



**ASSAM ELECTRICITY REGULATORY COMMISSION**

FILE NO. AERC. 576 (B)/2016/Pt-II

Petition No.: 29/2016

**ORDER**

30.12.2016

Before the Assam Electricity Regulatory Commission  
ASEB Campus, Dwarandhar,  
G. S. Road, Sixth Mile, Guwahati – 781 022

M/s Eastern India Powertech Ltd. (EIPL)  
Assam Power Distribution Company Ltd. (APDCL)

----- Petitioner  
-----Respondent

**In the matter of**

Petition No. 29 of 2016 filed by EIPL  
regarding determination of tariff for FY  
2012-13 for Banskandi Plant of EIPL

**CORAM**

Shri Naba Kr. Das, Chairperson  
Shri Dipak Chakravarty, Member  
Shri Subhash Ch. Das, Member

**ORDER**

**1. Introduction**

- 1.1. As per direction of the Hon'ble APTEL vide Judgement dated 12.08.2014, the Commission directed Eastern India Powertech Limited (erstwhile DLF Power Company Limited, hereafter referred as EIPL/Petitioner) to file Tariff Petitions for FY 2009-10 onwards. However, only after the Hon'ble APTEL Order dated 18.11.2015, the Petitioner filed a combined Tariff Petition for FY 2009-10 to FY 2014-15 for both the plants of the Petitioner i.e. Adamtila and Banskandi on 01.12.2015.
- 1.2. Thereafter, in pursuance to direction of the Commission's Order dated 05.08.2016, the Petitioner filed the present Tariff Petition (registered as Petition No 29/2016) for determination of tariff for FY 2012-13 for its 15.5 MW Combined Cycle Gas Turbine (CCGT) Banskandi Power plant at Cachar on 24.08.2016.
- 1.3. The first Tariff Order for the said station was issued by the Commission for FY 2008-09 on 20.10.2011. However, the Petitioner has not filed Petition for determination of tariff for any of the subsequent years and true up for FY 2008-09.

- 1.4. As per Regulation 6.1 of the Assam Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2006(hereafter referred as AERC Tariff Regulations, 2006), every generating company is required to file Tariff Petition annually before the Commission to determine changes to the current tariff, not later than 1<sup>st</sup> December of the previous year, unless an extension is granted by the Commission upon application, along with requisite Fee as per the prevailing Fee Regulations.
- 1.5. However, the Petitioner did not file the Tariff Petition for FY 2012-13 in time as per the prevailing AERC Regulations.
- 1.6. The Tariff Petition for FY 2012-13 has been filed now on 24.08.2016, only in the aftermath of the directions of the Commission's Order and Hon'ble APTEL's Orders.
- 1.7. The Commission in this Order has proceeded to process this Petition despite non-payment of requisite fees, in compliance to the direction of Hon'ble APTEL vide its Judgment dated 12.08.2014 for determining tariff for FY 2012-13.

## **2. Background and Summary of Proceedings**

- 2.1. The Commission vide its Order dated 20.10.2011 determined the final tariff for the two power plants, i.e., Adamtilla and Banskandi of EIPL for FY 2008-09. Both APDCL (erstwhile Assam State Electricity Board (ASEB)) and EIPL filed Review Petitions before the Commission against the Tariff Order dated 20.10.2011. The Commission, in its Review Order dated 12.02.2013, maintained the same tariff as per the Tariff Order dated 20.10.2011 with the clarification that the same tariff (both fixed and variable charges) in respect of Adamtilla and Banskandi plants shall also be applicable from FY 2009-10 onwards.
- 2.2. APDCL and EIPL filed cross Appeals before the Hon'ble APTEL against the Commission's Review Order dated 12.02.2013. The Hon'ble APTEL vide Judgment dated 12.08.2014, set aside part of the Commission's Order from FY 2009-10 and beyond, and directed the Commission to determine tariff from FY 2009-10 to FY 2014-15. The relevant extract of the said Judgment is reproduced below:-

*“22. We feel that determination of tariff from FY 2009-10 onwards has to be carried out by the State Commission according to Section 62 and 64 of the Act, after obtaining the objections and suggestions of the public on the proposal of the generating company. In fact there has been inordinate delay in determination of tariff for FY 2008-09. The tariff for FY 2008-09 was only determined on 20.10.2011 i.e. after 2½ years of commencement of FY 2008-09. Further, the tariff for FY 2009-10 onwards has not been determined by the State Commission even though the FY 2013-14 is already over and the current FY is 2014-15. Till now only provisional tariff is being paid by Assam Discom, which resulted in the financial crunch for EIPL. **We, therefore, direct the State Commission to determine the tariff for EIPL's projects for the period 2009-10 to 2014-15 at the earliest.**” [Emphasis Added]*

- 2.3. The Commission, vide its letter dated 16.09.2015, directed EIPL to file Tariff Petitions from FY 2009-10 upto the closure of the plants, as required under Hon'ble APTEL's Judgment dated 12.08.2014. In response, EIPL vide e-mail dated

14.10.2015 submitted that in view of the Hon'ble APTEL's Judgment dated 12.08.2014, they have raised invoices to APDCL for making payments as per the Tariff Order dated 20.10.2011, however, no response was received from APDCL. EIPL also requested the Commission to take up its pending Petition (Petition No. 13 of 2015) under Section 11 (2) of the Act and earlier Petition for adjudication of commercial disputes (Petition No. 4 of 2010) for the period up to 30.03.2008. In the said e-mail, EIPL also submitted that no time frame for filing of Tariff Petition has been specified in the Hon'ble APTEL's Judgment dated 12.08.2014. In reply to EIPL's letter, the Commission vide letter dated 7.11.2015 directed EIPL to submit the Tariff Petitions at the earliest.

- 2.4. The Hon'ble APTEL, vide its Order dated 18.11.2015 directed EIPL to submit the status of Tariff Petitions filed before the Commission for the period from FY 2009-10 onwards within two weeks. The relevant extract of the said Order is reproduced below:

*"The learned counsel for the Execution Petitioner is also directed to inform in writing whether the Execution Petitioner has filed any petition for determination of tariff since 2009-10 onwards before the State Commission so as to enable the State Commission to determine tariff after undergoing the procedure laid down in Electricity Act, 2003 for which two weeks' time is allowed."*

- 2.5. EIPL filed a combined Tariff Petition for FY 2009-10 to FY 2014-15 for both the plants, i.e., Adamtilla and Banskandi, on 01.12.2015. The Tariff Petition was registered as Petition No. 19/2016. The Commission vide its Order dated 05.08.2016 directed EIPL to file separate Plant-wise Petitions for each year till closure of the Plants by 24.08.2016. Accordingly, the Petitioner submitted the Plant-wise Petitions for the determination of Tariff for FY 2009-10 to FY 2014-15 separately for each year on 24.08.2016. The Tariff Petitions dated 24.08.2016 for Banskandi plant of EIPL were registered as under:

- i. Petition No.26 of 2016 for FY 2009-10
- ii. Petition No.27 of 2016 for FY 2010-11
- iii. Petition No.28 of 2016 for FY 2011-12
- iv. Petition No.29 of 2016 for FY 2012-13
- v. Petition No.30 of 2016 for FY 2013-14
- vi. Petition No.31 of 2016 for FY 2014-15

The Commission in this Order has dealt with the Petition No.29 of 2016 for determination of tariff for EIPL's plant at Banskandi for FY 2012-13. However, all the proceedings such as seeking data gaps, conducting hearings etc were done together for all the Petitions (Petition No 26 to 31 of 2016) for the convenience of the Petitioner and to save time.

- 2.6. Based on the preliminary analysis of the Petitions, the Commission vide its letter dated 08.09.2016 communicated the deficiencies/additional information required for further processing of the Tariff Petition and directed the Petitioner to submit the replies to the deficiencies on or before 15.09.2016. EIPL, vide its submissions dated 12.09.2016, requested the Commission that the Petition for each Financial Year be dealt separately by the Commission and sufficient time be granted for each Petition in view of the volume of work involved. The Petitioner further requested the Commission to grant time up to 24.10.2016 to file the additional information for FY 2012-13.

- 2.7. Subsequently, vide Order dated 16.09.2016, the Commission disposed of the earlier combined Tariff Petition filed by the Petitioner for determination of tariff for Adamtilla and Banskandi plant (Petition No. 19/2016) as the Petitioner had filed separate Tariff Petitions for each year. In the said Order, the Commission also directed EIPL to submit the required Affidavits, etc., as applicable under AERC Regulations and rectification of defects in the Petitions filed by EIPL on 24.08.2016, and to submit all the required information sought by the Commission vide its letter dated 08.09.2016 on or before 17.10.2016.
- 2.8. Thereafter, vide letter dated 18.10.2016, EIPL submitted certain data/information, partially complying with the direction of the Commission. In the said letter, EIPL also requested to extend the time for filing the Petitions in a proper format till 25.10.2016 as the Petitions cannot be notarized as Hon'ble Guwahati High Court was closed and would re-open on 24.10.2016.
- 2.9. EIPL, vide its letter dated 18.10.2016, replied to the Commission's deficiency note dated 08.09.2016, but on scrutiny the Commission found the same to be insufficient and directed the Petitioner to submit the pending information, vide its letter dated 21.10.2016.
- 2.10. The Hon'ble APTEL, in the order dated 20.10.2016, directed the Commission to comply with the Hon'ble APTEL Order dated 18.05.2016 latest by 05.01.2017 and also directed EIPL & APDCL to furnish information as required by the Commission on or before 01.11.2016. The relevant extract of the Order dated 20.10.2016 is provided below:

*"Counsel for the State Commission states that a letter will be sent to the Execution Petitioner as well as to the DISCOM by tomorrow i.e. 21.10.2016 informing them what data is required. Counsel for the **Execution Petitioner states that by 01.11.2016, the said data will be furnished to the State Commission.** Counsel for the DISCOM also states that the DISCOM shall furnish the necessary data to the State Commission.*

*We are not inclined to extend the time till February, 2017 as requested by Mr. Sen, learned senior counsel for the State Commission. **We extend the time till 05.01.2017.** We expect the parties to cooperate with the State Commission. If the required data is furnished by the parties, the State Commission shall comply with the direction issued by the State Commission vide its order dated 18.05.2016 by 05.01.2017 and shall not ask for further time."**[Emphasis Added]***

- 2.11. After scrutiny of EIPL's submission dated 18.10.2016, the Commission vide its letter dated 21.10.2016 communicated to EIPL that its submission is incomplete in many respects and directed EIPL to submit all the pending data/information/documents as sought by the Commission through earlier letters, Orders, etc., in appropriate Formats, complete in all respects on or before 31.10.2016 for further proceedings in the matter, to comply with the direction of the Hon'ble APTEL in the hearing dated 20.10.2016. Further, in the same letter, the Commission specifically directed EIPL to submit full particulars and details of plant-wise information sought by the Commission vide its letter dated 08.09.2016 and Order dated 16.09.2016, so as to reach the Commission positively on or before 31.10.2016. The Petitioner vide its submission dated 31.10.2016 submitted some of the pending information.

- 2.12. The Petitioner, in compliance to direction of Commission's Order dated 16.09.2016 and letter dated 21.10.2016 for removal of defects, submitted the Petition along with the required affidavit on 24.10.2016, which had the same content as the Tariff Petition filed on 24.08.2016.
- 2.13. The Commission, during the hearing held on 24.10.2016, directed the Petitioner to submit the draft abridged form of the plant-wise Tariff Petition for the Commission's approval on or before 31.10.2016, for publication in newspapers, and to publish the approved abridged form of the Tariff Petition in local newspapers as per the Regulations on or before 04.11.2016, with a timeline for seeking responses from public/respondents on or before 25.11.2016. The Commission also directed the Petitioner to make its submissions in response to the comments received from the public/Respondent and rejoinders filed on or before 30.11.2016.
- 2.14. In the meanwhile, APDCL submitted its views and comments on the Tariff Petition dated 24.08.2016 on 07.11.2016. The Commission has taken into consideration the comments / views of APDCL dated 07.11.2016 on the Petitions dated 24.08.2016 as the contents of Tariff Petitions filed on 24.08.2016 & Tariff Petitions filed along with affidavit on 24.10.2016 are same and the Petitions dated 24.08.2016 which were registered as such although the defects were removed only on 24.10.2016.
- 2.15. EIPL did not comply with the Commission's directions and did not submit the abridged form of the Tariff Petition for publication. However, keeping in view the directions of the Hon'ble APTEL and in order to expedite the entire process, the Commission published the abridged version of the Tariff Petition filed by EIPL in newspapers on 09.11.2016 giving the salient features of the Tariff Petitions for inviting objections/suggestions. The Commission has decided to recover the cost of publishing the abridged version of the Petition in newspapers from EIPL.
- 2.16. On scrutiny of the information submitted by the Petitioner, the Commission found certain non-compliances in view of which a Hearing notice was issued to EIPL and APDCL on 18.11.2016 for Hearing on 30.11.2016. The major areas of non-compliance are:
- a. Non-compliance with direction for submission of the abridged form of the Tariff Petitions for approval of the Commission on or before 31.10.2016, for publication in the newspaper under Section 64(2) of the Electricity Act, 2003.
  - b. Non-compliance with direction related to submission of soft copy of plant-wise cost allocation statements on or before 01.11.2016 and submission of the same duly certified by the Auditor on or before 05.11.2016.
  - c. Non-compliance with direction for deposit of requisite fees towards processing of the Tariff Petitions as per the Order dated 24.10.2016 on Petition No. 13/2015, on or before 15.11.2016. Thereafter, filing of Miscellaneous Petition dated 18.11.2016 for exemption from deposit of the requisite fees for processing of the Tariff Petitions for both Adamtilla and Banskandi Gas based power plants for FY 2009-10 to FY 2014-15.
- Accordingly, a Hearing was held on 30.11.2016 and an Order was passed.
- 2.17. The queries raised/information sought by the Commission in its deficiency notes and the replies submitted by the Petitioner along with the Commission's observation on adequacy of the information submitted by the Petitioner are summarised below:

**a) Copy of Gas Supply Agreement**

Query/Information Sought

The Commission directed the Petitioner to submit a copy of Gas Supply Agreement (GSA) between EIPL and Assam Gas Company Limited (AGCL).

Petitioner's Submission

EIPL submitted a copy of the GSA vide its reply dated 18.10.2016.

Commission's Observations

The Petitioner submitted the information sought.

