

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 159/MP/2012

Coram:

Shri Gireesh B. Pradhan, Chairperson

Shri V.S. Verma, Member

Shri M. Deena Dayalan, Member

Shri A. K. Singhal, Member

Date of Hearing: 13.11.2013

Date of Order : 21.02.2014

In the matter of

Petition under Sections 61, 63 and 79 of the Electricity Act, 2003 for establishing an appropriate mechanism to offset in tariff the adverse impact of the unforeseen, uncontrollable and unprecedented escalation in the imported coal price due to enactment of new coal pricing Regulation by Indonesian Government and other factors.

And

In the matter of:

Coastal Gujarat Power Limited
34, Sant Tuka Ram Road, Carnac Bunder,
Mumbai-400 021

...Petitioner

Vs

1. Gujarat Urja Vikas Nigam Limited
Sardar Patel Vidyut Bhawan,
Race Course, Vadodara-390 007, Gujarat
2. Maharashtra State Electricity Distribution Company Limited
4th Floor, Prakashgad, Plot No. G-9,
Bandra (East), Mumbai-400 051, Maharashtra
3. Ajmer Vidyut Vitaran Nigam Limited
Hathi Bhata, Old Power House,
Ajmer, Rajasthan
4. Jaipur Vidyut Vitaran Nigam Limited
Vidyut Bhawan, Janpath,
Jaipur, Rajasthan
5. Jodhpur Vidyut Vitaran Nigam Limited
New Power House, Industrial Area,
Jodhpur, Rajasthan
6. Punjab State Power Corporation Limited

The Mall, Patiala, Punjab

7. Haryana Power Generation Corporation Limited,
Room No. 329, Sector 6,
Panchkula, 134 109, Haryana

8. Secretary, Ministry of Power,
Sharam Shakti Bhawan,
New Delhi-110 001

...Respondents

Parties present:

Shri Amit Kapur, Advocate, CGPL
Shri Apoorva Misra, Advocate, CGPL
Shri Abhishek Munot, Advocate, CGPL
Shri Samera Chawala, CGPL
Shri Ramesh Subramanyam, Tata Power
Shri B.K. Mohanty, Tata Power
Shri Abhay Kumar, Tata Power
Shri Arun Srivastava, Tata Power
Shri Saurabh Srivastava, Tata Power
Shri Ashim Thankurta, Tata Power
Shri M G Ramachandran, Advocate, GUVNL, HPPC, JVVNL, JdVVNL, AVVNL
Ms. Poora Saigal, Advocate, GUVNL, HPPC, JVVNL, JdVVNL, AVVNL
Shri K.P. Jangid, GUVNL
Shri K.P. Jani, GUVNL
Shri Avinesh Menon, Advocate, HPPC
Shri Anand Ganesan, Advocate, PSPCL
Ms. Swapna Seshadri, Advocate, PSPCL
Shri Padamjit Singh, PSPCL
Shri S.K. Kansal, PSPCL
Shri Vikrant Saini, HPPC
Shri Ravi Juneja, HPPC
Shri Samir Malik, Advocate, MSEDCL
Shri Jayant Bhushan, Senior Advocate for Shri Pushpendra Surana, Consumer
Shri Salim Inamdar, Advocate for Shri Pushpendra Surana, Consumer

Order

The petitioner, Coastal Gujarat Power Limited, a subsidiary of Tata Power Company Ltd, has set up a 4000 MW Ultra Mega Power Project at Mundra in the State of Gujarat (Mundra UMPP) based on imported coal after Tata Power Company Ltd was selected as the successful bidder based on the competitive bidding carried out in accordance with section 63 of the Electricity Act, 2003 (2003 Act). The tariff of

Mundra UMPP has been adopted by this Commission under section 63 of the 2003 Act vide order dated 19.9.2007 in Petition No. 18/2007.

2. The petitioner has entered into a PPA dated 22.4.2007 with the distribution companies in the States of Gujarat, Maharashtra, Rajasthan, Punjab and Haryana for supply of 3800 MW power from Mundra UMPP for a period of 25 years, namely, Gujarat Urja Vikas Nigam Limited, Maharashtra State Electricity Distribution Company Limited, Ajmer Vidyut Vitaran Nigam Limited, Jaipur Vidyut Vitaran Nigam Limited, Jodhpur Vidyut Vitaran Nigam Limited, Punjab State Power Corporation Limited and Haryana Power Generation Corporation Limited (collectively referred to as "Procurers"). Subsequently, the petitioner and the Procurers have entered into a Supplemental PPA on 31.7.2006 for advancement of the Scheduled Commercial Operation Dates (SCOD) in terms of Article 3.1.2 (iv) of the PPA as per the following details:

	Unit- I	Unit- II	Unit- III	Unit- IV	Unit- V
Scheduled Commercial Operation Date	22.8.2012	22.2.2013	22.8.2013	22.2.2014	22.8.2014
Revised Scheduled Commercial Operation Date	30.9.2011	31.3.2012	31.7.2012	30.11.2013	31.3.2013

3. Mundra UMPP which is envisaged to be executed based on imported coal has an estimated coal requirement of approximately 12 MMTPA. The petitioner has made arrangement of imported coal from Indonesia by entering into Coal Supply Agreement dated 31.10.2008 with IndoCoal Resources (Cayman) Limited, a corporation organised and existing under the laws of Republic of Indonesia, for supply of 5.85 MMTPA (+/-20%). Tata Power had also entered into an agreement

with petitioner on 9.9.2008 for meeting the balance coal requirement of 6.15 MTPA on best effort basis. Subsequently, Tata Power has assigned its agreement with IndoCoal Resources (Cayman) Limited for supply of 3.51 MTPA (+/-20 %) (which was earlier meant for Coastal Maharashtra facility) in favour of the petitioner vide Assignment and Restatement Agreement dated 28.3.2011. The coal requirement of Mundra UMPP is stated to be met by sourcing coal on the basis of these two agreements.

4. Government of Indonesia promulgated the “Regulation of Minister of Energy and Mineral Resources No.17 of 2010 regarding Procedure for Setting Mineral and Coal Benchmark Selling Price” (hereinafter “Indonesian regulations”) on 23.9.2010. According to the Indonesian Regulations, the holders of mining permits for production and operation of mineral and coal mines are required to sell mineral and coal in domestic and international markets including to their affiliates by referring to the benchmark price and the spot price of coal in the international market. All long term coal contracts for supply of coal from Indonesia are required to be adjusted with the Indonesian Regulations within a period of 12 months i.e. by 23.9.2011.

5. The petitioner has submitted that on account of promulgation of Indonesian Regulations and escalation in international coal prices, the petitioner is supplying power to the procurers by purchasing coal at a higher price than what was agreed in the Coal Supply Agreements without any adjustment of tariff and is consequently suffering a loss of ₹1873 crore per annum and ₹47,500 crore over a period of 25 years. The petitioner took up the matter with Gujarat Urja Vikas Nigam Limited (GUVNL) who is the lead procurer and the Ministry of Power, Government of India

vide its letter dated 4.8.2011. The petitioner also took up the matters with the procurers in the Joint Monitoring Meeting dated 6.2.2012 for suitable adjustment in tariff. The procurers sought some further details which the petitioner furnished by its letter dated 6.3.2012. The petitioner also approached the Indonesian Government vide its letter dated 16.2.2012 requesting to exempt the existing coal supply contracts from the purview of Indonesian Regulations, without any success. IndoCoal Resources (Cayman) Limited which supplies coal to the petitioner under the Coal Supply Agreements (CSA) issued a notice to the petitioner on 9.3.2012 calling upon it to align the original CSAs with the Indonesian Regulations. The petitioner amended the Coal Supply Agreements on 23.5.2012 and 22.6.2012 to align them with the Indonesian Regulations and to ensure uninterrupted supply of coal under the provisions on the PPA.

6. Under these circumstances, the petitioner filed the present petition seeking relief under Article 12 (Force Majeure) and Article 13 (Change in Law) of the PPA and section 79 read with sections 61 and 63 of the 2003 Act seeking the following reliefs:

- “(a) Establish an appropriate mechanism to offset in tariff the adverse impact of:
 - (i) The unforeseen, uncontrollable and unprecedented escalation in the imported coal price and
 - (ii) the change in law by Government of Indonesia.
- (b) Evolve a methodology for future fuel price pass through to secure the Project to a viable economic condition while building suitable safeguards to pass to Procurers benefit of any reduction in imported coal price.
- (c) Pass any other order that this Commission may deem fit in the facts and circumstances of the present case.”

7. After detailed hearings and due consideration of various documents and submissions filed by parties, the Commission vide order dated 15.4.2013 flagged the issues as under:

“36. We have carefully considered the rival submissions. The main issues that arise for our consideration is whether the promulgation and coming into effect of Indonesian Regulations and non-availability of domestic coal linkage have resulted in a situation where the project of the petitioner has become commercially unviable, making it impossible for the petitioner to supply power to the respondents at the tariff agreed in the PPAs. If the answer to this question is in the positive, we have to consider whether the case of the petitioner falls under “*force majeure*” or “change in law” for the purpose of granting relief to the petitioner under the provisions of the PPA dated 22.4.2007. Alternatively, whether the Commission has power under the Act and the National Electricity Policy and tariff policy to grant relief to the petitioner without revisiting the tariff agreed in the PPAs.....”

8. The Commission in para 45 and 47 of the order dated 15.4.2013 came to the conclusion that the petitioner is suffering hardship on account of Indonesian Regulations as under:

“45. From the above analysis, we have come to the conclusion that the promulgation of Indonesian Regulations which required the sale price of coal in Indonesia to be aligned with the international benchmark price has, prima facie, altered the premise on which the energy charges were quoted by the petitioner in its bid. No doubt, the petitioner had taken huge risk by quoting 55% of the energy charges under non-escalable head as a result of which the benefits of escalation index are not available to the petitioner. Though the petitioner had quoted non-escalable energy charges to keep the bid price low, it was however factored on the basis of the then prevailing coal price for import from Indonesia. The petitioner has subsequently entered into Coal Sales Agreements for supply of coal @ USD 32/MT. Moreover, quotation of low bid price was in the interest of the consumers as the power would be available at the levelized tariff of ₹2.26367/kWh to the respondents. The petitioner would have continued to supply power at this price, had the Indonesian Regulations not made it mandatory for sale of coal from Indonesia at international bench-mark prices. Therefore, the competitive advantage of hedging in coal prices that the petitioner was enjoying by acquiring mining rights in Indonesia or by entering into long term contract with the coal suppliers in Indonesia appears to have been fundamentally altered/wiped out, after the coal sales are required to be aligned with international benchmark prices of coal. It is pertinent to note that the coal price in the international market is fluctuating. Therefore, the exact impact of the Indonesian Regulations will vary from time to time. We are also aware that other sources of imported coal are presently costlier than the Indonesian coal and it would not serve any purpose to say that the petitioner has got other viable options to source imported coal.”

