ash from the Generating Station was envisaged to be used by Reliance Cementation Pvt. Ltd. for its upcoming integrated cement plant at Mukutbun and grinding unit set up in Butibori MIDC Area. However, as the integrated cement plant has not yet been completed, ash is being lifted for the grinding unit at Butibori MIDC, whose requirement is not sufficient to utilise the entire fly ash generated. It is also observed that the actual area of ash dyke at the Generating Station is 42 acres.

iii. The CEA guidelines stipulate a certain area requirement for ash disposal of a Generating Station. The Appellant is operating its Unit in a lesser area, which has resulted in recurring additional expenditure on account of ash disposal. The Appellant ought to have taken due cognizance of the CEA guidelines. Therefore the Appellant is fully responsible for this lapse and the impact of such disposal difficulties should not be passed on to the Beneficiaries.

F-III Our observations on the **Issue No 6** regarding **Disallowance of Ash Utilization and Disposal Expenses** are as follows:-

i. The State Commission in the impugned Order has categorically dealt with the issue of disallowance of ash utilization and disposal expenses. The relevant para of the Impugned Order is reproduced below:

"3.14.6 As per the relevant extracts of DPR submitted by VIPL-G, 52 acres of land was reserved for ash disposal for Phase 1 of the Project, and additional 32 acres of land was required for ash storage including green belt around the ash pond. Phase 11. As against this, the actual area of ash dyke at the Generating Station is 42 acres. This is a significant deviation from the DPR design.*

3.14.7 The Report on land requirement of Thermal Power Stations published by the Central Electricity Authority (CEA) in December, 2007 specifies the maximum land requirement for ash storage area as 360 acres for a. Power Station of 1000 MW (2 x 500 MW) capacity:

3.14.8 The maximum land requirement for ash storage area was worked out by CEA on certain assumptions. Although these assumptions may not exactly fit the present case, CEA 's observations on the design of the ash dyke need to be kept in view. As against the CEA recommendation of a maximum area of 360 acres for ash storage for a 1000 MW power plant, the actual area the ash dyke at VIPL-G's Generating Station of 600 MW is 42 acres, i.e. very low compared to that recommended by CEA.

3.14.9 While acknowledging the mandated 100% ash .utilisation, CEA also observed that it is difficult in most of cases and, therefore, the Power Station authorities have no alternative but to keep sufficient space for ash disposal without which the power plant might have to be shut down after a few years of operation. It appears that, though VIPL-G commenced the Project work in 2010, it has not heeded this observation of the CEA.

3.14.10 In the light of the above, the Commission does not consider it prudent to accept VIPL-G claim for ash disposal expenses, considering inappropriate design by VIPL-G. Moreover, the actual ash dyke area is half the area considered in the DPR itself Therefore, the Commission has not approved the ash disposal expenses claimed by VIPL-G. The Commission also cautions that any adverse impact on the Generating Station on account of difficulties in ash disposal would not be passed on to the Beneficiaries."

ii. The State Commission has not allowed the Ash disposal expenses on the ground of inappropriate design. The Ash disposal area is even not in accordance with the CEA guidelines. Therefore the Appellant was held fully responsible for this lapse and the impact of such disposal difficulties was not allowed to be passed on to the Beneficiaries.

iii. Considering the facts and findings of the State Commission in the Impugned order, we are also of the opinion that impact of any such lapse in planning/ design of the Ash Utilization facilities should not be passed on to the Beneficiaries. Hence this issue is decided against the Appellant.

G Issue No.7. Disallowance of Additional O&M expenses towards RO Plant as held in paragraph 4.18 of the Impugned Order.