**b) Copies of Plant wise Audited Annual Accounts**

Query/Information Sought

The Commission directed the Petitioner to submit copies of Audited Annual Accounts of EIPL for Banskandi Plant from FY 2008-09 to FY 2014-15 along with duly audited allocation statements of Profit & Loss Statement and Balance Sheet between various businesses of EIPL.

Petitioner's Submission

EIPL submitted the Audited Annual Accounts of EIPL, and mentioned that the plant-wise or business-wise annual accounts are not maintained, as the same is prepared for the Company as a whole. Further, the Petitioner submitted a plant-wise cost allocation statements certified by Auditor on 30.11.2016, which it has submitted to be based on books of accounts, power purchase agreement (PPA), AERC Order dated 20.10.2011, Hon'ble APTEL Order dated 12.08.2014 and CERC Tariff Regulation.

Commission's Observations

The Petitioner submitted the copy of Audited Annual Accounts of EIPL for the Company as a whole. However, the Petitioner has not submitted the plant wise allocation statements of Profit & Loss Statement and Balance Sheet between various businesses of EIPL duly reconciled with Audited Annual Accounts as sought by the Commission even though the period is already over and the Petitioner should have got all the records. The plant-wise cost allocation statements submitted were found to be mere computation of variable and fixed charge based on certain principles / norms and assumptions rather than based on actual expenses. The Commission cannot accept the argument that plant wise costs data were not maintained by the Petitioner. **Thus, the Petitioner has failed to submit the crucial information regarding actual plant-wise cost allocation statement duly reconciled with Annual Accounts, which would have enabled the Commission to determine the tariff for the period based on actual costs as the period is already over.**

**c) Copies of Income Tax Returns and Income Tax Payment Challans**

Query/Information Sought

The Commission directed the Petitioner to submit copies of Income Tax Returns and Income Tax Payment Challans for the period from FY 2008-09 to FY 2014-15 for the Banskandi Plant of EIPL.

Petitioner's Submission

The Petitioner submitted the copies of Income Tax Returns and Income Tax Payment Challans for the period from FY 2008-09 to FY 2014-15 for the

company as a whole.

Commission's Observations

The Petitioner submitted the information sought for the company as a whole not plant wise.

**d) Supporting Documents regarding Closure of Plant**

Query/Information Sought

The Commission directed the Petitioner to submit supporting documents regarding closure of the Plants.

Petitioner's Submission

The Petitioner, vide its reply dated 18.10.2016, submitted the copies of correspondence with APDCL regarding closure of the Plant.

Commission's Observations

The Commission observed that copies of correspondences with APDCL were not accompanied by any separate acknowledgement letter. Subsequently, EIPL vide its reply dated 31.10.2016, submitted the received copy of the intimation letter towards closure of the plant with the signatures of the receiving officers from APDCL, as APDCL has not provided any separate acknowledgement letter on the intimation from EIPL on closure of the plants.

**e) Status of Compliance to Directions given by Commission in earlier Order**

Query/Information Sought

The Commission directed the Petitioner to submit the status of compliance to the directions issued by the Commission vide its Order dated 20.10.2011 in Petition No. 14/2008.

Petitioner's Submission

The Petitioner submitted the status of compliance to the directives issued by the Commission in its earlier Order.

Commission's Observations

Based on the information received, the Commission observed that most of the directions issued by the Commission have not been complied with and the Petitioner has only submitted the reasons for non-compliance of the directions. The Commission in this Order is not discussing the detailed status of compliance to the various directives issued in the previous Orders.

**f) Deemed Generation**

Query/Information Sought

The Commission directed the Petitioner to submit month-wise Deemed Generation Statements from FY 2009-10 to FY 2014-15 duly signed by APDCL and EIPL, with break-up of Deemed Generation claimed on account of shortfall in gas supply along with the reasons for shortfall in gas supply with supporting documents, and Deemed Generation on account of other reasons and the summary of this information for each year in a given format. The Commission also directed EIPL to submit the reason for mentioning that the Deemed Generation at Normative PLF figures are as per Hon'ble APTEL Judgment dated 12.08.2014

### Petitioner's Submission

The Petitioner in its reply dated 18.10.2016 submitted the Deemed Generation Statements for FY 2009-10 and FY 2010-11 and information for the remaining Years were submitted vide reply dated 31.10.2016. The Petitioner also replied that submission of information in the format prescribed by the Commission in its letter dated 08.09.2016 is not possible as both the events, i.e., Deemed Generation on account of Shortfall in Gas Supply and Deemed Generation on account of other reasons are concurrent, as the gas supply was short for almost 24 hours in a day. The Petitioner further submitted that it had committed a higher than normative PLF to the Respondent and the same has been demonstrated through capacity availability tests conducted by the Petitioner and witnessed by the Respondent for each year. It further submitted that as can be seen from the results, though the PLF achieved including deemed generation is even higher than 80% it has limited the same to 80% and during actual operation of the power plants, generation corresponding to 80% PLF could not be achieved only due to non-availability of gas. The Petitioner submitted that it has demonstrated to have achieved PLF including deemed generation in excess of 80% and is therefore entitled for deemed generation even beyond the normative PLF, but limited to 80% PLF.

### Commission's Observations

The Commission observed that the Deemed Generation statements submitted by EIPL are not jointly signed by APDCL. The Petitioner in its reply dated 31.10.2016 submitted that jointly signed copy of the statements is not available with EIPL. Further, the Commission observed that the Petitioner instead of submitting the summary of annual Deemed Generation information due to various reasons as sought by the Commission, submitted the hard copies of daily log sheets, which were also not complete and had certain discrepancies.

In reply to the Commission's specific query regarding the reason for mentioning that the Deemed Generation at Normative PLF figures are as per Hon'ble APTEL Judgment dated 12.08.2014, the Petitioner submitted that though the Hon'ble APTEL Judgment does not give any figures of deemed generation, the Hon'ble APTEL in its Judgment had directed that full fixed charges will be paid from FY 2009-10 onwards as per the directions given in the Tariff Order dated 20.10.2011 for FY 2008-09 till the Commission decides this issue while deciding the tariff for FY 2009-10 onwards and hence, the Petitioner has mentioned that the deemed generation at normative PLF figures are as per the Hon'ble APTEL Judgment.

The Commission has discussed the submissions made by the Petitioner in detail while analysing the issue of Deemed Generation subsequently in this Order.

### **g) Quantum of Gas Supply, Gas Price and GCV of Gas**

#### Query/Information Sought

The Commission directed the Petitioner to submit the month-wise quantum of gas supply, gas price and GCV of the gas for each year from FY 2009-10 to FY 2014-15 along with invoices from the gas supplier for the month of September and March for each FY from 2009-10 to FY 2014-15



#### Petitioner's Submission

The Petitioner submitted the required information for FY 2009-10 and FY 2010-11 vide its reply dated 18.10.2016. Further, EIPL in its reply dated 31.10.2016 submitted the balance information.

#### Commission's Observations

The Petitioner submitted the information sought.

### **h) Basis of Interest Rate**

#### Query/Information Sought

The Commission directed the Petitioner to submit the basis for considering the interest rate of 18% per annum for computing the Carrying Cost.

#### Petitioner's Submission

The Petitioner, in its reply dated 18.10.2016, submitted that the pendent lite interest rates allowed in arbitral awards on commercial contracts is in the range of 12% to 24% and accordingly it has considered 18% as the interest rate.

#### Commission's Observations

The Petitioner submitted the information sought.

### **3. Hearings on the Petition**

- 3.1. In the process of determination of final tariffs for EIPL plants at Adamtilla and Banskandi for FY 2009-10 to FY 2014-15, the Commission held hearings on 16.09.2016 and 24.10.2016 as per the direction of Hon'ble APTEL and also issued Orders on the same, which are available on the Commission's website and are also discussed subsequently in this Order. The public hearing in this matter was conducted on 05.12.2016 and the same is discussed subsequently in this Order.

### **4. Public Hearing**

- 4.1. A public hearing was conducted on 05.12.2016 at the office of the Commission at Guwahati. Prior to the hearing, a notice was published in daily newspapers intimating the date, venue and time of hearing in which suggestions/comments on the Petition filed by EIPL were invited from the stakeholders to be submitted to the Commission on or before 25.11.2016. Within the specified timeline, comments from Bidyut Grahak Mancha and Assam Gas Company Ltd were received. APDCL submitted its comments on 28.11.2016 i.e. after due date of 25.11.2016. Further, during the Public Hearing, the Representative of the Petitioner, APDCL, Bidyut Grahak Mancha and Assam Gas Company Ltd were present and they mostly re-iterated their written submissions along with certain additional submissions before the Commission. The Commission issued a Hearing Order dated 05.12.2016 on the public hearing conducted,.
- 4.2. As per the News Paper notification dated 09.11.2016, the Public/Stakeholders were required to submit their suggestions/comments on the Petition filed by EIPL on or before 25.11.2016. However, APDCL filed its written comments on the Petitions on 28.11.2016 to which Petitioner objected during the Public Hearing as the same was beyond the timeline provided by the Commission. Thereafter APDCL made oral submissions and also referred to the submissions made by them on 7.11.2016. The Commission directed APDCL to submit in written form the oral submission on or before 08.12.2016. The petitioner requested the Commission to give ample opportunity to them to reply to the submissions to be made by APDCL. In view of

the same, vide Order dated 05.12.2016, the Commission allowed EIPL to file Rejoinder on the submissions to be made by APDCL on or before 15.12.2016. Accordingly, the Commission in the proceedings of this Tariff Order has considered the submissions made by APDCL on 07.11.2016 and 08.12.2016. EIPL submitted the rejoinder on the submissions dated 08.12.2016 of APDCL only on 23.12.2016 after the due date thereby failing to comply with the timeline.

4.3. The written submissions received from the stakeholders and the responses of EIPL to the objections have been summarised below:

**4.3.1.** Mr. Subodh Sharma, representing Bidyut Grahak Mancha made the following submissions vide his letter dated 24.11.2016 and during the Public Hearing dated 05.12.2016.

- a) **Maintainability of the EIPL Petitions:** EIPL has flouted the legal procedure and has filed tariff Petitions for 2009-10 to 2014-15 together for 6 years. This is a blatant violation of the Electricity Act, 2003 and should be rejected outright by the Commission, which is an entity created under the Electricity Act, 2003.
- b) **Deemed Generation:** It is apparent from the public notice that a huge deemed generation charge has been claimed by EIPL for the past years of its operation. This burden would be passed to APDCL, which would eventually be passed on to the consumers. Even when there is no generation or very little generation, deemed generation charge has been claimed. Claiming such payment for the past is unjustified and against the consumer's interest.

**Petitioner's Response:**

The Petitioner, in its reply, made the following submissions:

- a) **Maintainability of the EIPL Petitions:** EIPL submitted that the Tariff Petitions have been filed in compliance with the directions given by the Hon'ble APTEL in its Judgment dated 12.08.2014 passed in Appeal Nos. 76 and 82 of 2013 and in pursuance to the directions given by the Commission by its Order dated 05.08.2016 passed in Petition No. 3,4 and 5 of 2016. The Petitioner further submitted that the Judgment dated 12.08.2014 has not been appealed against and hence, the directions therein have attained finality.
- b) **Deemed Generation:** The Hon'ble APTEL in its Judgment dated 12.08.2014 has allowed the claim of the Petitioner for Deemed Generation charges. The Petitioner further submitted that the determination of tariff for FY 2009-10 to 2014-15 has to be done in accordance with the principles determined by the Hon'ble APTEL. Hence, charges for deemed generation of electricity are liable to be paid to the Petitioner as has already been held by the Hon'ble APTEL.

**Commission's View:**

The Commission has noted the submissions of the stakeholders and has addressed the issues subsequently in this Order.

**4.3.2.** Mr. Aditya Kumar Sharma, representing AGCL, made the following submissions vide affidavit dated 25.11.2016:

**Payment of Outstanding Dues to AGCL:** EIPL has got arrear payment due to AGCL amounting to Rs.25,49,34,247/-, thus, AGCL by way of this objection/comment is staking claim over the said amount required to be paid to AGCL against the unpaid gas supply bills raised against EIPL, for the period 18.10.2010 to 08.01.2013. AGCL prayed that in the event EIPL is awarded with Orders for payment of money from APDCL in the 12 Tariff Petitions filed before the Commission, then the outstanding arrear dues payable to AGCL against the Gas Supply bills to EIPL should be directly paid to AGCL by deducting the same from the amount receivable by EIPL as would be ascertained by the Commission.

**Petitioner's Response:**

The Petitioner, in its reply, made the following submissions:

- i. Clause 14 of the FSA provides that the disputes arising out of or in connection with the FSA are to be adjudicated by the arbitral tribunal constituted in terms of the said clause. Accordingly, on 09.12.13, AGCL invoked arbitration in terms of the Arbitration Agreement between itself and the Petitioner (hereinafter the "Arbitration"). AGCL filed its Statement of Claim in the Arbitration on 28.04.2015 and the Petitioner has filed its Statement of Defence in the said Arbitration and the Arbitration is ongoing.
- ii. The Hon'ble Supreme Court, in its decision in Gujarat Urja Vikas Nigam Ltd. vs. Essar Power Limited, reported at (2008) 4 SCC 755, (hereinafter "Gujarat Urja Case") has held that except Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter the "Arbitration Act"), all other provisions of the Arbitration and Conciliation Act, 1996 will apply to arbitrations under Section 86(1)(f) of the Electricity Act, 2003. Section 5 of the Arbitration Act prohibits the intervention of any judicial authority in arbitral proceedings except in the manner provided for in the Arbitration Act.

In view of the above, the Petitioner has submitted that objections raised by AGCL ought to be rejected by the Commission as the same can only be raised before the arbitral tribunal appointed in terms of the FSA, subject to AGCL being able to satisfy the maintainability of its claim before the same.

**Commission's View:**

The Commission has noted the submissions of the stakeholders.

**4.3.3.** APDCL, vide its submission, apart from the specific observations on tariff components, raised the following issues:

- a. Non-submission of vital documents, i.e., plant-wise cost allocation duly certified by an Auditor, will seriously prejudice the computations related to the Tariff Petition and the purpose of entire proceedings will become infructuous in absence of such vital documents. Further, calculation of the actual amount due to EIPL as per the direction of the Hon'ble APTEL passed in its Judgment dated 18.05.2016 will be affected. APDCL submitted that EIPL's admission of non-maintenance of plant-wise audited accounts clearly breaches Regulations 4.4, 4.5 and 4.8 of the AERC Tariff Regulations, 2006, which specify that the generating company shall maintain and submit separate accounts of generation, its licensed business, and other business. Therefore, in view of the non-submission of data/documents by the EIPL within the timeline, the aforesaid Tariff Petition is liable to be dismissed by the Commission.