“47. The prevailing international market prices of coal, particularly in the countries like Australia and South Africa are on the higher side compared to the coal purchased from Indonesia under bilateral negotiation and the petitioner's coal supply contracts were based such bilateral negotiation. However, promulgation of the Indonesian Regulations requiring the existing agreements to align with the International benchmark price has created problems regarding project viability of the Mundra UMPP to supply power at the rates agreed to between the parties in the PPAs. Therefore, there is an imminent need to find out a practical and acceptable solution to

the problem for ensuring supply of power to the consumers at competitive price while seeking to ensure sustainability of the electricity sector..”

9. The Commission next proceeded to examine whether the relief for impact of Indonesian Regulations on the project viability of the petitioner can be granted under the provisions of the PPA, namely under 'force majeure' and 'change in law' and came to the conclusion that the petitioner is not entitled for relief under 'force majeure' and 'change in law' clauses of the PPA. As regards 'force majeure', the Commission concluded as under:

“56. The next question arises whether increase in price of imported fuel is an event of force majeure. Article 12.4 of the PPA clearly provides that changes in cost of fuel cannot be considered as force majeure unless it is a consequence of an event of force majeure. Rise in international price of coal or alignment of Indonesian coal with the benchmark international price cannot be considered as an event of force majeure. Fluctuation in prices is a normal event in free market conditions and cannot be considered as an event of force majeure. In this connection, the following observations of the Hon'ble Supreme Court in M/s Alopi Pershad & Sons Ltd. Vs Union of India {AIR 1960 SC 588} are relevant:

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

The petitioner and the respondents never intended in the PPA that the tariff to be charged will be dependent on the coal price which the petitioner will be required to pay to the Indonesian coal supplier under its Coal Sales Agreements. In fact the responsibility for arrangement of fuel rests with the petitioner only. Therefore, it cannot be said that any consideration of the terms of the PPA between the petitioner and the respondents has changed on account of the promulgation of Indonesian Regulations which changed the bilaterally agreed price to international benchmark price for import of coal. We find force in the argument of the respondents that alignment of the Indonesian coal price with the Indonesian benchmark price has not prevented the petitioner from importing the coal. In our view, Indonesian Regulations or increase in the international price of imported coal is not an event of force majeure and therefore,

change in the cost of the fuel imported by the petitioner cannot be covered under the provisions of force majeure.”

On the question of “change in law”, the Commission came to the following conclusion:

“62. We have considered the submission of the parties. In our view, "all laws" would refer to the laws of India, which includes Electricity Laws. An examination of the various provisions of the PPA shows that only Indian Laws are applicable. Moreover, the term governing laws has been defined in the PPA as the laws of India. If the term "all laws" is interpreted as to include the foreign law, it will lead to absurd results as any change in foreign law would be given effect to which would result in the changes in the rights and liabilities of the parties under the contract. In our view, if any foreign law is to be made applicable, it should be specifically provided for in the contract. For example, in some international contracts, the adjudication of the dispute is conferred on the courts of a third country. In the absence of any provision in the PPA that the change in law of the fuel exporting country would have to be given effect to as change in law under the PPA, change in the Indonesian Regulations cannot be considered as change in law.”

10. Next, the Commission proceeded to examine its power under section 79(1)(b) of the Act in the context of the case of the petitioner and came to the following conclusion:

“80. The petitioner has sought to make out a case that promulgation of the Indonesian Regulation has led to abnormal increase in the cost of generation of electricity which has made the project totally unviable. Accordingly, the petitioner has sought to be insulated against the ill-effects of enforcement of the Indonesian Regulation. In our view the petitioner’s plea deserves serious consideration and in depth examination of facts to address its concern. Unless the concerns of the petitioner are addressed, the possibility of the petitioner defaulting in discharging its obligations under the PPA due to the perceived financial burden cannot be totally ruled out and that will affect the interest of the consumers. In that event, the respondents shall be required to invite fresh bids to meet their requirement of power and till the selected project or projects are operationalised, the consumers will be deprived of power. Moreover, the ruling tariff for the new projects are in the range of ₹3.50 to ₹7.00/kWh which the consumers of Mundra UMPP shall also be required to pay. Thus at the macro level, it will be a serious setback for the electricity sector and will adversely affect the investment for the sector and at the micro level, it will affect the continued and reliable supply of power to the consumers. Accordingly, this Commission in discharge of its statutory functions to regulate the tariff feels it necessary to intervene in the matter in the interest of the consumers, investor and the power sector as a whole to consider adjustment in tariff the impact of unanticipated increase in price of imported coal.

81. This Commission has been vested with the function under clause (b) of sub-section (1) of Section 79 of the Act to "regulate the tariff of the generating companies having a composite scheme for generation and sale of electricity in more than one State". It has been held by the Hon'ble Supreme Court in a catena of judgements that

the power to “regulate” confers plenary power over the subject matter of regulation. Some of the judgments are extracted as under:

- (a) Jiyajeerao Cotton Mills Ltd. Vs. M.P. Electricity Board {(1989)SCC Supl(2)52}
“The word ‘regulate’ has different shades of meaning and must take its color from the context in which it is used having regard to the purpose and object of the relevant provisions, and the court while interpreting the expression must necessarily keep in view the object to be achieved and the mischief sought to be remedied.”
- (b) D.K.Trivedi & Sons Vs. State of Gujarat {(1986) SCC Supl 20}
“The word ‘regulate’ means ‘to control, govern, or direct by rule or regulations; to subject to guidance or restrictions; to adapt to circumstances or surroundings.”
- (c) V.S.Rice and Oil Mills & Others Vs. State of A.P. {AIR 1964 SC 1781}
“The word 'regulate' is wide enough to confer power on the State to regulate either by increasing the rate, or decreasing the rate, the test being what is it that is necessary or expedient to be done to maintain, increase, or secure supply of the essential articles in question and to arrange for its equitable distribution and its available at fair prices”.
- (d) K. Ramanathan Vs State of Tamil Nadu & Anr. {(1985) SCC(2)116}
“It has often been said that the power to regulate does not necessarily include the power to prohibit and ordinarily the word 'regulate is not synonymous with the word 'prohibit'. This is true in a general sense and in the sense that mere regulation is not the same as absolute prohibition. At the same time, the power to regulate carries with it full power over the thing subject to regulation and in absence of restrictive words, the power must be regarded as plenary over the entire subject. It implies the power to rule, direct and control and involves the adoption of a rule or guiding principle to be followed, or the making of a rule with respect to the subject to be regulated, the power to regulate implies the power to check and may imply the power to prohibit under certain circumstances, as where the best or only efficacious regulation consists of suppression. It would therefore appear that the word 'regulation' cannot have any inflexible meaning as to exclude 'prohibition'. It has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the legislation,"

82. The principles enunciated in the above judgements establish that the Commission has the plenary power to regulate the tariff of the generating stations, which fall under its jurisdiction which shall extend beyond the determination of tariff, keeping in view the objects of the Act to promote competition, encourage investment in electricity sector and protect consumer interest. The power to regulate tariff will also extend to the tariff determined through the competitive bidding. Therefore, if the situation so demands, the Commission can fashion a relief even in case of the tariff of the generating stations, which have been discovered through the competitive bidding, by providing for suitable adjustment in tariff while retaining the sanctity of competitive bidding under Section 63 of the Act.”

11. The Commission next considered the relief which could be granted to the petitioner for the hardship which it was suffering on account of Indonesian

Regulations. The Commission strongly disapproved of the renegotiation of tariff as discovered through the competitive bidding and emphasized that the sanctity of the PPAs and the tariff agreed therein should be maintained. The Commission decided to grant of relief in the form of compensatory tariff over and above the tariff agreed in the PPAs in the following terms:

“84. The study provides sufficient guidelines for renegotiation of all longterm contracts in the light of the international practice. However, we are not inclined to favour any re-negotiation of the tariff discovered through the process of competitive bidding as in our view, the sanctity of the bids should be maintained. The parties should not renegotiate the tariff discovered through the competitive bidding as that will bring uncertainty to the power sector and is prone to misuse. In our view, the parties should confer to find out a practicable solution and agree for compensation package to deal with the impact of subsequent event while maintaining the sanctity of the PPAs and the tariff agreed therein. In other words, the compensation package agreed should be over and above the tariff agreed in the PPAs and should be admissible for a limited period till the event which occasioned such compensation exist and should also be subject to periodic review by the parties to the PPAs.

85. In the present case, the escalation in price of imported coal on account of Indonesian Regulation is a temporary phenomenon and will be stabilized after some time. Therefore, the petitioner needs to be compensated for the intervening period with a compensation package over and above the tariff discovered through the competitive bidding. The compensation package could be variable in nature commensurate with the hardship that the petitioner is suffering on account of the unforeseen events leading to increase in international coal price affecting the import of coal. As and when the hardship is removed or lessened, the compensatory tariff should be revised or withdrawn. In our view, this is the most pragmatic way to make the PPAs workable while ensuring supply of power to the consumers at competitive rates.