G-I On the Issue No 7 regarding **Additional O&M expenses towards RO Plant** raised in the present Appeal, the learned counsel for the Appellant has made the following submissions for our consideration;

i. The Appellant with regard to the O&M expenses for RO Plant to be incurred for MYT period of F.Y. 2016-17 to 2019-20 proposed as follows:

" 5.1.1: Additional Reverse Osmosis (RO) operation and Maintenance expenses.

a) VIPL submits that Environment Clearance (EC) by MoEF & CTO by MPCB to VIPL was granted with condition of zero discharge outside the plant.

b) In order to achieve absolute zero discharge, waste generated during power generation need to be processed for reutilization within a plant.

c) As per industrial practice, Reverse Osmosis (RO) system is predominantly used for treatment of excess effluent generated from plant which is designed to meet zero discharge norms.

d) As per water balance of the plant, excess effluent generation from process is approximately 170 m3/ hr from cooling water blow down.

e) In compliance to MoEF EC condition, VIPL has installed RO plant to achieve zero discharge.

f) To operate RO plant, original equipment manufacturer has provided the estimate of chemicals required for running the plant form 90 days which is included in DBR provided by OEM.

g) The estimated cost of the chemicals required per annum based on the recommendation by OEM as per the offer received from vendors is Rs 4.19 Crs

h) In addition to above, being the special plant installed to meet statutory requirement, additional skilled manpower is also required to run, operate & maintain the RO plant. Expected manpower requirement and corresponding estimated cost as per the offer received from the vendor is approx Rs 1.99 Cr.

i) Total additional O&M cost on account of RO plant operation & Maintenance would be approx is Rs. 6.18 Crs/ annum and same is considered as part of other expenses for third control period. VIPL submits that since the RO plant is not a standard system required for the power plant which is unique and being installed at VIPL specifically to meet the requirement of MoEF, its O&M cost is not covered in normative O&M expenses being approved by the State Commission.

ii. In this regard, VIPL requested the State Commission to approve the request for relaxation of norms and/or removal of difficulty and allow additional actual expenditure towards O&M expenses of RO plant under other expenses considering the RO plant costs required to be incurred to achieve regulatory compliances subject to true up based on actual.

iii. VIPL has estimated RO plant O&M expenses for control period as per estimate mentioned above for FY 2016-17 and same is escalated at 5% per annum on year on year basis for balance control period.

iv. The State Commission has erred in holding that additional O&M expenses incurred towards RO Plant fall under the existing category of O&M expenses. The said finding is without any reasons or basis more particularly when water charges have been allowed by the State Commission as “Other O&M Expenses” and in any event admittedly such O&M expenses do not relate to the main plant of the Appellant.

v. The State Commission erred in referring to the earlier petitions being Case No.91 of 2013 and Case No.115 of 2013 in as much as during the period relevant to the said petitions the RO Plant was not at all commissioned and there was no question of seeking O&M expenses in regard to the same. There was no question of VIPL not being aware that the said plant would require additional expenditure or seeking the same in the said petitions.

vi. The State Commission has erred in holding that it has allowed additional Auxiliary Consumption of RO Plant since the actual considering the additional Auxiliary Consumption was higher than normative.

G-II On the Issue No 7 regarding **Additional O&M expenses towards RO Plant** raised in the present Appeal, the learned counsel for the Respondent No 1 has made the following submissions for our consideration.

i. The Respondent Commission has observed that the actual Operation and Maintenance (O&M) expenses are substantially lower than the normative, and hence there is no need to separately allow the O&M expenses for the Reverse Osmosis (RO) Plant. The relevant para of the Commission's Impugned Order are reproduced below:

4.18.7 In its Order dated 17 January, 2014 in Case No. 91 of 2013, the Commission had approved the provisional Tariff or FY 2014-15 and FY 2015-16. In that Order, the Commission had approved the Auxiliary Energy Consumption for the RO Plant and additional water pumping system over and above the normative O&M expenses as per the MYT Regulations, 2011. Hence, it was envisaged that the RO Plant would be operational from FY 2014-15 onwards. In Case No. 91 of 2013, VIPL-G had proposed O&M expenses as per the normative expenses specified in the MYT Regulations, 2011. VIPL-G had not sought any additional O&M expenses towards the RO Plant even though it was fully aware of the Act that the RO Plant was being commissioned in the Generating Station.

4.18.8 In Case No. 115 of 2014, the Commission had approved the Final Tariff' for FY 2014-15 and FY 2015-16. In its Order in that Case, the Commission had approved the additional capitalisation of the RO Plant in FY 2014-15. Hence, it was envisaged that the RO Plant would be operational from FY 2014-15 onwards. In its submissions in that Case, VIPL-G had proposed the O&M expenses as per the normative expenses specified in the MYT Regulations, 2011. In that Case also, VIPL-G had not sought any additional O&M expenses towards RO Plant even though it was aware that the RO Plant was being commissioned in the Generating Station.