- b. The cost allocation certificate from a CA Firm as submitted by EIPL is neither accompanied by any affidavit nor any forwarding letter and the certificate also states that the cost allocation is as per CERC Regulations, 2009 whereas EIPL falls under AERC Regulations and the period for which tariff determination is to be done falls under AERC Tariff Regulations, 2006.
- c. APDCL submitted the following reasons for rejection of the Tariff Petition on ground of non-compliance of various Orders passed by the Commission and Hon'ble APTEL:
- i. EIPL has not provided adequate intimations with regard to the fixed and variable cost and has simply extended the tariff of FY 2008-09 to the subsequent years from FY 2009-10 to 2014-15, after escalating O&M cost by 2.5% over previous years, which is not permissible as per Hon'ble APTEL's Judgment and AERC Tariff Regulations, 2006.
  - ii. In the absence of Audited Accounts of 2007-08, the annual revenue surplus could not be ascertained. Audited Annual Accounts are to be provided as per Regulation 7 of AERC Tariff Regulations, 2006 along with the FY 2012-13 Tariff Petition, which the Petitioner has not filed.
  - iii. The Electricity Act, 2003 came into force on 10.06.2003 and from that day all tariff should have been determined according to the provisions under Sections 62 and 64 of the Act. The Commission notified the AERC Tariff Regulations, 2006 on 29.05.2006 and the Petitioner should have filed Tariff Petitions as per the said Regulations. According to the AERC Tariff Regulations, 2006, the normative PLF of both the stations were raised from 68.49%, as per Clause 3.3 of PPA, to 80%. The Petitioner did not comply with the provisions of PPA only because they were getting higher tariff for those periods and had the Tariff Petitions been filed, tariff of the two generating stations would have been much lower than that considered for all the years.
- d. APDCL has submitted the computations of Annual Fixed Charges as per the provisions of AERC Tariff Regulations, 2006 and also the PPA. APDCL submitted that as per the said calculations, APDCL is entitled to recover Rs. 19.86 Crore (approx.) from EIPL with respect of Banskandi plant. APDCL submitted that recovery of excess amount paid for FY 2008-09 and FY 2009-10 onwards towards fixed cost and income tax is to be recovered with carrying cost by APDCL. As per the said calculation, APDCL, is entitled to get total refund of Rs 34 Crore (approx.) from EIPL for both Adamtilla and Banskandi plants after inclusion of
- i) Excess payment made by APDCL and carrying cost on excess payment
  - ii) Outstanding energy bills payable by the EIPL to APDCL,
  - iii) Adhoc payment of Rs 9 Crore made to EIPL by APDCL in view of the interim Order of the Hon'ble APTEL.
- e. APDCL further submitted that the composite Annual Accounts submitted by the Petitioner show very high profits, though EIPL has claimed to be undergoing financial crunch.

The other submissions made by APDCL on the tariff components have been discussed in the relevant sections of this Order.

**Commission's View:**

The plant-wise cost allocation duly certified by an Auditor is the essential requirement for carrying out truing up and in the absence of same, the Commission has not carried out truing up in this Order. The Commission prima facie agrees that there are several grounds for rejection of the Petition as the Petitioner has not complied with various statutory provisions, however, the Commission has proceeded with the process of determination of tariff in compliance to the direction issued by Hon'ble APTEL.

**5. Processing Fees for the Tariff Petitions**

5.1. The Petitioners are required to deposit requisite fees for the processing of the Tariff Petitions. The Commission observed that the Petitioner has not deposited the requisite amount towards processing of the Tariff Petitions. The Commission in its Order dated 24.10.2016 directed the Petitioner to deposit requisite fees towards processing of the Tariff Petition No. 13/2015 on or before 15.11.2016. Thereafter, the Petitioner filed a Miscellaneous Petition dated 18.11.2016 giving two options to the Commission - (1) exemption from deposit of the requisite fees (Rs. 2.4 Crore as per the AERC Fees Regulations, 2015) (2) adjustment of the fees with the pending payment to be received from APDCL for both Adamtilla and Banskandi Gas based power plants for FY 2009-10 to FY 2014-15.

5.2. Thereafter, the Commission vide its notice dated 18.11.2016, intimated the Petitioner to appear before the Commission on 30.11.2016 for non-compliance to direction for deposit of requisite fees towards processing of the Tariff Petitions as per the Order dated 24.10.2016 on Petition No. 13/2015 on or before 15.11.2016 in addition to two other matters. The Petitioner during the hearing made the following submissions in this matter:

- a. The representative of EIPL submitted that the applicable Fee Regulation of AERC for processing of the Tariff Petitions is AERC (Fees) Regulations, 2009 and not the AERC (Payment of Fees etc.) Regulations, 2015, because:
  - i. AERC (Payment of Fees etc.) Regulations, 2015 was notified on 20.08.2015, hence the same is not applicable for the period of FY 2009-10 to FY 2014-15
  - ii. The Judgment pronounced by Hon'ble APTEL in the matter of Tariff determination for FY 2009-10 to FY 2014-15 was on a date prior to the notification of the AERC (Payment of Fees etc.) Regulations, 2015. Hence, the earlier AERC (Fees) Regulations, 2009 is only applicable.
- b. The Petitioner expressed its concern regarding payment of the fees for processing of the Tariff Petitions as same will be treated as a pass through to the consumer i.e. APDCL.
- c. The representative of the Petitioner further submitted that it has already deposited Rs. 20.00 lakhs towards fees for processing of the Tariff Petitions for both the plants for FY 2009-10 to FY 2014-15 and also expressed its inability to deposit the balance amount of applicable fees in view of the distressed financial condition and closure of the plants of EIPL.
- d. The representative of the Petitioner proposed that the Commission may perhaps consider the deposited fee as fee for processing of the Petition for FY 2009-10 tariff period and reject the Tariff Petitions from FY 2010-11 onwards, due to lack of submission of requisite fees.

5.3. Further, on 01.12.2016, the Petitioner made written submission with regard to

payment of fee, the salient points are:

- a. The notice dated 17.02.2016 alleges short payment of fees under the 'Assam Electricity Regulatory Commission (Payment of Fees etc.) Regulations, 2015'(hereafter referred to as AERC Fees Regulations, 2015), however, it acknowledges the payment of Rs. 20 Lakh made by the Petitioner. It is not clear as to how the Commission is entitled to claim an amount of Rs. 20 Lakh per year-wise Petition. Such payment of fees as per AERC Fees Regulations, 2009 is a pass through and any amount of fees paid would eventually be passed on to the consumers. Hence, it is important to calculate the fees correctly.
- b. The AERC Fees Regulations, 2015 dated 20.08.2015 came into effect from 31.08.2015, i.e., the date of their publication in the official gazette. Upon coming into effect, the AERC Fees Regulations, 2015 repealed the Assam Electricity Regulatory Commission (Fees) Regulations, 2009 (herein referred as AERC Fees Regulations, 2009). Therefore, the AERC Fees Regulations, 2009 applied from FY 2009-10 to FY 2014-15.
- c. It may be noted that the AERC Fees Regulations, 2015 themselves provide that notwithstanding the repeal of the AERC Fees Regulations, 2009, any action purported to have been taken under the AERC Fees Regulations, 2009 shall be valid. Further, the said Regulations provide that the Commission has inherent powers to prevent abuse of process as well as to meet the ends of justice.
- d. The fees under the AERC Fees Regulations, 2009 are much lower than those under AERC Fees Regulations, 2015. The Petitioner submitted that the fees for any Petition for FY 2009-10 to FY 2014-15 should be determined as per the AERC Fees Regulations, 2009 as the said Regulations apply to the Multi-year Tariff period in review, which is evident from the following:
  - i. The AERC Fees Regulations, 2009 apply to the period for which this Commission is determining the tariff, i.e., FY 2009-10 to FY 2014-15. The AERC Fees Regulations, 2015 came into effect only on 31.08.2015, i.e., after the entire period had come to an end.
  - ii. The Petitioner was not responsible for the delay in tariff fixation for the period from FY 2009-10 to FY 2014-15. It further submitted that the imposition of the AERC Fees Regulations, 2015 is both incorrect and iniquitous as it burdens the Petitioner with more fees for no fault of its own and also adds a financial burden when it has not been paid its legal entitlements despite the same having been recognized by this Commission in the Order dated 20.10.2011 as well as Hon'ble APTEL's Judgment dated 12.08.2014.
  - iii. The Hon'ble APTEL, in its Judgment dated 12.08.2014, directed the Commission to determine the Petitioner's tariff. The Commission's notice dated 16.09.2015, which started the process of Tariff determination expressly asks for the Petitioner to file its tariff Petition in terms of the Judgment dated 12.08.2014 passed by the Hon'ble APTEL.
- e. In light of the above submission, the Petitioner submitted that the demand of Rs. 20 Lakh is unreasonable and contrary to the AERC Fees Regulations, 2009, which ought to apply to the tariff fixation process for FY 2009-10 to FY 2014-15. Consequently, no default is attributable to the Petitioner for the failure to pay Rs. 20 Lakh per Petition when not only the very computation of Rs. 20 Lakh but its applicability to each Petition is itself debatable.
- f. Unlike other MYT Petitions, the Petition filed by the Petitioner was for a MYT period, which had already expired. Despite the expiry of the said period, the tariff

for the same had not been determined by the Commission. Consequently, this MYT exercise is distinct from a regular MYT exercise as there was no need for projections followed by annual true-ups given the fact that the actual data for the requisite period were available.

- g. The Hon'ble APTEL in its Judgment dated 12.08.2014 had directed the Commission to undertake the determination of tariff as a composite exercise. Therefore, the payment of fees separately for each Tariff Petition does not meet the ends of justice. Hence, the fees of Rs. 20 lakh already paid covers the fees for both the power plants under the AERC Fees Regulations, 2009, if fees are not insisted upon for year-wise filing.
- h. The Petitioner has already filed its application for fee waiver on 14.11.2016 by e-mail and submitted the hard copy on 18.11.2016, and the same is pending before the Commission

5.4. The Commission, in its Order dated 30.11.2016, observed as follows:

*"6.3. **Deposition of requisite Fees for processing of the Tariff Petitions:** EIPL was required to pay Fee on or before 15.11.2016 and it didn't pray for any exemption prior to due date. Only on 18.11.2016, EIPL filed a Miscellaneous Petition giving two options- (1) exemption from deposit of the requisite fees (Rs. 2.4 Crore) (2) adjustment of the fees with the pending payment to be received from APDCL.*

*During the Hearing, the Petitioner did not reiterate the second option proposed vide earlier submissions. The Petitioner further submitted that the provisions of AERC (Payment of Fees etc.) Regulations, 2015 are not applicable for the period of FY 2009-10 to FY 2014-15 rather the AERC (Fees) Regulations, 2009 is applicable. The argument of the Petitioner that the AERC (Fees) Regulations, 2009 should be made applicable was not agreed to by the Commission, as the AERC (Fees) Regulations, 2009 has already been repealed by the AERC (Payment of Fees etc.) Regulations, 2015 and no action can be taken based on a repealed regulation. Therefore, as per Regulation 1.3 & Regulation 11 of the AERC (Payment of Fees etc.) Regulations, 2015, after notification of the said Regulations, filing of any kind of Petition/Application before the Commission needs to be accompanied with the Fee prescribed in the AERC (Payment of Fees etc.) Regulations, 2015.*

***However, as because as per direction of the Hon'ble APTEL, the Commission is required to determine Tariff for the plants of EIPL from FY 2009-10 to FY 2014-15, at this point of time the Commission will go ahead with the Tariff determination proceedings. The Petitioner will have to pay the requisite Fee for the whole period and given further time upto 12.12.2016 to deposit the Fee, failing which the Commission will take necessary steps as per Law."***  
*[Emphasis Added]*

5.5. It is to be noted that the Commission allowed time up to 12.12.2016 to the Petitioner for depositing the requisite fees vide its Order dated 30.11.2016, which the Petitioner failed to comply with. A separate Order in this regard has been issued by the Commission and determination of tariff by the Commission in this Order shall not be considered as a waiver/relaxation to the Petitioner towards payment of the

processing fees of the Tariff Petitions.

## 6. Truing Up

- 6.1. It is to be noted that subsequent to issuance of final Tariff Order for FY 2008-09 by the Commission on 20.10.2011, the Petitioner till now has not filed True-up Petition for the said period.
- 6.2. The Commission approves the cost parameters based on the data provided by the Petitioner as available at the time of filing of Tariff Petitions. The cost approvals for each of the items are based on projection of expenses and revenue generation before the start of the year and hence, the projections might vary over the course of the year. The actual cost/values for certain elements/parameters may vary as against the approved cost during the year due to various controllable and uncontrollable factors. The generating company may end up with higher or lower expenditure and profits, as the case may be, at the end of the year as against the approved cost.
- 6.3. Regulation 6.3 of the AERC Tariff Regulations, 2006, provides for submission of audited accounts for the latest previous year along with unaudited accounts for all the succeeding years while filing Petition for the determination of tariff. The relevant extract of the Regulations is as follows:

*“6.3 The tariff petition shall be accompanied by financial and performance information in forms specified by the Commission for the previous year/years, current year and the ensuing year. The information for the previous year should be based on audited accounts and in case audited accounts for the previous year are not available, audited accounts for the latest previous year should also be filed along with unaudited accounts for all the succeeding years.”*

- 6.4. Regulation 29 of the AERC Tariff Regulations, 2006, clearly specifies that after carrying out the truing up, the extra profit earned by Generating Company shall be shared with beneficiaries. The relevant extract of the Regulations is as follows:

### **“29. Sharing of Efficiency Gains**

- 29.1 *The financial gain or loss to the licensee or generating company shall be computed after considering any efficiency gains achieved as envisaged in the norms of operation set out in Parts IV, V, VI, and VII of these Regulations.*
- 29.2 *The profit of the licensee shall not be restricted to the amount determined under each Part of these Regulations but can exceed such amount provided that the licensee or generating company outperforms the target performance norms set by the Commission.*
- 29.3 *When the licensee or generating company earns a profit greater than the amount set in the tariff order, the licensee or generating company shall be entitled to retain fifty percent of the additional profit earned from all sources, twenty five percent shall be credited to the licensee’s or generating company’s contingency reserve and the remaining twenty five percent shall be passed on to the consumers/users.*



*Provided that the Licensee shall not be entitled to retain additional profit if in the Commission's opinion the licensee has failed to achieve the targets set in the Transmission or Distribution Licensees' Standard of Performance Regulations, 2004.*

*Provided also that when the licensee fails to achieve performance standards, the Commission may direct by order that the additional profit earned by the licensee be invested in improving the performance of the transmission and distribution services to consumers.*

*29.4 The benefits of better performance shall be shared between the licensee or generating company and the consumers at the end of the control period in case of Multi Year Tariff when base values for the next control period are reset in a ratio to be determined by the Commission.*

*Provide that the share allocated to the licensee shall not be less than 25%*

*29.5 If at the end of the current tariff period, the current tariff results in profits to the generating company or the licensees that exceed 20% return on equity, then the Commission may revise the tariff so as to reduce the profits to a maximum of 20% return on equity."*

6.5. As the tariff in this Order is being determined for FY 2012-13, i.e., a year which is already over, it would have been preferable to consider the actual expenses and revenue and carry out the truing up along with determination of tariff. With this objective, the Commission asked EIPL to submit the plant-wise cost allocation statements duly certified by the Auditor to ascertain the actual expenses.