86. The Electricity Act, 2003 vests in the Commission the responsibility to balance the interest of the consumers with the interest of the project developers while regulating the tariff of the generating companies and transmission licensees. Financial viability of the generating stations is an important consideration to enable them to continue to supply power to the consumers. The present case is one of the first of its kind where the tariff was determined through competitive bidding under Section 63 of the Act. The petitioner had quoted the bids on certain assumptions and those assumptions have been negated on account of the unexpected rise in coal price in international market coupled with the promulgation of Indonesian Regulations, required all long term contracts to be adjusted to the international benchmark price. In our view, under the peculiarity of the facts of the present case and also keeping in view the interest of both project developer and consumers, we consider it appropriate to direct the parties to set down to a consultative process to find out an acceptable solution in the form of compensatory tariff over and above the tariff decided under the PPA to mitigate the hardship arising out of the need to import coal at benchmark price on account of Indonesian Regulations. Accordingly, we direct the petitioner and the respondents to constitute a committee within one week from the date of this order consisting of the representatives of the Principal Secretary (Power)/ Managing Directors of the Distribution Companies of the procurer States, Chairman of Tata Power Limited or his nominee an independent financial analyst of repute and an

eminent banker dealing and conversant with infrastructure sector. The nominees of financial analysts and banker should be selected on mutual consent basis. The Committee shall go into the impact of the price escalation of the Indonesian coal on the project viability and obtain all the actual data required with due authentication from independent auditors to ascertain the cost of import of coal from Indonesia and suggest a package for compensatory tariff which can be allowed to the Petitioner over and above the tariff in the PPAs. The Committee shall keep in view inter-alia the following considerations while working out and recommending the compensatory tariff applicable upto a certain period:

- (a) The net profit less Govt. taxes and cess etc. earned by the petitioner's company from the coal mines in Indonesia on account of the bench mark price due to Indonesian Regulation corresponding to the quantity of the coal being supplied to the Mundra UMPP should be factored in full to pass on the same to the beneficiaries in the compensatory tariff.
- (b) The possibility of sharing the revenue due to sale of power beyond the target availability of Mundra UMPP to the third parties may be explored.
- (c) The possibility of using coal with a low GCV for generation of electricity for supply to the respondents without affecting the operational efficiency of the generating stations.

87. The Committee is also at liberty to suggest any further measures which would be practicable and commercially sensible to address the situation. The Committee shall submit its report by 15th May 2013 for consideration of the Commission and for further directions.”

Constitution of the Committee

12. In order to give effect to the directions of the Commission, the petitioner and the respondents took the necessary steps to constitute a Committee comprising of the representatives of the petitioner, State Governments, the concerned distribution companies and the independent experts. The constitution of the Committee was as under:

- (a) Shri Deepak Parekh, Chairman HDFC: Eminent Banker and Chairperson of the committee
- (b) Ms Arundhati Bhattacharya, MD & CEO, SBI Capital Markets Ltd.: Independent Financial Analyst
- (c) Dr. Devi Singh, Director IIM, Lucknow: Independent Member (as mutually agreed by the parties)

Representatives of Govt of Gujarat and Gujarat Discoms

(d) Shri D.J. Pandian, IAS, Principal Secretary (EPD), Govt. of Gujarat

(e) Shri Raj Gopal, MD, GUVNL

Representatives of Govt of Haryana and Haryana Discoms

(f) Shri Ajit M. Sharan, IAS, Addl. Chief Secretary (Power), Govt. of Haryana

(g) Shri Devender Singh, IAS, CMD, Haryana Discoms

(h) Shri Amit Dewan, Financial Advisor (HQ), Haryana Discom

Representatives of Govt of Maharashtra and MSEDCL

(i) Shri Ajoy Mehta, IAS, Principal Secretary/CMD, MSEDCL

(j) Shri A.S. Chavan, CE(PP)- MSEDCL

Representatives of Govt of Punjab and PSPCL

(k) Shri V.K. Kalra, CE (PP) PSPCL

Representatives of Govt of Rajasthan and Rajasthan Discoms

(l) Shri Kunji Lal Meena, IAS, CMD, JVVNL

(m) Shri B M Bhamu CE, RDPPC

Representative of the petitioner

(n) Shri Anil Sardana, Managing Director, Tata Power Company Ltd.

13. The Committee appointed M/s. KPMG as the consultant for carrying out accounting due diligence specific aspects of profits at the Indonesian coal mines where Tata Power has stakes and procurement of coal and sale of power by CGPL. The Committee constituted a Finance Sub-Group consisting of Shri Deepak Parekh, Dr Devi Singh and SBI Capital to work out the compensatory tariff package and seek guidance/approval from the Committee at regular interval. The Committee also appointed Shri A.G. Karkhanis, former ED and Legal Advisor IDBI Ltd as the Legal

Consultant and Shri Chandra Pratap Singh, former Director BHEL (Engineering and R&D) as Technical Consultant to assist the Finance Sub-Group and to provide their expert advice on various legal and technical matters and also to authenticate/opine on the inputs to find out an acceptable solution in the form of compensatory tariff.

14. The Committee held meetings on 11.5.2013, 26.6.2013, 11.7.2013, 17.7.2013 and 30.7.2013 and submitted its report on 16.8.2013 to the Commission. The report of the Committee was signed by Shri Deepak Parekh, Chairman of the Committee and Smt. Arundhati Bhattacharya, Independent Financial Analyst. After receipt of the report, the Commission directed the staff to seek a copy of the report signed by all members including the representatives of the petitioner and the respondents. Accordingly, the staff of the Commission vide letter dated 5.9.2013 addressed to Chairman of the Committee with copy to the representatives of the petitioner and the respondents sought a signed copy of the report. Chairman of the Committee in his response dated 10.9.2013 has clarified as under:

“5. During the last Committee meeting, the issue of signing of the report by all members was deliberated. However, the representatives of the procurer States felt that they would not be able to sign the report without obtaining formal approval of their respective State Governments, which might take some time. As you are aware, they have to take approval from respective ministries and cabinets.

6. In this connection, may kindly refer to record note for meeting held on 30th July 2013 on Page No.75 of the report, where it has been recorded that

“All the procurers mentioned that their formal approval on Compensatory Tariff mechanism may be obtained only after the CERC order is issued after the submission of report. It was then decided that Committee would submit its final report to CERC after incorporating feedback/suggestion from the members.”

7. Additionally, if the interested parties are insisted to sign the report, they would be deprived of their right to further appeal which may not be technically and legally tenable. Some Procurer States even agreed to participate in the committee with a condition of reservation of this right as mentioned in the communication dated 3rd May 2013 from Govt. of Gujarat included in the Appendix of our report.

8. Considering all these factors, it was decided to submit the report without the signatures of the Procurer States and the Developer.”

The petitioner in para 7 of its affidavit dated 11.10.2013 has conveyed its approval to the recommendations of the Committee as under:

"7. I say that the Petitioner has carefully studied the recommendations of the Committee and accepts the recommendation. I further say that as a token of our acceptance to the report, a copy of the Report duly signed is attached herewith and marked as **Annexure-A**"

GUVNL in its affidavit dated 12.9.2013 has submitted that Government of Gujarat has given in-principle consent to the committee's report subject to certain modifications suggested to the report and subject to the approval of the Government of Gujarat and Gujarat Urja Vikas Nigam Limited through the High Level committee in respect the compensatory tariff to be paid to the petitioner. Haryana Utilities in their reply filed vide affidavit dated 4.10.2013 have submitted that "in line with the approval of Government of Haryana, Haryana Utilities give in-principle consent as regards the Committee report with the observations raised by Haryana Utilities which have not been properly addressed in the report forwarded by the Committee to this Commission". Ajmer Vidyut Vitran Nigam Limited, Jaipur Vidyut Vitran Nigam Limited and Jodhpur Vidyut Vitran Nigam Limited ("**Rajasthan Discoms**") filed their affidavit dated 5.10.2013 conveying their in-principle consent to the Committee Report subject to certain modifications/conditions stated therein. Punjab State Power Corporation Limited ("**PSPCL**") vide its affidavit dated 30.9.2013 has submitted that if the recommendations made in the Committee Report is accepted, it would result in reopening of all the executed PPAs signed by other generators and would be against the basic principle that the sanctity of the bidding process needs to be maintained.

Consequently, PSPCL has submitted as under:

"9. In the circumstances, I say that subject to the condition that the rights of PSPCL under the PPA signed with the petitioner is not in any manner affected and there is no additional burden, directly or indirectly placed on PSPCL and its consumers, the Hon'ble Commission may dispose of the present petition."

Maharashtra State Electricity Distribution Company Limited (“**MSEDCL**”) vide its affidavit dated 26.11.2013 has submitted as under:

“7. I say that meeting of the Cabinet of Government of Maharashtra was conveyed to consider the views/comments on the Committee Report. It was decided to convey in-principle acceptance of the Committee Report by the GoM/MSEDCL as under subject to certain modification.”

Committee Report:

15. The Committee Report has seven chapters comprising of overview of CERC order, committee proceedings, scope of the Committee, company analysis, industry analysis, compensatory tariff determination and other concerns, and Annexures containing the chronology of events in respect of the Mundra UMPP, Minutes of the meetings of the Committee, illustrative computation for compensatory tariff, impact of Indonesian regulation on coal prices and the Appendix containing the correspondence of Government of Gujarat, Government of Maharashtra, GUVNL and MSEDCL.

16. Based on the directions contained in para 86 of the order dated 15.4.2013, the Committee has decided the scope of the Committee based on the advice of the legal consultant as under:

(a) Finding a long term solution to the problem arising due to the Indonesian Regulations resulting in significant escalation in prices of imported coal from Indonesia.

(b) Arriving at a compensatory tariff in such a way that (i) the compensation is variable in nature commensurate with the hardship and (ii) benefits arising to

the generator in case of lower coal price regime are passed on to the procurers.

(c) Taking into consideration the interest of the consumers while arriving at a long term solution.

Based on the above, the Committee has discussed in detail the underlying technical assumptions and market assumptions which may have been factored in while bidding and used inputs from the technical consultant to validate the underlying assumptions of the bid. The Committee has used the inputs from the report of the technical consultant for validating the underlying technical assumptions and has accessed publicly available information regarding coal price indices and a few classified documents for validating the market assumptions regarding the price of imported coal for power plants in India. In para 4.2 of the report, the Committee has analysed the technical parameters of the plant and has assumed the normative parameters of Station Heat Rate (2050kcal/kg), Auxiliary consumption(7.75%) as suggested by the Technical Consultant, and CERC norms for allowable variation in heat rate (6.50%) and coal transit losses(0.8%) for evaluation and calculation of Compensatory Tariff. The Committee has analysed the market assumptions in para 4.3 of the report and has arrived at the FOB price of USD 28.97/MT assumed in the bid and has compared the same with the then prevailing price of imported coal for 5350 kcal/kg (USD 42.13/MT) and has come to a conclusion that CGPL had a discount of USD 13/MT of coal at the time of bidding. The Committee has thereafter analysed in para 4.4 of the report the impact of Indonesian Regulations on the coal prices assumed by CGPL in the bid and has come to the conclusion that the

Indonesian Regulations has eliminated the discount of 30% over the market price assumed by CGPL in its bid. The Committee has observed that the impact on the non-escalable component is significant as it resulted in erosion of discount assumed while quoting the non-escalable fuel energy component and the impact on the escalable component is broadly confined to the erosion of the discounts assumed while quoting the escalable fuel energy component and the lower base of escalable component has not shielded CGPL completely from the subsequent escalation in coal prices.