4.18.9 VIPL-G would not have been unaware that the operation and maintenance of the RO Plant might require additional expenditure over and above the normative O&M expenses. V1PL-G itself has submitted in the present Petition that the OEM had provided the estimate of chemicals required for running the RO Plant.

4.18.10 The Commission has allowed the additional Auxiliary Consumption of the RO Plant, the actual Auxiliary Consumption, including that of the RO Plant, being higher than the normative. However, the actual O&M expenses are substantially lower than the normative, and hence there is no need to separately allow the O&M expenses for the RO Plant. The Commission notes that it had given a similar treatment for FGD: the additional Auxiliary Consumption for FGD was allowed in its Orders for RInfra-G and Tata Power Company Ltd (Generation Business) (TPC-G), but no additional O&M expenses for FGD were allowed"

ii. Considering the facts and analysis set out above, the State Commission did not find any merit in the representation of the Appellant. Hence the Respondent Commission has disallowed additional O&M Expenses for RO Plant and did not find it appropriate to pass them to the Consumers.

G-III Our observations on the **Issue No 7** regarding **Additional O&M expenses towards RO Plant** are as follows:-

i. The State Commission in its Impugned Order has detailed out the issue related to additional O&M expenses for RO Plant as well as normative O&M expenses allowed in the Impugned Order.

ii. We have perused the findings of the State Commission and do not find any infirmity.

iii. Considering our observations on the Issue no 6 and Issue No 7 above, we decided the issue No (q) at para 7 above i.e. **Whether the 1st Respondent ought to have exercised its powers under the provisions of the relevant Tariff Regulations regarding "Power to amend" and "Power to remove difficulties" and granted to the Appellant in the Impugned Order, Ash Utilization and Disposal Expenses and O&M expenses incurred for Reverse Osmosis Plant as proposed by it in view of supporting data and details given by the Appellant to the 1st Respondent, against the Appellant.**

H. Issue No 8 : Jurisdiction of the State Commission to order refund of the excess amount

H-I On the Issue No 8 regarding **Jurisdiction of the State Commission to order refund of the excess amount** in the present Appeal, the learned senior counsel for the Appellant has made the following submissions for our consideration;

i. The State Commission has by the Impugned Order for the period FY 2014-15 and FY 2015-16 directed to refund with effect from July 2016 in monthly instalments of an aggregate amount of Rs.840.6 crore to Respondent No.2 from whom the Appellant has recovered charges for supply of electricity with effect from April 2014 pursuant to an approved PPA.

ii. The Appellant had during the Truing Up exercise under the said Petition sought for an amount of Rs.59.95 crores for FY 2014-15 and Rs. 76.87 for FY 2015-16 to be adjusted in future recovery from Respondent

No.2 and any such refund directed by the State Commission is clearly illegal and contrary to law.

iii. The entire power generated by the Appellant is supplied to Respondent No.2 which is the only source of the Appellant's income. The PPA is for a period of 25 years for supply of entire power generated from the Appellant's generating station. Any such direction for refund of a huge amount would render the Appellant's business unviable and make the Appellant's Project unviable. The Fuel Cost which is recovered from Respondent No.2 has already been expended for procurement of fuel and Respondent No.2 has sourced such power to further supply to its consumers. Such a purported refund would drive the Appellant out of business and would render the power plant idle.

H-II On the Issue No 8 regarding **Jurisdiction of the State Commission to order refund of the excess amount** in the present Appeal, the learned counsel for the State Commission has made the following submissions for our consideration;

i. The State Commission, in its Impugned Order dated 20 June, 2016 on that Petition in Case No. 91 of 2015, has given the reasons for requiring VIPL-G to refund the amount, in six monthly instalments, mainly attributable to procurement of fuel at a rate higher than and on a different basis from that considered while approving the Power Purchase Agreement (PPA) with Reliance Infrastructure Ltd. (Distribution) (RInfra-D).

ii. Taking into account the State Commission's analysis of the fuel costs and other elements of the ARR, para. 2.31.1 of the Impugned Order sets out the Summary of the approved True-up and the Revenue Surplus

determined as Rs. 434.70 crore for FY 2014-15. At para. 2.31.2, the State Commission has stated that

"Although the net revenue surplus for FY 2014-15 has been determined as above, the entire amount cannot be considered as surplus to be adjusted from the ARR of FY 2016-17 as the Commission, in the Mid-Term Review (MTR) of Rlnfra-D, has not, in the provisional Truing up for FY 2014-15, allowed the variation in Energy Charge of VIPL-G. Accordingly, the surplus of FY 2014-15 is to be refunded to Rlnfra-D."