6.6. However, EIPL has not submitted the critical information for carrying out the detailed analysis of the Tariff Petitions and for truing up:

a. The Petitioner submitted the copy of Audited Annual Accounts of EIPL for the Company as a whole. However, the Petitioner has not submitted the plant wise allocation statements of Profit & Loss Statement and Balance Sheet between various businesses of EIPL duly reconciled with Audited Annual Accounts as sought by the Commission even though the period is already over and the Petitioner should have got all the records. The plant-wise cost allocation statements submitted were found to be mere computation of variable and fixed charge based on certain principles / norms and assumptions rather than based on actual expenses. **Thus, the Petitioner has failed to submit the critical information regarding actual plant-wise cost allocation statement duly reconciled with Annual Accounts.**

b. The Commission also observed discrepancies in the generation log sheet submitted by the Petitioner and the Petitioner also failed to submit jointly certified copy of deemed generation information.

6.7. As it can be observed from the above, the Petitioner failed to submit the plant-wise cost allocation statement, deemed generation information agreed by both the parties, etc. Ideally, as the period for which tariff is being determined, i.e., FY 2012-13, is already over, it would have been more appropriate to consider the entire actual information while determining the tariff. **However, only to comply with Hon'ble APTEL directives, the Commission has gone ahead with the determination of tariff for FY 2012-13 based on the information available with it due to lack of this critical information.**

## 7. Determination of Tariff for Period after Closure of the Plant

7.1. The Power Purchase Agreement (PPA) was signed between APDCL (erstwhile Assam State Electricity Board) and EIPL (erstwhile M/s. DLF Power Company Ltd.) on 09.02.1995. The duration of PPA has been specified as 33 years from the date of signing of the Agreement by the Parties or 30 years from the date of initial synchronization of Unit, whichever is later. This means that the PPA signed between the parties is still effective and is in force, as no contrary information has been received by the Commission. The PPA defines the Gas Company as follows:-

*“Gas Company: means the contractor / supplier of gas with whom the company contracts for supply of gas for the projects.”*

7.2. Article – 6 of the PPA does not entrust the responsibility of signing of Gas Supply Agreement (GSA) to APDCL. As per the PPA, APDCL is responsible for providing necessary assistance to EIPL to get all statutory/non-statutory clearances, water availability confirmation, waste water discharge, no-objection certificates, etc.

7.3. The GSA was signed between EIPL (erstwhile M/s. DLF Power Ltd.) and Assam Gas Company Ltd. (AGCL) on 19.10.1995 for supply and transportation of gas from Oil and Natural Gas Corporation Ltd.’s (ONGC) off take points at Banskandi and Adamtilla to EIPL’s power plants at Banskandi and Adamtilla. The GSA was effective for 15 years from the date of signing of Agreement, i.e., till 18.10.2010 subject to availability of gas at requisite pressure. It means the GSA expired on 18.10.2010 (during FY 2010-11) and the GSA was not renewed. It is observed from the submission of APDCL that APDCL was neither a party nor was it taken into confidence while signing of the GSA dated 19.10.1995.

7.4. Further, from the submissions of EIPL and AGCL, it is observed that EIPL, vide its letter dated 22.12.2009 to AGCL, expressed its consent for continuation of the GSA, on the basis of which AGCL continued its gas supply as per the terms and conditions of the original Agreement.

7.5. EIPL, in its reply to data gaps dated 18.10.2016, has submitted that the process of renewal of GSA could not be consummated despite the efforts made by EIPL because AGCL did not get back to back agreement signed with ONGC to meet the committed quantities of gas supply. EIPL further submitted that one year prior to expiry of the GSA, it wrote a letter to APDCL to sign the GSA with AGCL and APDCL refused to become a party to the renewal of GSA.

7.6. From the above, it can be seen that renewal of GSA was the responsibility of the Petitioner and APDCL refused to be a part of renewal of the fuel supply agreement to be signed by the generating company and the fuel supplier.

7.7. AERC Tariff Regulations, 2006 defines availability in relation to thermal generating station as follows:

*“Availability” in relation to a thermal generating station for any period means the average of the daily average declared capacities (DCs) for all the days during*

that period expressed as a percentage of the installed capacity of the generating station minus normative auxiliary consumption in MW, and shall be computed in accordance with the following formula:

$$\text{Availability} = 10000 * \sum_{i=1}^N (DC_i) / \{N \times IC \times (100 - AUX_n)\} \%$$

where,

- (i) IC = Installed Capacity of the generating station in MW,
- (ii) DC<sub>i</sub> = Average declared capacity for the <sup>i</sup><sup>th</sup> day of the period in MW,
- (iii) N = Number of days during the period, and
- (iv) AUX<sub>n</sub> = Normative Auxiliary Energy Consumption as a percentage of gross generation;”

“Declared Capacity” (DC) shall mean the capability of the generating station to deliver ex-bus electricity in MW declared by such generating station in relation to any period of the day or whole of the day, **duly taking into account the availability of fuel;**

Note:

- (i) In case of a gas turbine generating station or a combined cycle generating station, the generating station shall declare the capacity for units and modules on gas fuel and liquid fuel separately, and these shall be scheduled separately. Total declared capacity and total scheduled generation for the generating station shall be the sum of the declared capacity and scheduled generation for gas fuel and liquid fuel for the purpose of computation of availability and Plant Load Factor respectively.
- (ii) Declared capacity however shall be limited to Installed Capacity.
- (iii) Daily average declared capacity mean the sum of capacity declared for every fifteen minutes block during the twenty four period divided by ninety six.”(Emphasis Added)

7.8. The Regulations clearly specify that the Declared Capacity has to take into account the availability of fuel and hence, the Petitioner was solely responsible for arranging fuel. EIPL has not submitted necessary information, from which it can be concluded that it has made declaration of available capacity as required under Clause 31 of AERC Tariff Regulations, 2006 duly taking into account the availability of fuel. **Due to non-availability of gas, the Banskandi Plant was closed on 08.01.2013.**

7.9. In view of the above discussion and in light of the Hon’ble APTEL Judgment dated 12.08.2014 in Appeal No. 76 and 83 of 2016, the Commission has determined the Annual Fixed Charges (AFC) for the period after closure of the plant till FY 2014-15, even after expiry of the GSA. The question of determining the variable charges after closure of the plant does not arise as there was no generation of electricity due to non availability of fuel. **However, no tariff (whether fixed or variable) shall be payable to the Petitioner for 09.01.2013 to 31.03.2013 period as the plant was closed during the said period.**

## 8. Operational and financial norms and parameters

8.1. In the matter of determination of tariff for Banskandi plant of EIPL for FY 2012-13, the Commission decided to determine the tariff as per norms and some of the provisions of the PPA read with Govt. of India notification dated 30.03.1992 and

mostly as per provisions of AERC Tariff Regulations, 2006 including inter-alia, those setting out the terms and conditions for determination of rates, charges and tariff and wherein the provisions of the PPA are found to be inconsistent. It would be pertinent to mention here that there is no provision in the Electricity Act, 2003 granting deemed approval for past PPA's.

8.2. Further, at the time of determination of Final tariff for FY 2008-09 vide Order dated 20.10.2011, the Commission had followed the provisions of Section 61(a) of Electricity Act, 2003, the principles and methodologies specified in the CERC Tariff Regulations, 2001 and 2004 wherever it deemed appropriate.

Now, based on the above, the Commission has fixed the following operating norms and parameters for FY 2012-13.

### 8.3. Operating Norms

#### 8.3.1. Plant load factor (PLF)

a) *Submissions of EIPL:*

The Petitioner submitted in the Petition that in light of the Tariff Order dated 20.10.2011 for FY 2008-09 and Review Order dated 12.02.2013, it has computed the variable charges as per the approved design heat rates and normative PLF allowed in the Order. Thus, the Petitioner has considered the PLF for Banskandias 68.49%, as approved by the Commission in its Tariff Order for FY 2008-09.

The Petitioner further submitted that from the capacity availability tests, it can be observed that the PLF achieved including deemed generation is higher than 80%, but it has been limited to 80% and during actual operation of the power plants, 80% PLF could not be achieved only due to non-availability of gas. Since it has demonstrated to have achieved PLF in excess of 80%, the Petitioner is entitled for deemed generation beyond the normative PLF, but limited to 80% PLF.

b) *Submissions of APDCL:*

APDCL submitted that according to the AERC Tariff Regulations, 2006, the normative PLF of both the stations were raised from 68.49% of the Clause 3.3 of PPA to 80%. The Petitioner did not comply with the provisions of PPA only because they were getting higher tariff for those periods and had the Tariff Petitions been filed, tariff of the two generating stations would have been much lower than that considered for all the years.

c) *Commission's View:*

AERC Tariff Regulations, 2006 has the following provisions for PLF

***“39.2 For stations commissioned on or after these Regulations come into force the factors shall be as follows:***

***Target Availability for recovery of full Capacity (Fixed) charges for Thermal Power Stations 80%***

***Target Plant Load Factor for Incentive 80%” [Emphasis Added]***

The AERC Tariff Regulations, 2006 were notified on 28.4.2006 and the COD for Banskandi Plant was 5.9.1997.

In the Tariff Order for FY 2008-09, the Commission observed that as the Power Station at Banskandi was commissioned in FY 1997-98, its performance cannot be compared with the PLF achieved by the new generating stations. Therefore, the normative PLF of Banskandi has been considered from the PPA of February, 1995.

The Commission, therefore, after careful examination of the matter, considered the normative PLF for Banskandi as 68.49%.

The Commission reiterated its decision on PLF of the power plants of EIPL in its Review Order dated 12.02.2013 and held that even though EIPL claimed a committed PLF of 80%, the Commission deemed it appropriate to accept the normative PLF for FY 2008-09 as per the PPA considering the totality of the circumstances.

The issue of PLF as decided by the Commission in the Tariff Order dated 20.10.2011 and Review Order dated 12.02.2013 was challenged by APDCL before Hon'ble APTEL where it contended that the PLF should be allowed as per AERC Tariff Regulations, 2006 and the PPA also provides for application of all further change in law.

The Hon'ble APTEL upheld the decision of the Commission to consider the normative PLF for the power plants of EIPL as per the PPA, as the Tariff Regulations specify normative PLF of 80% only for new plants commissioned after the notification of the Regulations. The relevant extract of the Hon'ble APTEL's Judgment dated 12.08.2014 is reproduced below:

***“Thus, the norms provided for under Regulation 39.2 would not be applicable to the power plants of the Appellant Generating company which were commissioned during FY 1997-98. The Regulations also do not specify norms for Adamtilla and Banskandi.***

***36. In view of above, we find no infirmity in the order of State Commission deciding to adopt normative PLF for the power plants of EIPL as per the PPA, as the Tariff Regulation specifies normative PLF of 80% for only new plants commissioned after the notification of the Regulations. The State Commission specified normative PLF for some old plants of Assam at 50% but the normative PLF for the EIPL's plants was not specified. The State Commission correctly felt that the PLF provided for the PPA were appropriate for the plants of EIPL in view of their age. Accordingly, this issue is decided against the Distribution Company.” [Emphasis Added]***

As approved by the Commission in its Tariff Order dated 20.10.2011 & Review Order dated 12.02.2013 and Hon'ble APTEL's Judgment dated 12.8.2014, the claim of the Petitioner in the instant Petition, and absence of any prevalent Regulation, the PLF as approved by the Commission in its Tariff Order dated 20.10.2011 has been considered for determination of Tariff for FY 2012-13. The Commission, therefore, after careful examination of the matter and considering the submissions of both the Parties, has considered the normative PLF for Banskandi as 68.49%.

### **8.3.2. Auxiliary Energy Consumption (AEC)**

The Petitioner, in its Tariff Petition for FY 2012-13, has calculated the per unit Annual Fixed Cost considering auxiliary energy consumption at the rate of 5.50% of the gross energy generation, as approved by the Commission in its Tariff Order dated 20.10.2011. No specific comment from APDCL has been received in this regard. The issue of auxiliary

consumption was not raised in the Review Petition filed against the Tariff Order for FY 2008-09 dated 20.10.2011 by either of the Parties.

The auxiliary energy consumption is clearly defined in Clause 1.2 of the PPA as the difference between actual generation and net electricity supplied in kWh. However, the level of AEC in percentage is not specified.

Regulation 39.5 of the AERC Tariff Regulations, 2006 allows 3% auxiliary energy consumption for combined cycle gas plant. However, the Commission may allow higher rate of AEC where gas booster compressor is utilised.

Further, in the Tariff Order dated 20.10.2011, the Commission observed as follows:

*“As per the DPR submitted by EIPL the auxiliary energy consumption norms for both Adamtilla and Banskandi plants are as under:*

- 1. Without Gas Booster compressor = 3%*
- 2. With Gas Booster Compressor = 6%*

*Since, EIPL plants are provided with gas booster compressor with electric prime mover, the Commission has allowed AEC @ 5.5% for both Adamtilla and Banskandi plant as per the recommendations of CEA’s Technical Standard on operation norms for combined cycle gas plant.”*

In line with the approach followed by the Commission in its Tariff Order for FY 2008-09, the Commission in this Order also, has considered auxiliary energy consumption at a rate of 5.50% for determination of tariff for FY 2012-13.

### **8.3.3. Gross Station Heat Rate (SHR):**

#### *a) Submissions of EIPL:*

The Petitioner in its Tariff Petition has submitted that in light of the Tariff Order dated 20.10.2011 for FY 2008-09 and Review Order dated 12.02.2013, it has computed the variable charges as per the approved design heat rates and normative PLF allowed in the Order i.e. 2110 kCal/kWh.