17. The Committee in para 4.6 of the report has deliberated on various options based on two approaches, namely forward working approach and backward working approach. In Para 4.7, the Committee has considered the various options and evaluated these options in para 4.8. The Committee has recommended Option IV for deciding the compensatory tariff for the reasons that the said option addresses the hardship, does not involve any change in the existing tariff component and escalation index, and captures the spirit of the order of the Commission dated 15.4.2013. Para 4.9 deals with the illustrative calculation of compensatory tariff for the financial year 2013-14 based on the Option IV. Paras 4.6 to 4.9 of the report are extracted as under:

"4.6 Evaluation of alternatives for calculating Compensatory Tariff

The Committee deliberated on various options to arrive at a compensatory package based on the considerations outlined in sec 4.5 and the recent directives from the Hon'ble Commission and CCEA.

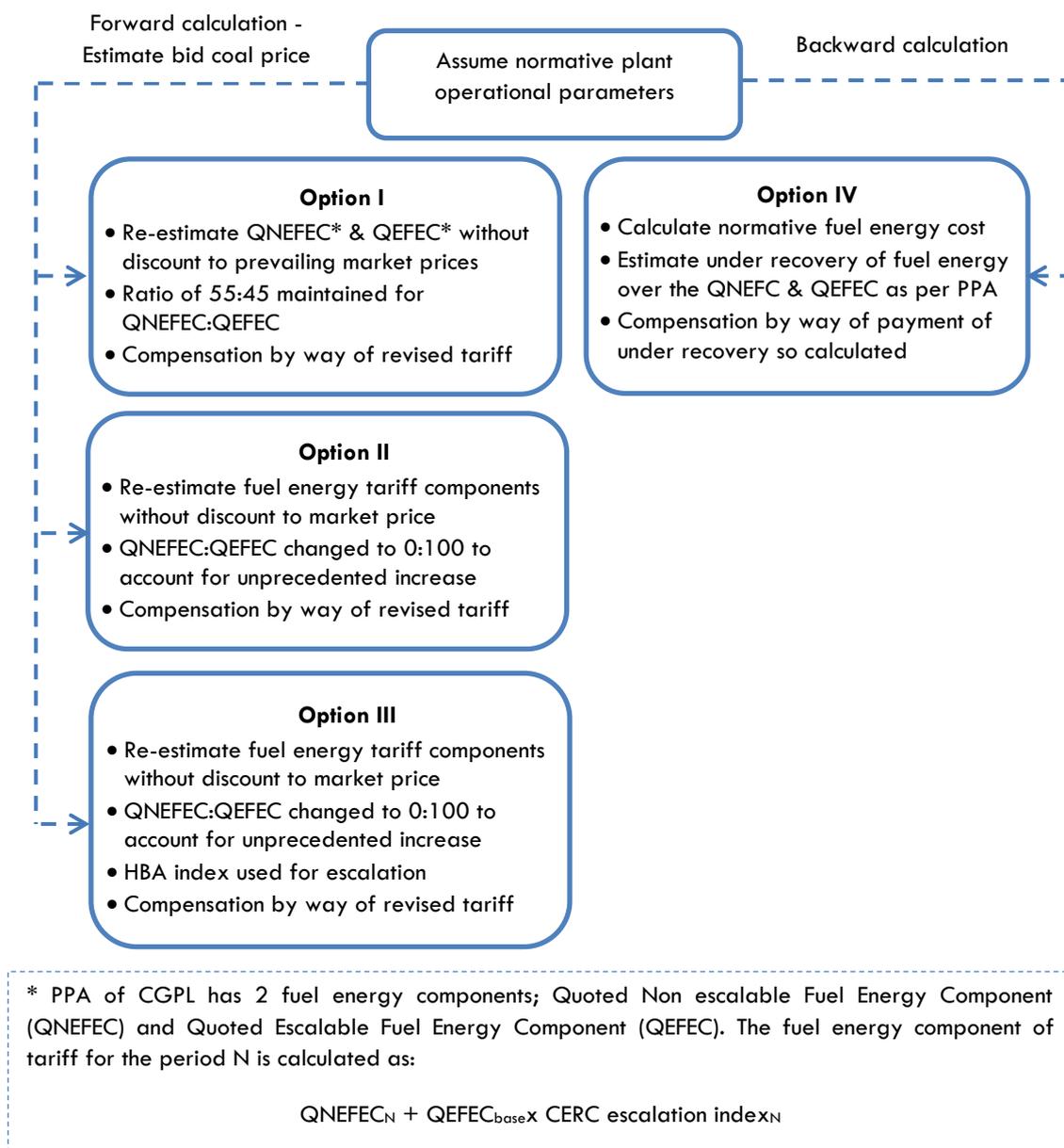
The Committee while deliberating the options for compensatory tariff used two approaches:

Forward working – The underlying principle in this approach is that the quoted tariff components were based on certain assumptions, which had been vitiated by certain subsequent events thereby causing hardship to the Company. Accordingly, adjustments to the quoted tariff components have been made after factoring in the change in the assumptions caused by these subsequent events. The compensation package under this approach will in effect be the difference between the revised

estimated tariff and original tariff as per the PPA. Options I-III discussed in the following sections are based on this approach.

ii. Backward working – In this approach, the actual hardship for the present period is estimated based on the normative plant operating parameters, prevailing coal prices and tariff quoted in the PPA. The compensatory package will be the under recovery on the tariff quoted in the PPA. Option IV discussed in the following sections is based on this approach.

The options are as follows:



Options for Compensatory Tariff

✚ **Option I:** As it was established in sec 4.4.3, the Indonesian Regulations and the increase in coal prices had impacted both the non-escalable and escalable

fuel energy components, this option explored a one-time adjustment to these components so as the hardship caused to CGPL is mitigated. Considering the same, Composite fuel energy charges are re-estimated using normative operating parameters and without any discount to the then prevailing market prices, as the discount factored in the components have been eroded by the Indonesian Regulations.

- ✚ **Option II:** The compensatory tariff derived by option I only addresses the impact of removal of discount assumed in the bid tariff compared to the market prices prevailing at the time of bid. However it does not address the other issue of Indonesian Regulations namely the need for alignment of coal price assumed under non-escalable portion to actual market price on an on-going basis. Considering the same in case of Option II, composite fuel energy charges are re-estimated using normative operating parameters and without any discount to the then prevailing market prices and entire fuel energy is loaded in the escalable component.
- ✚ **Option III:** The compensatory tariff derived by option II compensates the hardship caused by change in Indonesian Law and the coal price escalation, provided the CERC escalation index tracks the escalation in HBA prices exactly. However an analysis of the indices of CERC and HBA indicate a time lag in transmission of changes in HBA coal price to CERC escalation index. Option III is modified form of option II with the only change that the actual escalation in HBA prices has been used in place of CERC escalation index.
- ✚ **Option IV:** Under this option, the actual hardship for the present period is estimated based on the normative plant operating parameters, prevailing coal prices and tariff quoted in the PPA. The compensatory package will be the under recovery on the tariff quoted in the PPA vis-à-vis the fuel energy expenses.

Further explanation of all the four options with rationale for each is set out in sec 7.4

Evaluation of options

The Committee deliberated on the merits and demerits of each of the options extensively. The following table summarizes the pros and cons of each of the options for determining the compensatory tariff.

Option – I	Option – II	Option – III	Option - IV
<ul style="list-style-type: none"> ✓ Benefit of one-time adjustment in the bid tariff and continuation of existing PPA ✓ Requires changing components of tariff viz. Quoted Escalable Fuel Energy Charges and Quoted Non Escalable Fuel Energy Charges which will have legal implications ✓ In variance with the CERC order, as the order specifically prohibits changing the tariff components amounting to renegotiation ✓ Will not be a long term sustainable solution, as the coal price escalation in the non-escalable component (55% of total fuel energy component) is not factored in. ✓ Will work only if the coal price is around USD 42.13/ MT as the non-escalable component was fixed at these prices 	<ul style="list-style-type: none"> ✓ Benefit of one-time adjustment in the bid tariff and continuation of existing PPA ✓ Requires changing components of tariff viz. Quoted Escalable Fuel Energy Charges and Quoted Non Escalable Fuel Energy Charges which will have legal implications ✓ In variance with the CERC order, as the order specifically prohibits changing the tariff components amounting to renegotiation ✓ Due to lead/lag effect of CERC escalation index over HBA coal price index, the compensation is not commensurate to the hardship. Depending the index movement, there is a possibility of excess recovery / under recovery 	<ul style="list-style-type: none"> ✓ Benefit of one-time adjustment in the bid tariff and continuation of existing PPA ✓ Requires changing components of tariff viz. Quoted Escalable Fuel Energy Charges & Quoted Non Escalable Fuel Energy Charges and the methodology of calculating the escalation index which will have legal implications ✓ In variance with the CERC order, as the order specifically prohibits changing the tariff components amounting to renegotiation ✓ Compensation is commensurate to the hardship caused. As escalation index determined only by Indonesian coal prices, it eliminates the lead/lag effect of CERC escalation index (used in other options) over the escalation in Indonesian coal price 	<ul style="list-style-type: none"> ✓ No change required in any of the tariff components nor in the escalation indices. Hence no change required in PPA, but requires introduction of additional component ✓ Can serve as a long term solution as only the exact under recovery based on normative fuel cost is compensated ✓ There is provision for refund of excess recovery, if actual fuel cost based on audited accounts is less than the normative fuel cost ✓ Operational efficiency gets passed on completely to off takers and operational inefficiency is being borne by Generators ✓ Procurers also get to share the benefit, if coal prices decrease

The Committee recommended Option IV as the method for evaluating the compensatory tariff on account of the following reasons:

Option IV addresses the hardship caused both on account of the Indonesian Regulations and the escalation in coal prices

Option IV does not involve any change in existing tariff components nor the escalation index, which if present will have legal implications as the Mundra UMPP project was awarded on competitive bid basis. Further in accordance with the order of the Hon'ble Commission which specifically prohibits changing the tariff components, this option only involves addition of a new component, which shall remain till the hardship remains.