Consequently, the State Commission, at para. 2.31.3 of the Impugned Order, directed the Appellant to refund this surplus of Rs. 434.70 crore to Rlnfra-D in six monthly instalments.

iii. After determining a Revenue Surplus of Rs. 405.89 crore, taking into account its analysis of fuel costs and other elements, in its provisional Truing up for FY 2015-16 the Commission has stated at para. 3.28.2 of the impugned Order that

"Although the net revenue surplus for FY 2015-16 has been determined as above, the entire amount cannot be considered as surplus to be adjusted from the ARR of FY 2016-17 since the Rlnfra-D MTR Order, in the provisional Truing up for FY 2015-16, has not allowed the variation in Energy Charge from VIPL. Accordingly, the surplus of FY 2015-16 is to be refunded to Rlnfra-D."

Accordingly, as in the case of FY 2014-15, the State Commission directed the Appellant (at para. 3.28.3 of the Impugned Order) to refund the Revenue Surplus of FY 2015-16, determined as Rs. 405.89 crore upon provisional truing up, to Rlnfra-D in 6 monthly instalments.

H-III On the last issue i.e. Whether Respondent No.1 has the power, authority or jurisdiction to pass an order of refund as has been done in the present case?, our observations are as follows;

i. The Multi Year Tariff (MYT) Regulations issued by the State Commission are applicable to the whole of the State of Maharashtra. MYT Regulations 2011 were applicable for determination of tariff in all cases covered under these Regulations from April 1, 2011 and onwards up to FY 2015-16 [i.e., till March 31, 2016]. Further the MYT Regulations are applicable to all existing and future Generating Companies, Transmission Licensees and Distribution Licensees and their successors, if any.

ii. The Appellant has submitted that the State Commission has no jurisdiction, power or authority to direct such refund from a Generator to a Distribution Company

iii. The State Commission has the jurisdiction to determine the Generation Tariff of the Appellant as per the Regulation 3.1 of the MYT Regulations 2011 issued by the State Commission.

"3.1 The Commission shall determine tariff, including terms and conditions thereof, for all matters for which the Commission has jurisdiction under the Act, including in the following cases:-
(i) Supply of electricity by a Generating Company to a Distribution Licensee: ..."

iv. The Appellant had approached the State Commission under Sections 61 and 62 of the EA, 2003 and the Commission's MYT Regulations for determination of Tariff claiming a Revenue Gap of Rs. 59.95 Crore and Rs. 76.87 Crore in the final True-up for FY 2014-15 and provisional True-up for FY 2015-16, respectively, and seeking to recover this amount the ARR for FY 2016-17. However, when a Revenue Surplus has been

determined instead, the Appellant contends that the State Commission cannot direct such refund. Such an argument cannot be accepted. The Tariff can be determined by the State Commission with either upward revision resulting in increase in charges payable by the Consumer or have the downward revision with reduction in charges payable. Hence we decide this issue against the Appellant.

v. Hence the issue at para 7 (s) i.e. **Whether Respondent No.1 has the power, authority or jurisdiction to pass an order of refund as has been done in the present case, is decided against the Appellant. However, the quantum of such refund, if any, would have to be reworked in the light of decisions detailed out in the preceding paras as above.**

ORDER

We are of the considered opinion that some of the issues raised in the present Appeal and I.A. have merits and Appeal and I.A. have been partly allowed as decided above.

The Impugned Order dated 20.06.2016 passed by the State Commission is modified to the extent as decided above.

No order as to costs.

Pronounced in the Open Court on this **day of 3rd November, 2016.**

(I.J. Kapoor)
Technical Member

(Mrs. Justice Ranjana P. Desai)
Chairperson

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REPORTABLE/NON-REPORTABLE

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