Furthermore, considering the liberty given by Hon’ble APTEL for raising the SHR issue before the Commission, the Petitioner has requested the Commission to compensate for the higher SHR and the excess gas consumption caused by it, stating that the designed SHR can only be obtained at ideal operating conditions like full load operation, continuous operation, etc., and these conditions don’t prevail due to following reasons:

- a) Non-evacuation of power to full capacity by ASEB
- b) Grid failures and fluctuations resulting in frequent starts ups
- c) Unpredictable nature of grid availability and grid condition
- d) Generating sets running on part load due to adverse grid conditions
- e) Non-availability or inadequate supply of gas and / or load restrictions imposed by ASEB

#### *b) Submissions of APDCL:*

APDCL submitted that AERC Tariff Regulations, 2006 allows heat rate of 1950 kcal/kWh for combined cycle gas based generation and the Commission should approve the heat

rate as per AERC Tariff Regulations, 2006. APDCL further submitted that Gol Notification 1992 allows heat rate of 2000 kcal/kWh, but the PPA allows a heat rate of 2110 kcal/kWh, therefore, enhancement in heat rate should not be allowed arbitrarily.

*c) Commission's View:*

In the Tariff Order dated 20.10.2011, the Commission approved the gross SHR values of 2110 kcal/kWh as per the designed heat rate of the plants as per the SHR curve submitted by the manufacturer and DPR submitted by EIPL.

The Commission, in its Review Order dated 12.02.2013, made the following observations:

***“(c) Observations of the Commission: After detailed scrutiny of the relevant documents like SHR curves etc. furnished by the manufacturer Allison Engine Co. USA and as per revised DPR submitted by EIPL, the Commission noted that the design SHR of the EIPL plants are as under:***

*Adamtila = 2500 Kcal/kwh*

*Banskandi = 2110 Kcal/kwh*

***As CEA norms for Station Heat Rate is based on the Design Heat Rate, after careful consideration of relevant aspects in totality, the Commission has approved the above Design Heat Rates as SHR norms for computation of Variable charge component of the Tariff.”***

The Gross Station Heat Rate as approved by the Commission in its Tariff order for FY 2008-09 was challenged by both APDCL and EIPL before the Hon'ble APTEL. In this matter, APDCL contended that the Heat Rate should be allowed as per AERC Tariff Regulations, 2006, while EIPL contended that the Heat Rate should be allowed as per actuals, as higher Station Heat Rate is due to partial load, grid interruption, etc.

The Hon'ble APTEL, in its Judgment dated 12.08.2014, viewed that there has been considerable advancement in the technology and design of the Gas turbines over the years since the commissioning of the Gas turbine plants of EIPL, resulting in improvement in the efficiency or the Heat Rate. Therefore, the SHR specified for Gas Turbine Plants, which are commissioned after the notification of the AERC Tariff Regulations, 2006 cannot be applied to EIPL's plants, which were commissioned in FY 1997-98.

The Hon'ble APTEL upheld the Station Heat Rate approved by the Commission. Regarding EIPL's contention for higher Station Heat Rate due to operation of plant at partial load, grid interruption, etc., Hon'ble APTEL gave liberty to EIPL to raise these issues while determining tariff from FY 2009-10 onwards. The relevant extract of the Hon'ble APTEL's Judgment dated 12.08.2014 is reproduced below:

***“(iii) Station Heat Rate:***

***We find that the findings of the State Commission are perfectly in order. Regarding contention of EIPL for higher Station Heat Rate due to operation of the plant at partial load, grid interruption, etc., we give liberty to EIPL to raise these issues while determination of tariff for FY 2009-10 onwards. We also reject the contention of EIPL that variable charges have to be determined strictly in terms of the PPA.”***

The Petitioner has claimed higher SHR (without specifying the actual values) in light of the

liberty given by Hon'ble APTEL, but in the calculation for variable charge, has considered SHR as approved by the Commission in its Tariff Order for FY 2008-09.

The Commission had determined the SHR in the Tariff Order for FY 2008-09 based on scrutiny of the relevant documents like SHR curve, etc., supplied by the manufacturer Allison Engine Co. USA and as per the DPR submitted by EIPL.

The Commission observed that the Petitioner has not submitted detail data/information showing achievement of SHR higher than the normative value due to partial load operation and also not submitted any corresponding calculation for the same.

Thereby, the Commission approves the gross SHR values of 2110 kcal/kWh for Banskandi plant as approved in FY 2008-09 Tariff Order and as upheld by Hon'ble APTEL's Judgment dated 12.08.2014, considering the designed heat rate of the plants, SHR curve submitted by the manufacturer, DPR submitted by EIPL at the time of tariff determination for FY 2008-09.

#### **8.3.4. Gross Calorific Value (GCV) of Gas:**

##### *a) Submissions of EIPL:*

In the Tariff Petition for FY 2012-13, EIPL has submitted to have considered GCV of 8324 kcal / SCM for its Banskandi power plant.

##### *b) Submissions of APDCL:*

APDCL submitted that the price of gas is matter of decision of Gol and till any new direction of Gol is received, the consumer shall pay at the rate of Rs.10000.00 per 1000 SCM of gas as per Gol Circular No. L-12015/2/88/GP dated 31-12-91 applicable to GCV range of 9000 to 9500 kcal/SCM. APDCL submitted that this should be considered as the base for deciding the rebate on the price of the gas. Similarly, as the value of GCV submitted by the Petitioner is below the notified range of 9000 to 9500 kcal/SCM, similar principle may be applied for calculation of price of the gas with appropriate rebate.

##### *c) Commission's View:*

The Commission, in its deficiency note dated 08.09.2016, had asked the Petitioner to submit the landed price of Gas and GCV for computing the variable charge for FY 2009-10 to FY 2014-15. The Petitioner, in its reply dated 18.10.2016, submitted the information regarding gas quantum, landed gas price and GCV of the gas, for FY 2009-10 to 2010-11 for Banskandi plant, along with copy of the invoices from the Gas supplier for the months of September and March. The Petitioner submitted its reply on 31.10.2016 in response to the Commission's second deficiency note in the matter of submission of landed price of gas and GCV for computing the variable charge for FY 2011-12 to FY 2014-15.

The Commission has also done prudent check on the value of GCV and landed price of gas submitted by the Petitioner in its Tariff Petitions and has found the same as appropriate for the purpose of determination of the Tariff for FY 2012-13 for the Banskandi power plant of EIPL. In light of the above, the value of GCV and landed price of gas as submitted by the Petitioner is approved in this Order.

#### **8.3.5. Gross & Net Generation:**



a) *Submissions of EIPL:*

The Petitioner in its Tariff Petition has submitted that Hon'ble APTEL in the Judgment dated 12.08.2014 had given liberty to the Petitioner to raise the issue of actual generation at generator terminal. The Petitioner in view of this, has submitted that generation at generator terminal should be taken into account.

b) *Submissions of APDCL:*

APDCL submitted that metering at the generator terminal is not allowed as per Clauses 2.1, 2.2 of the PPA and under the provisions of PPA, mutually agreed interconnection point for Banskandi station is Pailapool sub-station. Further, the 33 kV transmission line connecting the plant and interconnection point is built, owned & operated by the Petitioner and therefore question of measurement of energy at generator terminal does not arise.

c) *Commission's View:*

Clause 1.8, 2.1 and 2.2 of the PPA provides as under:

*"1.28 Inter Connection Point means the physical point where the company's transmission/power evacuation system and ASEB's grid system is connected...."*

*"2.1 In consideration of tariff, the Board shall purchase and the company shall sell in accordance with the terms of this PPA, all the net electrical supply.*

*2.2 The obligation to sell & purchase of power pursuant to this Article-2 shall arise with effect from the date of the project's first delivering of electrical power to the interconnection point and continue for the term of PPA"*

The Commission is of the view that PPA clearly mentions about the sell and purchase of power at the interconnection point. As submitted by the Respondent, the interconnection point is agreed by both the parties. The Commission thus finds no reason for considering the energy generated at the generator terminal which is exclusive of the auxiliary energy consumption. The Commission in this Order has considered gross generation on normative basis calculated on normative PLF of 68.49% and auxiliary consumption of 5.50% as approved in this Order. The net generation has been calculated by deducting the auxiliary consumption of 5.50% from the gross energy generation.

<b>Particulars</b>	<b>FY 2008-09</b>	<b>FY 2012-13</b>
Normative Gross Energy Generation (MUs.)	93.00	93.00
Approved Auxiliary Consumption (%)	5.50%	5.50%
Normative Auxiliary Consumption (MUs)	5.11	5.11
Normative Net Energy Generation (MUs.)	87.88	87.88

#### **8.4. Annual Fixed Charge (AFC)**

Clause 67 (b) of AERC Tariff Regulations, 2006 provides that Annual Fixed Charge shall consist of the following components:

- i. Interest on Loan capital
- ii. Depreciation
- iii. Return on Equity
- iv. Operation and Maintenance Expenses
- v. Interest on Working capital

Clause 3.3 of the PPA provides that Annual Fixed Charge shall consist of the following components:

- i. Interest on Debt
- ii. Return on Equity
- iii. Interest on Working capital
- iv. Depreciation
- v. Operation and Maintenance Expenses
- vi. Taxes
- vii. Special Appropriation for amount in Rupees and or in US Dollars that is necessary
- viii. Any capacity charge levied by third parties that are necessary for the Project
- ix. All costs associated with changes in laws & regulations in India

The Petitioner has claimed the following Annual Fixed Cost (AFC) in its Tariff Petition for FY 2012-13 for the Banskandi Power Plant:

*(Rs. Lakh)*

<b>Particulars</b>	<b>FY 2012-13</b>
O&M	449.21
Depreciation	471.92
ROE	477.15
Interest on Working Capital	68.13
Income Tax	237.33
Incentive payable per annum	--
<b>Total</b>	<b>1703.75</b>

The Commission has discussed each component of the AFC as claimed by the Petitioner subsequently in this Order.

#### **8.4.1. Capital Cost:**

##### *a) Submissions of EIPL:*

The Petitioner in the Tariff Petition appears to have considered the capital cost as approved by the Commission in its Tariff Order for FY 2008-09 for calculation of various components of tariff for FY 2012-13.

##### *b) Submissions of APDCL:*

APDCL has submitted that there were certain errors apparent on the face of the record in the Tariff Order dated 20.10.2011 with regard to consideration of additional capitalisation. APDCL further stated that additional cost as mentioned by the Commission in the Tariff Order dated 20.10.2011 was incurred after COD as spares, which cannot be accepted as Capital Cost.

c) *Commission's View:*

The AERC Tariff Regulations, 2006 provide that the capital cost may include capitalized initial spares up to 4% of the original approved cost in the case of Gas turbine/combined cycle generating stations. The power plants were commissioned much before the notification of the AERC Tariff Regulations, 2006 and the initial spares were procured as per the PPA. The relevant extract of the AERC Tariff Regulations, 2006 has the following provisions as regards to determination of Capital Cost.

*“35.1 The actual capital expenditure as on the date of Commercial Operation in the case of new investment shall be subject to prudence check by the Commission.*

*35.2 Where PPA provides for a ceiling on capital cost, the capital cost to be considered shall not exceed the ceiling.*

*35.3 The capital cost may include capitalised initial spares as follows:-*

*(a) Up to 2.5% of original approved cost in case of coal based generating stations;*

*(b) Up to 4% of original approved cost in the case of gas turbine/combined cycle generating stations.*

*35.4 Scrutiny of the cost estimates by the Commission shall be limited to the reasonableness of the capital cost, financing plan, interest during construction, use of efficient technology and such other matters for determination of tariff.*

*35.5 In case of any abnormal delay in execution of the project causing cost and time overruns, attributable to the failure of the generator in executing the project the Commission may not approve the capitalisation of interest and overhead expenses in full but limit it to a reasonable amount only.”*

Since EIPL plants were commissioned in 1997-98, the Commission in the Tariff Order dated 20.10.2011 has considered the relevant provisions of PPA and CERC Tariff Regulations, 2001 for arriving at a reasonable capital cost.

The Commission in its Tariff Order dated 20.10.2011 has approved the total capital cost of Banskandi Plant as on 31.03.2008 as under:

(Rs. Crore)

Particulars	Capital Cost
Approved Capital Cost as on 31.03.1998	80.104
Additional Capital Cost approved	7.398
Approved Capital Cost as on 31.03.2008	87.502

Further, the Commission in its Review Order dated 12.02.2013 reaffirmed the capital cost as approved in the Tariff Order dated 20.10.2011 and also stated that the PPA sub-clause 1.7.7 also specifies that the total project cost will cover all expenditure till the COD and additional cost which, inter-alia, includes cost of initial spares for five years of operation, metering equipment, communication equipment, etc.

The issue of additional cost towards spares was challenged by APDCL before the Hon'ble APTEL stating that the initial spares should be allowed subject to the ceiling specified in AERC Tariff Regulations, 2006. Hon'ble APTEL upheld the capital cost approved by the Commission as the ceiling for initial spares as per Regulations is for new plants and not for these old plants. In the Judgment dated 12.08.2014, the Hon'ble APTEL held that

*“The Generating plants of the Generating company were commissioned much before the notification of the 2006 Tariff Regulations and they actually procured the initial spares as per the PPA. Further 93% of the additional capital spares have been actually utilized much before the notification of the Regulations. Therefore, the State Commission was correct in allowing the expenditure incurred on additional capital spares after prudence check. “*

Hon'ble APTEL was in agreement with the approach followed by the Commission in its Tariff Order for FY 2008-09. It is also observed that the Petitioner has also not claimed any additional capitalization beyond FY 2008-09. Thus, the capital cost as approved by the Commission in its Tariff Order dated 20.10.2011 is considered for determination of Tariff for FY 2012-13.

#### **8.4.2. Debt-Equity Ratio**

##### *a) Submissions of EIPL:*

The Petitioner in the Tariff Petitions have considered same debt-equity ratio as approved by the Commission in its Tariff Order for FY 2008-09 for computation of ARR for FY 2012-13.

##### *b) Submissions of APDCL:*

APDCL submitted that in the original DPR, the debt-equity ratio was considered as 70:30, i.e. equity was 30% of the capital cost and as per the revised capital cost after completion, the equity employed was 33.3% for Banskandistation. APDCL also submitted that as per AERC Tariff Regulations, 2006 debt-equity ratio should be 70:30 and as per Gol Notification also, the equity portion should be as per the approved financial package and as the Detailed Project Report was approved at equity capital of 30% and debt capital of 70%, as per PPA and Gol Notification, the equity capital should not be more than 30%.