It serve as a long term solution as only the exact under recovery based on normative fuel cost is compensated

The possibility of excess recovery / under recovery on account of lead / lag of CERC escalation index over the escalation of HBA prices (or an equivalent index accepted by CERC) never arises in case of option 4 and if the actual fuel expenses are lesser than the normative fuel expenses, it gets adjusted at the annual true-up.

The marginal cost benefits of blending with lower grade coal are passed on to the procurers

The benefit of decrease of coal prices below USD 42.13 per MT is passed on to the procurers only in this option.

Option 4 truly captures the spirit of the order of the Hon'ble Commission i.e. compensatory tariff shall be available only till the hardship prevails and limited the extent of hardship

Accordingly the formula for gross compensatory tariff for each period is calculated as:

GROSS COMPENSATORY TARIFF (GCT) = NORMATIVE FUEL ENERGY CHARGES - TARIFF RECOVERED FROM FUEL ENERGY COMPONENTS OF PPA

Where,

NORMATIVE FUEL ENERGY CHARGES= Normative fuel Energy consumption x HPB marker prices
adjusted for GCV

1. Normative Fuel Consumption =

$$\frac{\text{Scheduled Energy}}{(1 - \text{Auxiliary Power Consumption})} \times \frac{\text{Station Heat Rate}}{\text{GCV of Coal}} \times \frac{1}{(1 - \text{Transportation losses})}$$

Where,

- Station Heat Rate shall be 2050 kcal/kwh
- Auxiliary Power Consumption shall be 7.75%
- Transportation losses shall be 0.80%

TARIFF RECOVERED FROM FUEL ENERGY COMPONENTS OF PPA = {QNEFEC+ (QEFEC x CERC

Escalation index)) x
Scheduled Energy

18. Based on the above formula, the Committee has worked out the compensatory tariff calculation for the year 2013-14 as under:-

“4.9 Illustrative Calculation of compensatory tariff for FY 2014

To illustrate the calculation of compensatory tariff, a sample calculation for FY 2014 is shown in this section. The major assumptions for calculations are listed below:

Assumption	Ref	Unit	Value	Remark
<u>Contracted Capacity</u>				
Contracted Capacity at bus bar	(1)	MW	3800	PPA
Normative Availability	(2)		80%	PPA
Units generated for sale	(3)	mil units	26630	
<u>Normative Plant operating parameters</u>				
Normative Station Heat Rate	(4)	kcal/kWh	2050	Technical consultant
Blended GCV	(5)	kcal/kg	5350	
Aux consumption	(6)		7.75%	Technical consultant
Transportation Loss of coal	(7)		0.80%	CERC norm
Normative Quantity of coal consumed	(8)	mil tons	11.08	
<u>Tariff components</u>				
Quoted NEFEC of tariff for FY 2014	(10)	USD/kWh	0.00707	PPA
Quoted EFEC	(11)	USD/kWh	0.00585	PPA
CERC Escalation index	(12)		196.41	CERC

Fuel Energy tariff component	(13)	USD/kWh	0.01856	
Exchange Rate	(14)		59.7	
<i>Coal Price</i>				
HPB price of 5400 kcal/kg coal – July 13	(15)	USD/MT	64.38	Govt. of Indonesia
HPB price of Melawan coal (5350 kcal/kg)	(16)	USD/MT	63.78	
Effective import duty of coal – FY 2007	(17)		6.33%	

For calculation purposes, it has been assumed that the July 2013 price of coal will be representative of FY 2014 and CERC escalation index for July 2013 will be representative of FY 2014.

As discussed in sec 4.8 the Gross Compensatory tariff is calculated by the following formula:

$$\text{Gross Compensatory Tariff (GCT) per unit} = \frac{(\text{GCV Adjusted HBA Index Price} \times \text{Normative Quantity of coal imported}) - (\text{QNEFEC} + (\text{QEFEC} \times \text{CERC escalation index}))}{\text{Units supplied under the PPA during the time period}}$$

The compensatory tariff calculation for FY 2014 is shown below:

Item	Ref	Unit	Value
Units sold	(18)	mil kWh	26630
Fuel charges (only FOB) as per tariff	(19)	USD/kWh	0.01856
Fuel charges recovered	(20)	mil USD	494.27
FOB cost of imported coal	(21)	USD/ton	63.78
FOB cost of imported coal – adjusted for taxes	(22)	USD/ton	67.82
Normative Quantity of coal imported	(23)	mil ton	11.15
Normative Cost of coal imported	(24)	mil USD	756.25
Gross Compensation	(25)	mil USD	261.99
Gross Compensation	(26)	mil INR	15640.53
Gross Compensation per unit	(27)	INR/kWh	0.59

19. The Committee has recommended the calculation of fuel energy losses of CGPL for the Financial Year 2012-13 in para 4.11 of the report as under:

“4.11 Calculation of Fuel Energy Losses of CGPL for FY 2013

The past losses may be calculated as per audited accounts till the date of commencement of Compensatory Tariff as recommended in the Committee report. The CERC order had stated that Compensatory Tariff would be admissible for a limited period till the hardship persists and since the hardship commenced from COD of respective units, it was agreed during the Committee proceedings to quantify the past Fuel Energy losses of CGPL since the date of commissioning of Unit 1. The following table presents the calculation of losses accruing to CGPL for FY 2013¹ on the Fuel Energy component of the PPA:

Particular	Reference	Unit	Value
PPA sale (MU)	(1)	mil kWh	11565
Energy Charge recovered	(2)=(3)+(4)	INR crore	1730.25
<i>Energy charge (Fuel)</i> ²	(3)	INR crore	1274.54
<i>Energy charge (Transportation & Fuel handling)</i>	(4)	INR crore	455.71
Energy Cost (₹ crore) ³	(5)=(6)+(7)	INR crore	2169.46
<i>Fuel cost (FOB)</i>	(6)	INR crore	1603.99
<i>Ocean Freight, Inland handling, Sec fuel</i>	(7)	INR crore	565.47
Under recovery in fuel cost	(8)=(6)-(3)	INR crore	329.45
Fuel Cost recovered per unit	(9)=(3)*10/(1)	INR/kWh	1.10
Fuel cost incurred per unit	(10)=(6)*10/(1)	INR/kWh	1.39
Under recovery in Fuel charges per unit	(11)=(8)*10/(1)	INR/kWh	0.29

As can be observed from the table above the under recovery in Fuel Energy charges is ₹329.45 crore for FY 2013. As the CERC order does not provide clear guidance to the Committee on the recovery of past losses, the Hon'ble Commission may take an appropriate decision on the payment of compensation to CGPL for FY 2013.”

¹Unit 1 of CGPL was commissioned in March 2012 and was operational only for 6 days in FY 2012. Hence losses for FY 2012 are not considered

²Based on PPA invoices for FY 2013

³Based on audited financial statements of CGPL for FY 2013

20. The Committee has also dealt with the process for recovery of compensatory tariff, other considerations suggested by the Commission such as profits from promoter's shareholding in Indonesian mines, profit from the sale of power beyond 80% availability, blending with low GCV coal and the considerations suggested by the procurers such as curtailment of rate of return by the seller, waiver/reduction of rate of interest by banks/financial institutions, reduction of import duty on coal and other taxes by the Government of India, fixing a ceiling for gross compensatory tariff and additional considerations received from GUVNL and MSEDCL.

21. Summary of the recommendations of the Committee as given at page 61 of the report are as under:

“The scope of the Committee is limited to evaluate and evolve a mechanism to mitigate the hardship on account of unprecedented increase in coal price and change in Indonesian Regulation. Considering the guidance provided in the CERC order and acknowledging that the procurers’ right to make submissions before the Hon’ble Commission/any other legal forum, the Committee recommends the following:

A. The Provisional Compensatory Tariff for each period may be calculated using the following formula:

Gross Compensatory Tariff (GCT) = Normative Fuel Energy charges — Tariff recovered from Fuel Energy components of PPA

Where,

1. Normative Fuel Energy Charges = Normative Fuel Consumption x Published HPB marker prices adjusted for GCV

2. Normative Fuel Consumption =

$$\frac{\text{Scheduled Energy}}{(1 - \text{Auxiliary Power Consumption})} \times \frac{\text{Station Heat Rate}}{\text{GCV of coal}} \times \frac{1}{(1 - \text{Transportation losses})}$$

3. Tariff recovered from Fuel Energy components of PPA = (QNEFEC + (QEFEC X CERC escalation index)) X Scheduled Energy.

4. Station Heat Rate, Auxiliary Power consumption shall be based on the normative parameters set by the technical consultant for the corresponding GCV of coal and Coal Transportation losses shall be based on the lesser of actual losses or CERC norm.

B. True-up of Provisional Compensatory Tariff shall be carried out at the end of each financial year based on audited financial statements in a time bound manner with adjustments for:

(i) Actual/Normative Fuel Energy expenses.

(ii) Tata Power's share of profit/ dividend from the Indonesian mining companies proportionate to the coal supplied to the UMPP. Tata Power's share of profits/dividends shall be the summation of the dividends available to Tata Power in India and the profits at the Indonesia mining level (reduced to the extent of dividends declared)

C. The ceiling of Compensatory Tariff may be fixed (after consultation between the generator and procurers or as approved by CERC) as a pre-determined percentile of the power procurement cost of the procurers in that particular year as per the approved power purchase plan.

D. Third party sale of power beyond the target availability of 80% may be permitted after making appropriate modification in the extant PPA and profits from such sale may be shared equally between the procurers and generator.

E. Blending of lower GCV coal is currently not commercially beneficial at prevailing prices of lower GCV Coal as the savings in fuel energy charges are more than offset by the increase in coal transportation and coal handling charges and increase in capacity charges.

F. Procurers and Generator may jointly continue to pursue all possible options with the concerned authorities for reduction in duties and taxes.

G. Lenders to the Project may explore all possible options including reduction of interest rates, extending moratorium on principal payment for a period of 2-3 years and elongation of loan repayment tenor to reduce the hardship faced.

H. Domestic Banks, with the support of this Commission, may approach RBI for forbearance from the ambit of restructuring guidelines for reduction of interest rate and elongation of loan tenor for the Mundra UMPP Project. The Committee strongly recommends special dispensation from RBI for sustainable viability of the Mundra UMPP.

The Committee also recommends the following aspects to be decided by this Hon'ble Commission:

A. Methodology for compensation to the Petitioner for the period starting from COD of the Unit 1 till the date of implementation of the Compensatory Tariff as per the final order on the Compensatory Tariff;

B. Billing mechanism of Compensatory Tariff; and

- C. Frequency of recovery (viz. monthly, quarterly etc.) of Compensatory Tariff by the Petitioner after due consideration to the carrying cost of both generator and the procurers for recovery of compensatory package.”