##### *c) Commission's View:*

Regulation 32 of AERC Tariff Regulations, 2006 specifies Debt: Equity ratio of 70:30 for a new generating station. However, no debt: equity ratio has been notified for the existing plants of EIPL. The relevant portion of the AERC Tariff Regulations, 2006 has been reproduced below:

##### *“32. Debt-equity ratio*

*For the purpose of determination of tariff, **debt-equity ratio in the case of a new generating station commencing commercial operations after the notification of these Regulations shall be 70:30.** Where equity employed is more than 30%, the amount of equity for the purpose of tariff shall be limited to 30% and the balance shall be treated as loan. Where actual equity employed is less than 30%, the actual equity employed shall be considered. In the case of Assam Power Generation Corporation Ltd. the debt equity ratio as per the Balance Sheet on the date of the Transfer notification will be the debt equity ratio for the first year of operation, subject to such modification as may be found necessary upon audit of the accounts if such Balance Sheet is not audited. ” [Emphasis Added]*

The Commission in its Tariff Order dated 20.10.2011 has observed that the debt-equity ratio agreed and prescribed in the PPA is different from the normative debt-equity ratio of AERC Tariff Regulations, 2006. As at the time of conclusion of the PPA, no normative debt-equity ratio was in place, the actual infusion of equity by the IPP was therefore considered for the financial closure. In view of the above, the Commission approved the final debt-equity ratio of the plant based on equity infusion by the Developer up to the FY 2000-01 after prudence check. The Commission in its Tariff Order for FY 2008-09 allowed the additional capital cost to be treated as equity as the expenditure has been met by EIPL from the internal accruals of the company.

The Commission in its Tariff Order for FY 2008-09 approved the debt: equity ratio as under:

Particulars	%
Debt	61
Equity	39

The Commission again reaffirmed its decision with regard to debt-equity ratio in its Review Order dated 12.02.2013.

APDCL challenged the debt-equity ratio as considered by the Commission in its Tariff Order for FY 2008-09 before Hon'ble APTEL stating that the same should be allowed as per Tariff Regulations. Hon'ble APTEL in its Judgment dated 12.08.2014 upheld the Debt-Equity approved by the Commission as the Regulation is applicable for new plants and viewed that EIPL is entitled to debt equity ratio as per actuals as decided by the Commission after prudence check. Hon'ble APTEL was in agreement in the approach followed by the Commission in its Tariff Order for FY 2008-09; the relevant extract of the said Judgment dated 12.08.2014 is provided as under:-

*“60. We are in full agreement with the above findings of the State Commission. The Tariff Regulations provide for debt equity ratio of 70:30 for new plants. For existing plants of the State Generating company, the Regulation specifies debt equity ratio as per actuals as reflected in the balance sheet. No debt equity ratio has been specified for the EIPL's Plants. The power plants of the EIPL were commissioned much before the notification of the Regulations. The PPA also does not specify debt equity ratio. EIPL has funded the equity more than 30% in the absence of any provision in the PPA. Thus, EIPL is entitled to debt equity ratio as per actuals as decided by the State Commission after prudence check. Similar approach has been specified in the Tariff Regulations for the power plants of the State owned Generating company which were existing prior to the date of notification of the Regulations.”*

Considering all above, the Commission maintains the debt-equity ratio as allowed in the Tariff Order for FY 2008-09, for determination of Tariff for FY 2012-13 as under.

	Debt (Rs Crore)	Equity (Rs Crore)	Debt:Equity Ratio
Banskandi	53.42	34.082	61:39

#### 8.4.3. Return on Equity(RoE):

##### a) Submissions of EIPL:

The Petitioner in the Tariff Petitions appears to have considered same rate of 14% on the

equity base as approved by the Commission in its Tariff Order for FY 2008-09 for determination of Tariff for FY 2012-13. The Return on Equity as proposed by the Petitioner for its power plant at Banskandi is Rs. 477.15 Lakh for FY 2012-13.

b) *Submissions of APDCL:*

APDCL submitted that additional cost in terms of spares as allowed by the Commission in its Tariff Order dated 20.10.2011 should not be considered as capital cost and accordingly should not form a part of calculation of Return on Equity. APDCL has not objected to consideration of rate of 14% for calculation of return on equity as submitted by the Petitioner. APDCL further submitted that in the original DPR, the debt-equity ratio was considered as 70:30, i.e. equity was 30% of the capital cost and as per the revised capital cost after completion, the equity employed was 33.3% for Banskandi station. APDCL also submitted that as per AERC Tariff Regulations, 2006 debt-equity ratio should be 70:30 and as per Gol Notification also, the equity portion should be as per the approved financial package and as the Detailed Project Report was approved at equity capital of 30% and debt capital of 70%, as per PPA and Gol Notification, the equity capital should not be more than 30%.

c) *Commission's View:*

AERC Tariff Regulations, 2006 has the following provisions with regard to Return on Equity (RoE)

***“33. Return on Equity***

***33.1 Return on equity shall be computed on the equity base determined in accordance with Regulations 32 and 33 and shall not exceed 14%. In the case of Assam Power Generation Corporation. Ltd this rate will be applied for the first year on the equity recorded in the balance sheet as per the Transfer notification. Provided that equity invested in a foreign currency may be allowed a return up to the prescribed limit in the same currency and the payment on this account shall be made in Indian Rupees based on the exchange rate prevailing on the due date of billing.***

***33.2 The premium received while issuing share capital shall be treated as a part of equity provided the same is utilised for meeting capital expenditure.***

***33.3 Internal resources created out of free reserves and utilised for meeting capital expenditure shall also be treated as a part of equity.***

***33.4 Foreign equity will also attract the same rate of return.***

***33.5 Return on Equity shall be allowed by the Commission on achievement of a satisfactory level of performance by the generating company or the licensees as per the Transmission or Distribution Licensee's Standards of Performance Regulations, 2004 notified by the Commission.”[Emphasis Added]***

The RoE is payable @ 14% as per AERC Tariff Regulations, 2006 and the Commission in its Tariff Order dated 20.10.2011 has approved the RoE as per AERC Tariff Regulations, 2006. This issue of RoE was not raised by none of the parties in the Review proceedings against Tariff Order for FY 2008-09.

The rate considered for calculation of RoE in its Tariff Order for FY 2008-09, i.e., 14% was challenged by EIPL before Hon'ble APTEL stating that RoE should be allowed at rate of 16% as per PPA and not 14% as per AERC Tariff Regulations, 2006. In the Judgment dated 12.08.2014, Hon'ble APTEL ruled that the Tariff Regulations regarding RoE are quite clear and RoE of only 14% is permissible to a generating company.

The Commission in line with the approach followed by the Commission in its Tariff Order for FY 2008-09 & subsequent Review order dated 12.02.2013, and Hon'ble APTEL's Judgment dated 12.08.2014, has considered Rate of RoE @ 14% on the approved equity base for determination of tariff from FY 2012-13. Accordingly Rs 477.15 Lakh is allowed as Return on Equity for FY 2012-13.

#### 8.4.4. Interest on Loan

The Petitioner has not claimed interest on loan, so the Commission has not considered the same for calculation of Annual Fixed Cost (AFC).

#### 8.4.5. Depreciation:

##### a) Submissions of EIPL:

The Petitioner in the Tariff Petitions appears to have considered same depreciation rate of 6% as approved by the Commission in its Tariff Order for FY 2008-09. The depreciation as submitted by the Petitioner for its power plant at Banskandi is Rs 471.92 Lakh for FY 2012-13.

##### b) Submissions of APDCL:

APDCL submitted that for Banskandi Plant, cumulative depreciation of 91.2% has already been recovered by EIPL and as per provision of AERC Regulations, 2006, depreciation is recoverable up to 90% of the total capital cost of the project, considering the remaining 10% as salvage value. Therefore, no more depreciation is admissible for the power plant of EIPL from FY 2009-10 onwards. APDCL has also submitted the following table showing calculation of cumulative depreciation.

**Depreciation Rate in %**

Station	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04	FY 05	FY 06	FY 07	FY 08	FY 09	Total
Banskandi	4.70	8.05	8.05	8.05	8.05	8.05	8.05	8.05	8.05	8.05	8.05	6.00	91.2

##### c) Commission's View:

AERC Tariff Regulations, 2006 has the following provisions with regard to Depreciation

##### *"14. Depreciation*

*c) Depreciation shall be calculated annually as per straight-line method over the useful life of the asset as per asset register maintained at the rate of depreciation. **The Rate of Depreciation shall be the same as the Rate of Depreciation declared by CERC as laid down in the Appendix to these Regulations. : Provided that the total depreciation during the life of the asset shall not exceed 90% of the original cost.***

*Provided that land is not a depreciable asset and its cost shall be excluded from the capital cost while computing the historical cost of the asset." [Emphasis Added]*

The Commission in its Tariff Order dated 12.10.2011 considered 6% depreciation rate for FY 2008-09 as extracted below:

*“The Commission noted that depreciation charges were paid @ 8.05% to EIPL prior to 2008-09 and the depreciation charges for 2008-09 is now payable @ 6% as per AERC Regulation. The balance depreciation charges including on additional capital cost approved by the Commission will only be payable now in the remaining period which shall not however exceed 90% of the total project cost.”*

The Commission in its Review Order dated 12.02.2013 stated that as per Govt. of India notification dated 30.03.1992 and as per clause 3.3(d) of the PPA, the depreciation rate is pursuant to GOI guidelines as notified from time to time. With the notification of AERC (Tariff) Regulations, 2006 w.e.f. 24.05.2006, the depreciation rate for gas plant shall be 6% as per the said Regulations and the remaining depreciation charges, if any, shall be allowed on the total approved capital cost including additional capital cost allowed by the Commission in the remaining period, which shall not however, exceed 90% of the total approved project cost including the approved additional capital cost.

None of the parties raised any issue of depreciation as approved by the Commission in its Tariff Order dated 20.10.2011 before the Hon'ble APTEL.

The Commission has gone through the submissions made by both the Parties. The Commission has observed from the calculation table submitted by the APDCL that the Petitioner has already been allowed a cumulative depreciation of 91.2% since FY 1997-98, i.e., COD of the plant. Further, no claim has been made by the Petitioner towards interest on loan as the same has already been repaid. The cumulative depreciation has also exceeded 90% of the capital cost, which is supposed to have been restricted to 90%. Thus, the Commission is in agreement with the APDCL that the Petitioner has already recovered more than 90% of the depreciable value of the power plants by FY 2008-09 and there has been over recovery in terms of depreciation for FY 2008-09. As the recovery of 90% of the depreciable value of the assets in terms of depreciation has already been done by the Petitioner, no depreciation is allowed for FY 2012-13 for determination of tariff.

#### **8.4.6. Interest on Working Capital:**

##### *a) Submissions of EIPL:*

The Petitioner in its Petitions has submitted to have considered the rate of interest as SBI short term prime lending rate on 1st April of the year for calculation of interest on working capital in line with the directions of the Hon'ble APTEL in its Judgment dated 12.08.2014. The interest on Working Capital as submitted by the Petitioner for its power plant at Banskandiis Rs. 68.13 Lakh for FY 2012-13.

##### *b) Submissions of APDCL:*

No specific comment from APDCL has been received in this regard.

##### *c) Commission's View:*

AERC Tariff Regulations, 2006 has the following components under Working Capital:-



*“42.2 For Gas Turbine/Combined Cycle generating stations*

*(a) Fuel cost for one month corresponding to target availability duly taking into account the mode of operation of the generating station on gas fuel and liquid fuel;*

*(b) Liquid fuel stock for fifteen days*

*(c) Operation and maintenance expenses for one month;*

*(d) Maintenance spares @ 1% of the historical cost escalated @ 6% per annum from the date of commercial operation ; and*

*(e) Receivables equivalent to two months of fixed and variable charges for sale of electricity calculated on target availability.”*

AERC Tariff Regulations, 2006 has the following provisions with regard to Rate of Interest on Working Capital

*“Rate of interest on working capital to be computed as provided subsequently in these Regulations shall be on normative basis and shall be equal to the short-term Prime Lending Rate of State Bank of India as on 1st April of the financial year for which the generating station or the licensee files petition for annual Revenue Requirement and tariff proposal. The interest on working capital shall be calculated on normative basis notwithstanding that the licensee or the generating company has not taken working capital loan from any outside agency.”*

The Interest Rate for calculation of Interest on Working Capital has been approved by the Commission in its Tariff Order for FY 2008-09 considering SBI PLR rate as on 1<sup>st</sup> April of the financial year, i.e., 01.04.2008 for FY 2008-09 as per the provisions under the AERC Tariff Regulations, 2006. The Commission considered 9.5% as rate of interest (which was the SBI PLR rate as on 01.04.2008) to work-out the interest on working capital as specified in Regulation 42 of the AERC Tariff Regulations, 2006.

This issue was not raised in the Review Petition filed by Petitioner against the Tariff Order for FY 2008-09.

EIPL challenged the rate of interest as considered by the Commission in its Tariff Order dated 20.10.2011 before Hon'ble APTEL by stating that the actual interest rates for working capital for FY 2008-09 onwards have been in the range of 12.25% to 14.5% and requested Hon'ble APTEL for an interest rate of 12.25% per annum.

Hon'ble APTEL in its Judgment dated 12.08.2014 upheld the Interest Rate approved by the Commission as per the Regulations. In the Judgment dated 12.08.2014 Hon'ble APTEL has clearly mentioned that the interest on working capital for the subsequent years from 2009-10 onwards shall be considered by the State Commission in the tariff determination exercise for FY 2009-10 onwards as per its Regulations.

Hence, the Commission has considered the interest rate for calculation of Interest on Working capital as the SBI PLR rate as on 1<sup>st</sup> April of the financial year in line of the approach followed in the Tariff Order for FY 2008-09, for determination of tariff for FY 2012-13.

The various elements of the working capital as considered by the Commission are:

- i. One month fuel cost corresponding to target availability, i.e., targeted PLF in this case.
- ii. O&M expenses for one month.
- iii. Maintenance spares @ 1% of the historical cost escalated @ 6% per annum.
- iv. Receivables equivalent to two months of fixed charges for sale of electricity

calculated on target availability.

The Commission approves Interest on Working Capital as under:-

(Rs. Lakh)

Particulars	FY 2012-13
Fuel Cost (1 Month)	114.26
O&M Expenses (1 Month)	37.43
Maintenance Spares	209.70
Receivables (2 Months)	167.39
<b>Total Working Capital</b>	<b>528.78</b>
Rate of Interest	14.75%
<b>Interest on Working Capital</b>	<b>78.00</b>

#### 8.4.7. Operation and Maintenance (O&M) Expenses:

##### a) Submissions of EIPL:

The Petitioner in its Tariff Petition has considered escalation rate of 4% as per Hon'ble APTEL's Judgment dated 12.08.2014 over the approved O&M expenses for FY 2008-09, for calculation of O&M expenses for FY 2012-13. The O&M expense as submitted by the Petitioner for its power plant at Banskandi for FY 2012-13 is Rs 449.21 Lakh.

##### b) Submissions of APDCL:

APDCL submitted that the Petitioner simply extended the tariff of FY 2008-09 to the subsequent years from FY 2009-10 to 2014-15 with an escalation of 2.5% on O&M expenses of previous years, which is not permissible as per Hon'ble APTEL's Order and AERC Tariff Regulations, 2006. APDCL further submitted that in absence of Audited Accounts of FY 2007-08, the revenue surplus could not be ascertained. Audited Annual Accounts are to be provided along with the Tariff Petition for FY 2012-13 as per Clause 7 of the AERC Tariff Regulations, 2006, which the Petitioner did not file. APDCL proposed an O&M expense of Rs 395.37 Lakh for FY 2012-13.

##### c) Commission's View:

AERC Tariff Regulations, 2006 has the following provisions with regard to O&M Expenses:-

#### *"41. Operation and maintenance expenses*

*Normative level of operation and maintenance expenses shall be as follows:*

*For new generating units commissioned after coming into operation of this regulation, the O&M expenses shall be 2.5 % of approved capital cost for the first year of operation and thereafter increase at the rate of 4% of the amount of expenses, unless revised.*

*For existing generating stations the base O&M expenses including insurance shall be derived by averaging the actual O&M expenses for five years, namely 2000-01 to 2005-06 for which audited balance sheets are available after a prudent check by the Commission. The year 2002-03 shall be taken as the base year and the average O&M expenses of the five years shall be escalated at the rate of 5% per annum to arrive at the operation and maintenance*

*expenditure to be considered by the Commission for all relevant purposes.”*  
**[Emphasis Added]**

The Commission in its Tariff Order for FY 2008-09 considered it prudent to compute O&M expenses for the year 2008-09 @ 2.5% on the original project cost with annual escalation as per norms of CERC/AERC Regulations. The Commission decided to consider the annual escalation rate since 1998-99 as per the relevant provisions of CERC/AERC Regulations as under:

- a. 1998-2000            10%
- b. 2000-2001           6%
- c. 2001-2009           4%

The Commission while calculating the O&M expenses for FY 2012-13 has followed similar approach, i.e., escalation of 4.00% over previous year as adopted in the Tariff Order for FY 2008-09 and escalated the O&M expense for FY 2011-12 for determining O&M expense for FY 2012-13. The O&M expense as approved by the Commission for FY 2012-13 is provided as under:-

*(Rs. Lakh)*

Particulars	Approved in T.O. dtd. 20.10.2011 for FY 2008-09	FY 2012-13
O&M Expenses	383.99	449.21

#### **8.4.8. Tax on Income**

##### *a) Submissions of EIPL:*

The Petitioner in its Tariff Petitions has submitted that it has grossed up the RoE with the applicable income tax rate, for calculating income tax using the following formula:

$$\text{Income tax on RoE, grossed up} = \text{RoE} \times (33.99/66.01)$$

The Income Tax as submitted by the Petitioner for its power plant at Banskandi is Rs 237.33 Lakh for FY 2012-13.

##### *b) Submissions of APDCL:*

APDCL has submitted that in absence of Audited Accounts and in line of the approach followed in Tariff Order dated 20.10.2011, no Income Tax should be allowed.

##### *c) Commission's View:*

AERC Tariff Regulations, 2006 specifies that tax on the income streams of a generating company from its core business shall be computed as an expense and shall be recovered from the beneficiaries/consumers, provided that the benefit of tax holiday, if any, shall be passed on to the consumers. The relevant portion of the said Regulation is reproduced as under:-

*“20. Tax on income*

*20.1 Tax on the income streams of the licensee or the generating company, as the case may be, from its core business, shall be computed as an expense and shall be recovered from the beneficiaries/consumers.*

*Provided that tax on any income stream other than the core business shall not constitute a pass through component in tariff and tax on such other income shall be payable by the licensee or the generating company as the case may be.*

*20.2 Any under-recoveries or over-recoveries of tax on income shall be adjusted every year on the basis of income-tax assessment under the Income-Tax Act, 1961, as certified by the statutory auditors”.*

...

*“20.4 Income-tax allocated to the thermal generating station shall be charged to the beneficiaries in the same proportion as annual fixed charges, the income-tax allocated to the hydro generating station shall be charged to the beneficiaries in the same proportion as annual capacity charges and in case of intra-state transmission, the sharing of income-tax shall be in the same proportion as annual transmission charges.”*

As per Clause 3.6 of the PPA:

*“All taxes, cesses and levies payable on power generation/ sale etc. by the Company shall be refunded by the Board at actuals to the Company”.*

The Commission in its Tariff Order dated 20.10.2011 had not considered the income tax in tariff, as EIPL had not provided adequate information/documents to verify that the actual income tax has been paid and the financial statements of the Company for FY 2008-09 show a net loss of Rs 11.12 Crore and no provision for current taxation was made.

This issue of Income Tax was not raised in the Review Petition filed by the Petitioner. However, EIPL challenged this issue of Income Tax before Hon'ble APTEL and stated that as a result of prudent planning, i.e., by combining the income from different projects of the company other than Adamtilla and Banskandi Projects, EIPL minimized the liability for FY 2008-09 and paid taxes accordingly. Before the Hon'ble APTEL, the Petitioner further submitted that, the tax challan of the Company will show the overall tax paid by the company for its total operations during the financial year and, therefore, cannot be used as proof of tax paid for Adamtilla and Banskandi Projects alone. Only the grossed up calculated payable income tax value has any relevance in this context. The 2009 Tariff Regulations of the Central Commission also provides for pre-tax RoE grossed up at applicable tax rate.

Hon'ble APTEL in its Judgment dated 12.08.2014 upheld the stand of the Commission regarding Income Tax in its Tariff Order for FY 2008-09 and gave the following direction to be followed while determination of Income Tax for future years from FY 2009-10 onwards:

*“89. Thus, according to the Tariff Regulations when the tariff of a generating station is determined in advance before the commencement of the ensuing financial year or during the ensuing financial year, the State Commission would compute the income tax on the basis of estimated profit before tax. Accordingly, the estimate has to be based on ROE allowed in the tariff at the applicable tax rate, to be grossed up as the reimbursement of tax by the customer is also taxable. The under recovery or over recovery of tax will be adjusted in subsequent year on the basis of income tax assessment as certified by the statutory auditor for which the generating company will have to furnish the necessary documents to the State Commission. When tariff is determined after the year is over as in the present case, the State Commission shall allow the income tax as per actual income tax paid as per the Income Tax Act. If the company has not paid the income tax at all, no income tax has to be considered. In*

*case a company is filing the income tax for its generation business along with other businesses, the proportionate income tax paid on account of net profit before tax of generating stations alone is to be considered. The income tax paid on the other business streams shall not be considered in the tariff. We feel that 2009 Tariff Regulations of CERC have no application in this case as 2006 Tariff Regulations of the State Commission alone have to be considered.”*

The Petitioner had not provided the Plant-wise Allocation Statements reconciled with Audited Accounts in its Tariff Petitions.

During the hearing dated 24.10.2016, the Petitioner expressed its inability to submit the plant-wise audited statement of accounts, as EIPL's Annual Accounts are prepared on consolidated basis for the Company as a whole. However, the Petitioner stated that it will be able to submit the plant wise financial information by way of submitting plant wise cost allocation statements duly certified by the Auditor. The Petitioner stated that due to upcoming holidays there will be time constraint for submission of required information by 31.10.2016 and sought time till 5.11.2016. The Petitioner further submitted that it will be able to submit the soft copy of all the information by 1.11.2016. So, the Commission directed the Petitioner to submit soft copy of plant-wise cost allocation by 1.11.2016 and submit the same duly certified by the Auditor on or before 5.11.2016.

EIPL submitted soft copy of cost allocation statement certified by an Auditor vide e-mail on 25.11.2016 without any affidavit and further submitted the same in hard copy with affidavit on 30.11.2016. It has been observed that the document submitted in the name of Cost allocation does not contain any such allocation of actual costs and is also not reconciled with Annual Accounts rather it is a certified copy of the calculation of AFC and Variable Charge based on certain principles, norms and assumptions.

Hon'ble APTEL in its Judgment dated 12.08.2014 had directed that when tariff is determined after the year is over as in the present case, the Commission shall allow the income tax as per actual income tax paid as per the Income Tax Act and if the Company has not paid the income tax at all, no income tax has to be considered. In case a Company is filing the income tax for its generation business along with other businesses, the proportionate income tax paid on account of net profit before tax of generating stations alone is to be considered. The income tax paid on the other business streams shall not be considered in the tariff. The Petitioner was unable to submit necessary / sufficient information before the Commission using which income tax could be allocated among the various business units of EIPL, and Annual Accounts of EIPL are prepared on consolidated basis. **In view of the above, the Commission has not considered Income Tax for determination of tariff for FY 2012-13.**

#### **8.4.9. Deemed Generation**

##### *a) Submissions of EIPL:*

The Petitioner in its Tariff Petitions has submitted that the Commission was correct in allowing the deemed generation due to non-supply or short supply of gas and permitting the Petitioner to recover full fixed cost for FY 2008-09. Thus, in light of the Hon'ble APTEL Judgment dated 12.08.2014 the Petitioner has prayed that it should be allowed to recover full fixed cost for all the years though the plants stopped generation due to short / non-availability of gas.

The Petitioner has further submitted that it has committed a higher than normative PLF to the Respondent and has demonstrated the same through capacity availability tests conducted by the Petitioner and witnessed by the Respondent for each year and has submitted the PLF as committed and maintained for Banskandi power plant for FY 2012-13as provided below:-

	<b>FY 2012-13</b>
PLF Committed	88.34%
PLF Limited to	80.00%

The Petitioner has further submitted that it can be observed from the results achieved that, the PLF achieved is even higher than 80%, however, the Petitioner has limited the same to 80% and submitted that during actual operation of the power plants during these years, generation corresponding to 80% PLF could not be achieved only due to non-availability of gas. The Petitioner submitted that since, it has demonstrated achievement of PLF in excess of 80%, it is entitled for deemed generation even beyond the normative units but limited to 80% PLF. The Petitioner has submitted the details of the month wise deemed generation values in the Tariff Petitions. The Deemed Generation and Actual Generation claimed by the Petitioner for the Banskandi Plant has been provided below:-

<b>Particulars</b>	<b>FY 2012-13</b>
Deemed Gen. at Normative PLF as passed by APTEL Order dtd. 12.8.2014 (kWh)	61910322
Actual Gen. in kWh as per PPA clause 1.1 (kWh)	31085400

*b) Submissions of APDCL:*

APDCL submitted that Clause 2.6 of the PPA states the following:-

*“the rate at which the project is required by the Board to change load either by increasing or decreasing shall be mutually agreed and determined in advance. In case the decrease is due to Board’s inability to accept all generation the portion not accepted will become deemed generation”.*

APDCL submitted that as per AERC Tariff Regulations, 2006 a generator is to declare in advance its available capacity to the State Load Despatch Centre (SLDC), which shall confirm the availability of the generator, which the Petitioner did not carry out. Therefore, deemed generation should not be allowed in the interest of justice and moreover both parties never mutually agreed as required in PPA as regards deemed generation.

*c) Commission’s View:*

The Commission in the Tariff Order dated 20.10.2011 after scrutiny and examination of various documents submitted by EIPL as regards deemed generation, noted that they are not jointly certified and therefore, the Commission considered it as inadequate and infirm submission for evaluation of quantum of deemed generation. While determining fixed charges for EIPL plants for the year 2008-09, **the Commission as a one-time measure** considered the deemed generation aspect by allowing recovery of full fixed charges even though the actual PLF for both the plants were lower than the normative PLF. The relevant extract of the said Order is reproduced below for reference:

*“While determining fixed charges for EIPL plants for the year 2008-09, the Commission as a **one time measure** has considered the deemed generation aspect by allowing recovery of full fixed charges even though the actual PLF for both the plants were less than the normative PLF as specified under Clause 5.1.1 of this order.”[Emphasis Added]*

Further, the Commission in its directives, ordered that the plant generation scheduling be linked with SLDC through robust real time communication link for integrated operation of the EIPL plants with the grid.

APDCL raised this issue before Hon’ble APTEL claiming that the deemed generation should not be considered while computing PLF for full fixed cost recovery and in its Judgment dated 12.08.2014 upheld the view taken by the Commission and opined as follows for future years:

*“Till the scheduling through SLDC is put into place as per the directions of the State Commission, the State Commission shall determine the deemed generation after prudence check of the records as has been done for FY 2008-09 to FY 2011-12”*

The Commission in its deficiency note dated 08.09.2016 directed the Petitioner to submit the following details:

- a. Month-wise Deemed Generation Statements from FY 2009-10 to FY 2014-15 duly signed by APDCL and EIPL
- b. Month-wise Deemed Generation from FY 2009-10 to FY 2014-15 claimed on account of shortfall in gas supply alongwith the reasons for shortfall in gas supply with supporting documents in the form of communication received from AGCL.
- c. Month-wise Deemed Generation from FY 2009-10 to FY 2014-15 on account of other reasons along with description of reasons.

The Petitioner vide its reply dated 18.10.2016 submitted that APDCL has not been signing the Deemed Generation sheets despite having agreed to sign the same. However, the Petitioner has been signing and sending these sheets regularly to APDCL. The Petitioner submitted the copies of the log sheets containing deemed generation signed only by EIPL. The Petitioner further made the following submissions:

- i. As per MOM dated 22.9.2000 between the Petitioner and the Respondent, a methodology for calculation of Deemed Generation was agreed.
- ii. The Petitioner was specifically informed by ASEB vide letter no. CE(COM) / DLF/SYS-OP|99|43 dated 14.12.2000 that the Log Sheet for recording (and calculation) of the Deemed Generation was approved by the Board and the same was annexed with the letter.
- iii. ASEB made some Deemed Generation payments for the first 2 years and later unilaterally stopped making Deemed Generation payments and stopped signing the Deemed Generation log sheets.
- iv. The Petitioner has been regularly recording the Deemed Generation situations on day to day basis in the formats duly approved by the Respondent and these records are being sent to the Respondent for signatures after being signed by the Petitioner. However, the Respondent has refused to sign on these formats for reasons best known to them, although these formats were prepared and approved by Respondent only. Scores of letters have been written by the Petitioner requesting the Respondent to come forward to sign these log sheets / formats but the Respondent has not acted. Therefore, those filled in log sheets should be deemed to have been accepted by the Respondent.