Gross Compensatory Tariff (GCT) per unit

$$= \frac{\text{(GCV Adjusted HBA Index Price x Normative Quantity of coal imported)}}{\text{Units supplied under the PPA during the time period}}$$

$$- (\text{QNEFEC} + (\text{QEFEC} \times \text{CERC escalation index}))$$

22. Copy of the Committee Report was posted on the website for information of all concerned. The Commission also directed the petitioner and respondents to file their replies on the Committee Report. The Prayas Energy Group, a consumer group registered with CERC sought to file its submission on the report which was allowed. One Shri Pushendra Surana, a consumer from Uttar Pradesh sought impleadment as respondents in the petition. The Commission in the Record of Proceeding for the hearing on 1.11.2013 while rejecting the prayer of Shri Surana for impleadment, allowed him to file its submission and participate in the hearing. The petitioner, the respondents, Prayas Energy Group and Shri Surana have filed their replies and the petitioner has filed its rejoinders. Subsequently, Shri Padamjit Singh, Chief Engineer (Retd.), PSEB has submitted his comments on the Committee Report.

23. The hearing of the petition on merit took place on 13.9.2013, 1.11.2013 and 13.11.2013. After the hearing, all parties have filed their written submissions.

Submissions of the procurers:

24. GUVNL vide its affidavit dated 13.9.2013 filed its reply to the report of the Committee subject to further submission in the light of the High Level Committee appointed by the Government of Gujarat. In the light of the decision taken by the High Level Committee in its meeting dated 5.10.2013, GUVNL has filed affidavit dated 14.10.2013 and has placed on record the additional submission in view of the decision taken in the meeting of the High Level Committee. The submissions of GUVNL in brief are as under:

(a) Compensatory Tariff shall be applicable from the date of order of the Commission.

(b) Price of coal on FOB basis: Price of coal may be considered at actual subject to ceiling of this Commission's indices. In line with the Commission's order dated 15.4.2013, Compensatory Tariff should be worked out by taking the difference between the current price and the tariff quoted by the petitioner, adjusted for market price at that time. Since the market price at the relevant point of time was USD 42 as against USD 32 quoted by the petitioner, the existing tariff should be adjusted with the factor $42/32$.

(c) This Commission may decide the base on actual SHR and Auxiliary Consumption as per guaranteed parameters with Commission's norms as ceiling,

(d) Sale of Power to third party above 80% may be allowed initially for a period of three years with sharing of profit at 50:50 (without any payment of incentive to generator). After three years, decision will be reviewed to take

appropriate view at the relevant point of time considering demand and supply position in the State of Gujarat. In the light of the decision of the Government of Gujarat, sharing in excess of 80% availability of power has been suggested in the ratio of 60:40 between GUVNL and the petitioner, with minimum incentive of 10 paise/ per unit revenue to GUVNL.

(e) 100% profit earned on coal tied-up in Mundra UMPP should be shared as 30% share of coal in the mines is much higher than the total requirement of coal for Mundra UMPP.

(f) The Commission should recommend to the Government of India for reduction in duties, taxes etc. on imported coal and insist on Banks to reduce the rate of interest to bring reduction in the impact of Compensatory Tariff on buying State.

(g) In case after compensatory tariff, power becomes unviable, GUVNL should have the right to surrender the capacity for the time being without payment of fixed cost and the term of the agreement should be extended for such period.

(h) Generator should give commitment for ensuring availability of 80%.

(i) Compensatory tariff payment shall be subject to approval by GERC for passing on the same to the end consumers.

(j) The views and suggestions given by GUVNL to the Committee through letters dated 20.5.2013 and 29.7.2013 should be taken into consideration while

passing the final order in the petition.

25. Haryana Power Purchase Centre on behalf of Uttar Haryana Bijli Vitran Nigam Limited and Dakshin Haryana Bijli Vitran Nigam Limited has made the following submissions vide affidavit dated 3.10.2013:

(a) Similar submissions as in case of Gujarat have been made with regard to applicability of the compensate tariff, pricing of coal, station heat rate, sharing of profit from Indonesian mine. However, with regard to merchant sale of power above 80%, it has been suggested that profit should be shared between the procurers and the generator for a period of 3 years at the rate of 60:40 (without any payment of incentive to generator) subject to a minimum incentive of 10 paise per unit to the procurers. After 3 years, Haryana shall review the decision and take appropriate view considering the demand supply position in the State at that time.

(b) In the event cost of power from Mundra UMPP become prohibitive in the opinion of Haryana utilities on account of increase in price of Indonesian coal and/or devaluation of rupee and if the procurement of such power goes beyond top 50 percentile of merit order of cost of power for Haryana Utilities from all the sources, there should be an unconditional option for Haryana Utilities to decide the non-procurement and in such a case procurement of power from CGPL Project would not be binding on Haryana Utilities and no capacity charge or any compensatory tariff or deemed charges shall be payable for the period for which

such option is exercised.

(c) The submissions of Haryana Utilities is subject to the rise of Government of Haryana/ Haryana Utilities in Appeal No. 151 of 2013 pending before the Appellate Tribunal for Electricity against the order dated 15.4.2013 passed by this Commission.

26. Rajasthan Discoms have made their following submissions vide affidavit dated 5.10.2013:

(a) Similar submissions have been made as in case of Gujarat in respect of applicability of compensatory tariff, pricing of coal, station heat rate and auxiliary consumption, sharing of mine profit.

(b) As regards the sale of power above 80% availability by CGPL, Rajasthan Discoms have opted to avail their full share on the terms of the PPA.

(c) No Compensatory Tariff should be allowed upto an increase of 10.46% in coal prices as the same has been considered by CGPL while bidding. Any increase above 10.46% should only be considered and that too, only on the escalable energy charges.

27. PSPCL vide its affidavit dated 30.9.2013 has submitted that PSPCL participated in the deliberations of the Committee to explore an acceptable solutions without prejudice to the rights and contentions of PSPCL under the PPA. The tariff and other

terms and conditions for supply of electricity by the petitioner to PSPCL should be governed strictly by the PPA and no extra burden whether directly or indirectly by way of compensatory tariff or otherwise should be placed on PSPCL and its consumers. If the recommendations made in the report are accepted, then it would become a means for reopening of all power purchase agreements signed with other procurers which is against the principle of sanctity of the bidding guidelines.

28. MSEDCL has made detailed following submissions vide its affidavit dated 27.11.2013:

(a) Compensatory tariff shall be prospectively applicable from the date of order of this Commission.

(b) The price of coal may be considered at actual subject to ceiling of indices notified by this Commission. In accordance with the order of the Commission dated 15.4.2013, compensatory tariff should be worked out on the basis of the difference between the current coal price minus the tariff quoted by the petitioner, adjusted for market price at that time. Since the market price at the relevant point of time was USD 45 as against USD 32 quoted by the petitioner, the existing tariff should be adjusted with the factor $45/32$ subject to the certification of the ratio by an independent auditor of repute. Thereafter, the compensatory Tariff has to be calculated based on the normative norms as agreed.

(c) The Commission may decide SHR based on the parameters set by the technical consultant or actual or applicable CERC norms, whichever is lower.

Similar approach needs to be considered for Auxiliary Consumption. Coal transit loss on the basis of actual losses or CERC norms whichever is lower should be allowed. The technical consultant shall certify the optimal operational parameters keeping in view the best interest of the Procurers.

(d) The entire coal tied up for Mundra UMPP is coming out of total share of 30% in the mine. Therefore, 100% profit earned on coal tied-up in Mundra UMPP should be shared as 30% share of coal in the mines is much higher than the total requirement of coal for the project. However, the coal quantity and mine capacity be verified by an independent agency. In case it is discovered by the independent agency that the mine is capable of meeting only part of the requirement of the plant, then in that event Compensatory Tariff be considered only to the extent of coal available from Indonesian Mines.

(e) As regarding allowing sale of power to third party above 80%, MSEDCL has opted to avail full share on the terms of the PPA and entire surplus power over and above 80% of the normative availability shall be made available to Procurers. MSEDCL has reserved the first right to refusal to the capacity.

(f) CERC should recommend that the Government of India to reduce duties and taxes on imported coal to bring reduction in the impact of the Compensatory Tariff.

(g) CERC should recommend that the lenders to reduce rate of interest on debt which will result in lower interest cost and reduction in Compensatory Tariff.

(h) Since the sacrifice needs to be shared by all the stakeholders, the Promoters need to reduce the return on equity claimed in the fixed charges. The reduction in fixed charges equivalent to the Rate of Equity needs to be reduced by 13 paise per unit which is also recognized by the Committee Report in para 5.2.1.

(i) In case the power becomes unviable for MSEDCL due to higher compensatory charges, MSEDCL should have the right to surrender the capacity or part thereof for the time being without any payment of additional Fixed Cost, Compensatory Charges or deemed charges. Therefore, power procurement from such project would not be binding on MSEDCL. Further, the term of agreement should also be extended for such period.

(j) The generator should give commitment for ensuring availability of 80% for the future period.

(k) Compensatory Tariff, if approved by CERC, shall be recoverable from MSEDCL subject to approval by Maharashtra Electricity Regulatory Commission for passing on the same to end customer.

(l) CERC should: (i) examine Station Heat Rate, Auxiliary Consumption etc. subject to maximum ceiling as approved by CERC Tariff Regulations, (ii) determine a formula for working out upfront Compensatory Tariff so as to enable scheduling of power, as per merit / protocol. This will become the ceiling rate subject to reduction as per actual cost, (iii) to undertake yearly truing up exercise

taking into consideration ceiling rate for each month, (iv) since the Compensatory Tariff is temporary mechanism, the financial support received by the generator should be suitably restored to the Procurers, once the generator recovers cost through normal mechanism.

(m) While working out Compensatory Tariff, a ceiling limit needs to be considered by CERC, whereby the tariff above the ceiling limit may not be allowed to pass on to MSEDCL. It will be onus on the petitioner to try out all the feasible solution to reduce the cost and avail the best possible option to procure coal.

(n) CGPL and other holding or investing company will not be permitted to dilute their stake or shareholding through whatever means to any other entity.

(o) All accounts and other relevant material used for calculation of Compensatory Tariff should be certified by an independent auditor of repute and a technical consultant of repute.