In reply to Commission's letter dated 21.10.2016 for partial submission of information with regard to deemed generation, the Petitioner submitted its reply on 31.10.2016. In the reply, the Petitioner submitted that the summary of information in the required format (as specified by the Commission vide letter dated 8.9.16) is not possible as both the events, i.e. (a) Deemed Generation on account of Shortfall in Gas Supply and (b) Deemed Generation on account of other reasons are concurrent as the gas supply was short for almost 24 hours in a day.

On scrutiny of the log sheets, the Commission found that none of the daily log sheet is completely filled for example the columns named "Short fall in drawl due to "EIPL's cause (in kWh)", "ASEB's fault (in kWh)", "Gas Supply shortage (in kWh)" " are not filled in. Further, the Commission found discrepancies at many places viz., for 10<sup>th</sup> hour of 11.04.2012, the log sheet shows actual generation at Generator terminal as 6800 kWh whereas actual drawl for the same period has been mentioned as 7440 kWh. Similarly, for 1<sup>st</sup> hour of 14.04.2012, the log sheet shows actual generation at Generator terminal as 7200 kWh whereas actual drawl for the same period has been mentioned as 7680 kWh. The Commission fails to understand how the actual drawal can be greater than the actual generation at generator terminal. The Commission does not find the information submitted by the Petitioner to be reliable. Further, the Deemed Generation log sheets were not mutually signed by EIPL & APDCL.

The Commission could not evaluate the quantum of deemed generation due to inadequate, infirm data and information, which were not jointly certified by APDCL and EIPL. Therefore, the Commission in its directives as provided in Tariff Order for FY 2008-09 ordered that the plant generation scheduling be linked with SLDC through robust real time communication link for integrated operation of the EIPL plants with the grid. However, the Commission has observed that the deemed generation mechanism has not been put in place till date despite the above directives. The GSA expired on 18.10.2010 and the Commission has observed that no GSA was put in place despite frequent directions of the Commission in various Orders. Therefore, the Commission is of the opinion that it will be illogical to allow deemed generation in absence of any Fuel Supply Agreement.

**Considering all these aspects, the Commission has not allowed the Deemed Generation for the tariff period and hence, the tariff determined by the Commission will be applicable only for the power supplied by EIPL to APDCL.**

#### **8.4.10. Delayed Payment Surcharge**

##### *a) Submissions of EIPL:*

The Petitioner in its Tariff Petitions in light of the liberty given by the Hon'ble APTEL has prayed before the Commission for allowing Delayed Payment Surcharge (DPS) on the arrears to be paid by the APDCL for FY 2012-13 from the date of passing of the Tariff Order till actual date of payment at a rate of 2% per month.

##### *b) Submissions of APDCL:*

APDCL submitted that the question of delayed payment surcharges does not arise as the tariff is not determined for the period. APDCL further submitted that in actual terms as per provisions of PPA and AERC Tariff Regulations, 2006 EIPL has already recovered excess amount from APDCL, which is to be recovered along with carrying cost at bank interest rate.



c) *Commission's View:*

AERC Tariff Regulations, 2006 specifies Delayed payment surcharge as under:-

*"28. Late payment surcharge*

*28.1 In case the payment of bills of transmission charges, wheeling charges or charges for **electricity purchased by a person other than a consumer is delayed beyond a period of two months from the date of billing, a late payment surcharge at the rate determined by the Commission shall be levied by a generating company, the transmission licensee or the distribution licensee.***

*28.2 For delay in payment of bill by a consumer beyond a period of fifteen days a late payment surcharge at the rate determined by the Commission shall be payable to the Distribution Licensee.*

*28.3 The amount recovered as late payment surcharge by a generating company or a licensee shall be considered as income from tariff.*

*28.4 The normal principle to be followed for adjustment of any arrear payment shall be that first adjustment shall be made against the delayed payment surcharge due and adjustment against energy charges shall be made only after the full recovery of the delayed payment surcharge." [Emphasis added]*

The PPA has the following provision for late payment of invoices:-

*"5.5 Payments of invoices including any supplementary invoices made beyond the due date of payment shall carry an interest rate equal to that applicable to interest on Working Capital as mentioned in Clause 3.3 (c) calculated on days of delay. This does not give any right whatsoever to the Board to delay payments and accordingly is without prejudice to any other remedy the company may have for late payment by the Board."*

Hon'ble APTEL in its Judgment dated 12.08.2014 had held as under:-

*"102. As far as payment of interest on arrears for FY 2008-09 on the basis of tariff order dated 20.10.2011 is concerned, EIPL is entitled to delayed payment surcharge as per the 2006 Tariff Regulations on the bills raised by EIPL after passing of the main tariff order. We find from the impugned order dated 12.2.2013 that the Assam Discom had not paid the arrears due to EIPL as per the main tariff order. The State Commission had not passed any interim order for stay of its main tariff order dated 20.10.2011 and, therefore, Assam Discom was bound to make payment of arrears as per the tariff order dated 20.10.2011 for FY 2008-09. In the Appeal 76 of 2013 this Tribunal had also not granted any stay of the tariff order dated 20.10.2011 and the review order dated 12.2.2013. Therefore, the Distribution Company is liable to pay delayed payment surcharge to the EIPL as per the Regulation."*

The Commission has gone through the submissions made by both the parties and is of the opinion that the DPS is not a part of tariff determination. Hence, the Commission has not dealt with the issue of DPS in this Order.

**8.4.11. Carrying Cost**

a) *Submissions of EIPL:*

The Petitioner in its Tariff Petition in light of the liberty given by the Hon'ble APTEL has prayed before the Commission for allowing carrying cost @ 18% per annum on the accounts that become payable for FY 2012-13 from the due date of each payment to the date of passing of the final Tariff Order

b) *Submissions of APDCL:*

APDCL submitted that the Petitioner did not file these Tariff Petitions in time complying with various provisions under AERC Tariff Regulations, 2006. APDCL further submitted that the delay in filing of Tariff Petitions is attributable to the Petitioner and under such condition the Petitioner is not entitled to get carrying cost rather the APDCL is entitled to get carrying cost according to the provisions under Section 62(6) of the Electricity Act, 2003 and other provisions of AERC Tariff Regulations, 2006.

c) *Commission's View:*

Hon'ble APTEL in its Judgment dated 12.08.2014 had held that

"103. As far as carrying cost for arrears from the due date of payment is concerned, this issue had not been raised before the State Commission in the main Appeal and in the review. Therefore, we are not inclined to go into the same. However, EIPL is at liberty to raise this issue before the State Commission in the tariff proceedings for determination of tariff for FY 2009-10 to 2014-15 and the State Commission shall decide the issue as per law."

The Commission in its deficiency note dated 08.09.2016 directed the Petitioner to submit the basis of considering rate of 18% per annum for computation of carrying cost. The Petitioner vide its letter dated 18.10.2016 replied that pendent lite interest rates allowed in arbitral awards on commercial contracts is in the range of 12% to 24% and therefore it has considered 18% as the interest rate for calculation of carrying cost.

The Commission has gone through the submissions made by both the parties and is of the opinion that the Tariff Petitions by the Petitioner should have been filed by the Petitioner in time as per Clause 7.1 of the AERC Tariff Regulations, 2006 which states as under:-

*"7.1 The licensee and generating company shall file petitions with the Commission six months prior to the commencement of the control period proposing the tariff determination principles to be applied by the Commission or such shorter period that the Commission may specify."*

The Petitioner filed the Tariff Petition for FY 2012-13 on 24.08.2016 without affidavit and submitted the required affidavit on 24.10.2016, which is a clear violation of Clause 7.1 of the AERC Tariff Regulations, 2006, which says that the generating companies should file Petitions six month prior to commencement of the Control Period. Accordingly, the Commission has determined tariff in this Order for past years as a result of inordinate delay in filing of Petitions by the Petitioner. Hon'ble APTEL in its Judgment dated 19.9.2007 in Appeal no. 70 of 2007 has held that the extra burden on account of carrying cost due to late filing of the Petitions cannot be allowed to be passed on to the consumers. The relevant extract of the said Judgment is provided as under:-

*“Secondly the financial implication caused solely due to late submission is only the delay in recovery and not the increase in tariff. It is not the case of the MERC that the tariff has gone up because of late filing. Only the determination of tariff is delayed because of late filing. The financial implication of the delay is nothing but the carrying cost. The consumer cannot be burdened with this resulting carrying cost because the delay has not been caused on account of their default.”*

Thus, the Commission is of the view that carrying cost should not be allowed to the Petitioner on account of delay in determination of tariff due to late filing of the Petitions.

#### **8.4.12. Annual Fixed Charge**

Based on the above, the Annual Fixed Charge as approved by the Commission for FY 2012-13 on normative basis is as under:-

*(Rs. Lakh)*

<b>Particulars</b>	<b>FY 2012-13</b>
O&M	449.21
Depreciation	0.00
ROE	477.15
Interest on Working Capital	78.00
Income Tax	0.00
<b>Total</b>	<b>1004.36</b>

#### **8.5. Variable Charge:**

##### *a) Submissions of EIPL:*

The Petitioner in its Tariff Petition has submitted that it has computed the Variable Charge in light of the Tariff Order for FY 2008-09 as per the approved Heat Rates, normative PLF allowed in the Tariff Order and applicable gas prices as charged by AGCL. The Petitioner has made following claim towards variable charges for Banskandi Power Plant.

<b>Particulars</b>	<b>Approved in T.O. dtd. 20.10.2011</b>	<b>FY 2012-13</b>
Gross Generation (MU)	93.00	93.00
Heat Rate (kcal/kWh)	2110.00	2110.00
Landed price of Gas (Rs./ 1000 SCM)	2560.00	5816.48
GCV (kcal/SCM)	8324.00	8324.00
Variable Charges (Rs. Lakh)	603.47	1371.11

The Petitioner has submitted that in view of the reasons like inability of ASEB to evacuate full power, grid failures, unpredictable nature of grid availability and grid condition, part load resulting in inefficient operation of the plants, the actual heat rate are bound to be much higher than the designed heat rates and EIPL should be compensated for the higher rate and excess gas consumption caused by it.

Further, the Petitioner submitted that after the plant stopped on 08.01.2013, variable charge

component of tariff is zero.

b) *Submissions of APDCL:*

APDCL submitted that the data provided by EIPL is not sufficient for providing comments. The Gas Prices are fixed as per GoI notification for APM Gas. APDCL further submitted that the gas is available at discounted rate for the State of Assam (NER States) which is 60% of the APM price for North Eastern Region for generation of electricity and the Petitioner must submit gas bills for at least three months from the producers prior to the Control Period of Tariff Petition for prudence check by the Commission. APDCL also submitted that in absence of the plant wise auditor's certified balance sheet, it is not possible to ascertain whether EIPL kept the amount as profit or passed it to the gas supplier. The variable cost component of Tariff is a pass through item and therefore, the Petitioner must provide the necessary plant wise audited financial reports for further comment.

c) *Commission's View:*

Hon'ble APTEL in its Judgment dated 12.08.2014 had held that

*'The Regulations provide for determination of the variable charges on the basis of normative Station Heat Rate and therefore, the variable charges cannot be allowed on the basis of the actual fuel bill of the gas supplier.'*

The Commission has computed the variable charge considering the actual landed fuel price and actual gross calorific value. On prudent check, the landed gas price and GCV of gas as submitted by the Petitioner are found to be appropriated for computation of variable charge.

In view of the above submissions made by the Petitioner and approach followed by the Commission in its Tariff Order for FY 2008-09, the Commission has approved the variable charge for FY 2012-13 as under:-

<b>Particulars</b>	<b>FY 2008-09</b>	<b>FY 2012-13</b>
Aux. Power Consumption	5.50%	5.50%
Gross Station Heat Rate (kcal/kwh)	2110.00	2110.00
GCV of Gas (kcal/SCM)	8324.00	8324.00
Landed Price of Gas (Rs./1000SCM)	2560.00	5816.48
Net Variable Charge (Rs/kWh)	0.69	1.56

As the plant stopped on 08.01.2013, the variable charge component of tariff for the period 9.1.2013 to 31.3.2013 is zero.

## 8.6. Approval of Tariff

The per unit tariff sent out of Banskandi plant is as under:-

<b>Particulars</b>	<b>(Rs. / kWh)</b> <b>FY 2012-13</b>
Per unit Net Fixed Charge	1.14
Per Unit Net Variable Charge	1.56
<b>Net Per Unit Cost of Electricity</b>	<b>2.70</b>

As per the Hon'ble APTEL's Judgment dated 12.08.2014 in Appeals No. 76 & 83 of 2016, the Commission is to determine tariff from 2009-10 till 2014-15 at the earliest. The relevant extract of the said Judgment is provided as under:-

*"22. We feel that determination of **tariff from FY 2009-10 onwards** has to be carried out by the State Commission according to Section 62 and 64 of the Act, after obtaining the objections and suggestions of the public on the proposal of the generating company. In fact there has been inordinate delay in determination of tariff for FY 2008-09. The tariff for FY 2008-09 was only determined on 20.10.2011 i.e. after 2 ½ years of commencement of FY 2008-09. Further, the tariff for FY 2009-10 onwards has not been determined by the State Commission even though the FY 2013-14 is already over and the current FY is 2014-15. Till now only provisional tariff is being paid by Assam Discom, which resulted in the financial crunch for EIPL. **We, therefore, direct the State Commission to determine the tariff for EIPL's projects for the period 2009-10 to 2014-15 at the earliest. [Emphasis added]***

Accordingly, in this Order, the Commission has determined the tariff for FY 2012-13 in compliance with the direction of the Hon'ble APTEL. Though the tariff has been determined for FY 2012-13, the applicability of tariff and payment to be made to EIPL will be based on the actual parameters achieved by EIPL. **However, no tariff (whether fixed or variable) shall be payable to the Petitioner for 09.01.2013 to 31.03.2013 period as the plant was closed during the said period.**

This Order disposes of Petition No.29 of 2016.

Inform all concerned accordingly.

Sd/-  
(Subhash Ch.Das)  
Member  
AERC

Sd/-  
(Dipak Chakravarty)  
Member  
AERC

Sd/-  
(Naba Kumar Das)  
Chairperson  
AERC