(p) The concessions given to MSEDCL should not be inferior to those given to other Procurers.

(q) The technical parameters as proposed by the Committee based on the inputs from technical consultant deviate from the parameters/ assumptions considered in the bid in respect of SHR (2050 kCal/kWh as against 1991.48 kCal/kWh) and auxiliary consumption (7.75% assessed by technical consultant as against 4.75% considered in the bid design). Additional burden on account of

change in parameters cannot be passed on to the procurers. All options for ensuring affordable coal supply should be considered. This unprecedented and unexpected situation warrants special measures.

(r) The views and suggestions given by MSEDCL to the Committee through letter dated 1.8.2013 are crucial and should be taken into consideration while finalizing the final order in the petition.

Submission by consumer groups and consumers

30. Prayas Energy Group in its letter dated 30.10.2013 has submitted as under:

(a) The composition of the Committee has not included adequate representations to take care of the interest of the most affected stakeholder mainly the consumers and public at large. Presence of procurers who have opposed the said tariff increase, independent banker and financial analyst and the project developer cannot be considered as adequate representation.

(b) The decision of the Committee was not unanimous and one of the important requisites for the Committee process was that the solution it proposes should be acceptable to both procurers and the project developers. As the procurers who were part of the Committee have participated and given specific caveats and have not signed the final report, relying upon the Committee's recommendations by the Commission is questionable.

(c) The Commission should hold a public hearing in such a matter so peculiar and having long term implications for tariff as well as sector policy.

(d) The Commission should independently evaluate and clearly establish the need for compensation in order to arrive at a final decision. The Commission should clearly define the principles based on which any solution can be found having regard to factors such as it should not fundamentally alter risk allocation in the bidding process and the PPA; it should protect the procurers' entitlement of normative generation at the PPA agreed tariff; and it should impose equitable sharing of incremental burden on all stakeholders such as developer/equity holder, lenders and investors.

(e) Given the extraordinary nature of this case and considering the fact that any decision in the matter is going to impact competition, policy as well as tariff of all the electricity consumers in the two States, the Commission must ensure full transparency and provide adequate opportunity to all stakeholders, most importantly the consumers of these discoms, to participate in the process. To ensure this, the Commission must issue a draft order based on which a public hearing should be held after giving adequate publicity and allowing all stakeholders sufficient time to comment on this matter.

(f) The combination of following options will more or less offset any impact on tariff due to Indonesian Regulations:

- (i) Ploughing back the incremental revenue (net of taxes and royalty)

from coal mines;

(ii) Sale of generation beyond normative availability and using the entire surplus revenue to offset impact on tariff;

(iii) Haircut for equity holder, lenders and investors;

(iv) Develop options for further reducing need for compensation by adopting suitable measures such as procuring lower GCV coal, using current lower transportation costs, etc.

(v) The increase in fuel cost as indicated in the Commission's order is a transient phenomena which will get self corrected whenever the prices of coal fall down. In view of the Commission's direction to look at the possibility of blending low cost coal with low GCV, the cost of transport would increase and there is no need for the Committee to double the freight rates.

(g) Prayas has submitted its own analysis of the impact of changes in FOB price of coal, sharing of mining profit, sale of power beyond the normative availability to third parties and use of coal of lower calorific value and has suggested alternative approach for calculation of these aspects.

31. Shri Pushendra Surana, consumer, has submitted the following with regard to the petition in general and Committee report in particular, as under:-

(a) The mandate of the Committee constituted in pursuance to the Commission's order to work out the compensation package agreeable to all parties. Since the

respondents have not agreed to the compensation package suggested by the Committee, no compensatory tariff can be granted to the petitioner in terms of the Commission's order.

(b) If the Commission's proposes to direct the respondents to accept the compensatory tariff, despite their disagreement, it would amount to renegotiation/ redetermination of the tariff and interference with Section 63 process. This Commission has not decided in order dated 15.4.2013 that binding directions which alter the terms of Section 63 PPAs and interfere with the sanctity of the bidding process can be passed in exercise of the regulatory powers. Therefore, this issue has to be addressed first before allowing compensatory tariff despite the disagreement of the respondents.

(c) The scope of extent of regulatory power under statutory is determined by the Statute itself. The role of the appropriate Commission in relation to Section 63 bidding process has been expressly circumscribed by the Statute and regulatory power in relation to it should be construed accordingly. Even though, it is assumed that tariff can be re-determined by exercising jurisdiction under Section 79 (1) (b) of the Act, the same should be done in a manner prescribed in Section 64 of the Act by publishing the petition for benefit of general public and inviting objections/ suggestions of the general public thereon. The Commission should have directed the petitioner to publish the petition before proceeding further after taking into account the suggestions and objections received from the public.

(d) If the corporate veil is pierced, the real impact of the Indonesian Regulation

would be limited to the tax payable to the Indonesian Government by the related entity of the petitioner. On account of the holdings of the petitioner in the Indonesian mines, the price differential should be ignored and only the tax liability should be considered.

(e) Since, the Commission has evoked its regulatory power with a view to grant relief to the petitioner limited to price escalation of coal as a result of Indonesian regulation and for no other reason, the Commission should scrutinised the calculation of the Committee with a view to discard any factor which is not relatable to price escalation of coal.

(f) The Committee has based its calculations on normative parameters of station heat rate and auxiliary consumption supplied by the technical consultant appointed by the Committee. CGPL should provide normative parameters taken into account by the lenders or OEM granted parameters and lowest of the available normative parameters should be taken into account for the purpose of calculating the compensatory tariff.

(g) The Commission in its order dated 15.4.2013 has not finally decided the issue of third party sale and only refer to the Committee as one of the factors to be considered while working out and recommending the Compensatory tariff. The PPA did not envisaged as any sale of power to third party and therefore, the Commission would not have jurisdiction to deviate from the fundamental term of the PPA and permit sale to third parties. The Committee has recommended the capacity over and above normative availability be sold to third parties and profit

from the same be distributed between the petitioner and the procurers. This has been done in order to give relief to the petitioner on account of increase in the capacity charge. It has been submitted that no relief on this account can be granted since it was neither the basis of the petitioner nor was it the mandate of the Commission. If third party sale is allowed, the entire benefits should flow to the utilities in order to enable them to pass on the same to the consumers.

32. Shri Padamjeet Singh, a consumer has submitted his comments vide a letter which was received in the Commission on 17.1.2014. He has submitted that Shri K.K Sharma, Executive Director and CEO of CGPL in its interview to the Financial Express printed on 10.8.2013 has admitted that upto 70% of the coal being used at Mundra UMPP is the low cost and economical ECO coal. The Committee on compensatory tariff has not worked out and taking into consideration the savings made by CGPL on account of use of upto 70% blending with ECO coal. Shri Padmaraman of Tata Power Company in his interview to the magazine Business World printed on 17.12.2013 has admitted that losses related to the 4000 MW Mundra UMPP are balanced out from the profit made by the other operations of the group. Therefore, there is no ground or justification for CGPL for claiming compensation before the Committee.

33. The petitioner has filed its rejoinder to the replies of the Respondents, Consumer Group and the Consumers:-

(a) As regards of applicability of compensatory tariff, the petitioner has submitted that promulgation of Indonesian Regulations had an impact on the

petitioner from the COD of unit-I and cause of action for filing of present arose on the date of COD of unit-I. Immediately after the COD, the petitioner has filed its petition for compensatory tariff specifically requesting the Commission establish a mechanism to offset the adverse impact on tariff. Moreover, the reading of prayers (a) and (b) makes clear that the prayer (a) was for past losses and prayer (b) was for future losses. The order of the Commission recognizing the hardship and its impact on the commercial viability of the project read with prayers (a) and (b), mechanism has to be devised for past and future losses. Therefore, as per the Committee recommendation, the petitioner is entitled to recover the full compensatory tariff for the hardship suffered by it from the COD of unit-I of the project.

(b) As regards the mechanism suggested by GUVNL regarding manner and mode of deciding the coal (the existing tariff has to be adjusted with the factor 42/32) was duly considered by the Committee as one of the options for arriving at the compensatory tariff. However, a committee on evaluation of all options did not accept the option suggested by Govt. of Gujarat and GUVNL since it would be at variance with the order dated 15.4.2013 and would not be a sustainable solution in the long run as the coal price escalation was not factored in. The Committee has set out the compensatory tariff based on the actual hardship based on the normative plant of operative parameters, prevailing coal prices and tariff quoted in the PPA.

(c) As regards the SHR and Auxiliary consumption, the Committee based on the report of technical consultant made its recommendations in Section 6 of the report. The parameters are most stringent than the parameters prescribed under the present CERC norms and with the recommendations period truing up, any additional burden on account of deviation in normative technical parameters would not be passed on the procurers and would be borne by the seller /generator.

(d) As regards the mining profit, it has been submitted that Tata Power owns 30% equity investment in Indonesian coal mining company; therefore its share on dividend/profit would be limited to 30% only. As such there is no rationale seeking adjustment 100% of the dividend/profit from the mining company on the coal purchase by the petitioner for Mundra UMPP.

(e) As regards the sharing of profit, the petitioner has submitted that for sale of power beyond 80% to the third party, the petitioner is agreeable to equal sharing of profit in accordance with the recommendation of the Committee for initial three years. However, in view of the differences, the petitioner may determine the mechanism/ratio and methodology in which profits are to be shared between the petitioner and the procurers for sale of power to third party beyond 80%.

(f) As regards submission regarding recommendations to be made by the Commission to the Govt. of India for reduction of the duties and taxes on

imported coal and to the lenders to reduction of rate of interest, the petitioner has submitted that the Commission may pass appropriate order in this regard in the light of the recommendations of the Committee.

(g) As regards submission for recommendations to the Govt. of India for the allocation of coal mine to the petitioner as the first option, the petitioner has submitted that due to shortage of domestic coal, plants which are based on domestic coal are importing coal outside of India to meet their commitments under their respective PPAs. Moreover usages of domestic coal are not commercial feasible due to high input cost.

(h) As regards the suggestion for curtailing the rate of return by the power producers, wavier/reduction of interest by the financial institutions and banks and reduction in the import duty and other taxes on coal by Govt. of India and reduction in port handling charges, the petitioner has submitted that the recommendations in this regard made by the Committee are acceptable to the petitioner.

(i) As regards the suggestion for transfer of investment in the coal mining companies to the power project companies and for adjustment of all return of coal mining business in the tariff, the petitioner has submitted that the generating company has never invested its money in the mine and has not right in the mine ownership and therefore, there is no direct link between UMPP and coal mines.

The petitioner has submitted that the recommendation of the Committee towards sharing of profit of coal mines are acceptable to the petitioner.

(j) As regards the suggestion that the compensatory tariff should be considered as cap in order to discover competitive tariff afresh with full transparency and equity, the petitioner has submitted that the option of inviting fresh bid has been considered by the Commission in its order dated 15.4.2013 and the same has been rejected as it would be deprive the consumer with power till the new power plant are operational. The committee has also stated in its report that inviting new bid at this stage and substituting the petitioner with a new winner will take a very long time and also the recent bid indicate that the generation cost of other bidder is higher that of the petitioner.

(k) As regards the suggestion regarding sacrifice of ROE by the generator, the petitioner has submitted that the financial analyst SBI CAP in its analysis has submitted that the petitioner is earning an ROE of 35 paisa per unit and the under recovery of fixed charges with ROE is around of 48 paisa per unit and without ROE is around 13 paisa per unit. The petitioner has submitted that no ROE has been earned by the promoter of the petitioner for the year 2013-14 and there is estimated under recovery of capacity charges of ₹0.13 paisa per kWh amounting to ₹346 crore.

(l) As regards the submission of PSPCL, the petitioner has submitted that most procurers submitted their affidavit placing on record their in-principal consent to the recommendations of the Committee with some suggested modifications. However, PSPCL having been a party to the consultative process cannot seek to question the fundamental of its obligation to pay the compensatory tariff to the petitioner. PSPCL has failed to recognize that if appropriate compensatory tariff is not provided, the petitioner will not be able to supply electricity to the consumers and PSPCL will force to buy power from other sources. The burden of the same will ultimately borne by the consumers.

(m) As regards the submission of Prayas for holding a public hearing, the petitioner has submitted that the Commission in its order dated 15.4.2013 has duly considered the submission of Prayas to represent the consumer of the country. Moreover, the Commission has while proposing compensatory tariff has kept the consumer interest in view. If the public process at this stage is adopted as sought by Prayas, it would result in further delay and spell dooms day for the petitioner.

(n) As regards the alternative approach suggested by Prayas with regard to the profit earned by Tata Power from mining Companies, the petitioner has submitted that the said approach has inherent shortcoming such as non consideration of the escalation as per CERC norm over the contracted price of fuel under the FSA, non consideration of the incremental fuel cost and non

consideration of dividend tax payment of Tata Power. If the above aspects (excluding incremental fuel cost) are taken into consideration, the impact per KWh will be approximately ₹0.0387 instead of 0.012 as suggested by Prayas.

(o) As regards the suggestion of Prayas regarding denial of incentive for sale of power beyond 85%, the petitioner has submitted that the some incentive should be provided to generator to supply more electricity and to bear additional O&M expenses.

(p) As regards the submission of Prayas regarding the blending of coal, the petitioner has submitted that the Committee has categorically stated that blending of higher GCV coal to lower coal, the proportion of 80:20 may be explore in future if the cost economic is favourable and the benefit to be pass on to the procurers.

(q) As regards the submission of Mr Pushendra Surana that the order dated 15.4.2013 is an interim order and the Commission at this stage can go into all issues as the interim order is subject to final order, the petitioner has submitted that order dated 15.4.2013 is conclusive with regard the issues adjudicated upon therein. It is of the nature of preliminary decree and it is settled law that preliminary decree are final and is challenged only in the appeal.

(r) As regards the submission of Shri Surana that no compensatory tariff can be given as there is no consensus between the parties, the petitioner has submitted that Shri Surana has misconstrued and misinterpreted that consultative process directed in the order dated 15.4.2013. The petitioner has submitted that the judgement of the APTEL in the Essar Power is not applicable in the facts of the present case.

(s) As regards the suggestion of Shri Surana regarding the public notice, the petitioner has submitted that the present petition has emanated from the dispute between the parties to the PPA. Therefore, the petition was filed under section 79 of the Act read with the Articles 12, 13 and 17 of the PPA and clauses 4.7 and 5.7 of the competitive bidding guidelines. Therefore, the present proceeding is not under section 62 of the Act which requires publication of notice under section 64 of the Act. Moreover the reading of the order dated 15.4.2013 made it crystal clear that compensatory package awarded to the petitioner is not a redetermination and renegotiation of the tariff but it is mere a compensation package over and above the tariff agreed in the PPA.

(t) As regards the submission of Shri Surana that the real impact of the Indonesian Regulation is limited to tax payable by the related entities of the petitioner, the petitioner has submitted that Tata Power has 30% equity in the Indonesian Coal mining companies and the petitioner does not have any equity in the mining companies. The petitioner and Tata Power are two separate legal

entities and cannot be clubbed together as single entity. The profit from the mining companies considered is only to reduce the compensatory tariff as per order 15.4.2013 and therefore, the profit of the mining companies must be considered into account in accordance with the direction of the Commission.

(u) As regards the submission of Shri Surana for considering the lower of the parameters which were taken into account by the lenders or the OEM guaranteed parameters.

(v) In response to the submission of Shri Padamjit Singh, the petitioner has submitted that Shri Singh participated in the proceedings of the Commission as the representative of PSPCL and no such objection was raised. Shri Singh does not have any locus to raise new issues after the hearing is over and order has been reserved in the petition.

Submissions during the hearing

34. We heard the petitioner, procurers, Prayas Energy Group and Shri Surana on 13.9.2013, 1.11.2013, and 13.11.2013 on the recommendations of the Committee on the said various aspects of the Compensatory Tariff. Records of Proceedings for those dates of hearing have been issued which are not repeated here for the sake of brevity. The petitioner, respondents, Prayas Energy Group and counsel for Surana have filed written submissions. The submissions of the parties have been discussed under each issue in the later part of this order.

Analysis and Decision

35. After perusal of the pleadings of the parties including the Prayas Energy Group and the applicant, the following issues arise for our consideration:

- (A) Preliminary issues;
- (B) Scope of the Compensatory Tariff ;
- (C) Date from which the Compensatory tariff should be granted;
- (D) Pricing of imported coal;
- (E) Change in Operational Parameters
 - Station Heat Rate,
 - Auxiliary Consumption,
 - Transit Loss,
- (G) Sharing of the profits of the mines in Indonesia;
- (H) Sharing of surplus from sale of power to third party above target availability;
- (I) Compensatory tariff from 1.4.2013 onwards;
- (J) Compensatory Tariff for the period from SCOD to 31.3.2013;
- (K) Procedure for payment of compensation;
- (L) Miscellaneous issues.

A. Preliminary issues

36. The following preliminary issues have emerged from the pleadings of the parties:

- a) Interim nature of the order dated 15.4.2013
- b) Re-determination/re-negotiation of tariff
- c) Non representation of the consumer in the Committee

d) Public hearing

(a) Interim nature of the order dated 15.4.2013

37. Learned counsel for Shri Surana (hereinafter the “applicant”) in his written submission has submitted that the order dated 15.4.2013 is an interim order and the Commission at this stage can go into all the issues as interim orders are subject to final order. The Commission at this stage can take a view contrary to the view taken in the order dated 15.4.2013. Learned senior counsel for the applicant adopted his arguments in Petition No.155/MP/2012 on this aspect according to which the order dated 15.4.2013 is an incorrect order and should be rectified at the stage of final order as otherwise, it would ruin the whole bidding process. Learned senior counsel for the petitioner has submitted that the order dated 15.4.2013 is conclusive with regard to the issues adjudicated upon therein. Learned counsel submitted that order dated 15.4.2013 has crystallized the rights of the petitioner for compensatory tariff by holding that the petitioner is needed to be compensated by providing a compensatory package to mitigate the hardship on account of Indonesian Regulations. Therefore, the present proceedings are limited to methodology/mechanism of compensatory tariff as per the order dated 15.4.2013 and the recommendations of the Committee. Learned senior counsel has submitted that issues which have already been decided by the order dated 15.4.2013 cannot be reagitated again. The applicant has neither challenged nor has filed review against the said order. Learned counsel relying on the judgments in *Ajai Mohan Vs H M Rai* {(2008) 2 SCC 507}, *C.V. Rajendran Vs.N.M. Muhammed Kunhi* {(2002) 7 SCC 447}, *Bhanu Kumar Jain Vs. Archana Kumar* {(2005) 1 SCC 787}, *Ishwar*

Dutt Vs. Collector(LA) {(2005) 7 SCC 190} has submitted that it is a settled law that *res judicata* applies to the different stages of same proceedings.

38. We have considered the submission of learned Senior Counsel for the applicant and learned counsel for the petitioner. As regards the submission of the learned senior counsel of the Applicant that the order dated 15.4.2013 is an interim order, we are of the view that the order has attained finality in so far as the issues which have been finally adjudicated in the said order. The Commission has recorded conclusive findings regarding the impact of the Indonesian Regulation on project viability of Mundra UMPP, non-admissibility of reliefs under the Force Majeure and Change in Law and the necessity to compensate the petitioner for the hardship suffered on account of the Indonesian Regulations in the form of compensatory tariff. Therefore, the conclusive findings on these issues will operate as *res judicata* at the subsequent stage of the proceeding. It is pertinent to mention that Haryana Utilities have filed an Appeal before the Appellate Tribunal for Electricity against the order dated 15.4.2013 which has been kept pending by the Hon'ble Tribunal at the request of the Appellant therein to enable it to participate in the deliberation in the Committee and subsequently, in the proceedings before this Commission. Therefore, this Commission has become *functus officio* in respect of the issues which have been finally adjudicated. Moreover, consideration of the said issues at a subsequent stage of the proceedings is hit by the principle of *res judicata* and issue estoppels. Hon'ble Supreme Court in the case of Hope Plantations Ltd Vs. Taluk Land Board Peermade & Anr {(1999) 5 SCC 590} has laid down the principle that *res judicata* operates in any subsequent proceedings in the same suit in

which the issue has been determined. The relevant portion of the judgment is extracted as under:

"It is settled law that principles of estoppels and res judicata are based on public policy and justice. Doctrine of res judicata is often treated as a branch of the law of estoppels though these two doctrines differ in some essential particulars, rule of res judicata prevents the parties to a judicial determination from litigating the same question over again even though the determination may even be demonstrated wrong. When the proceedings have attained finality, parties are bound by the judgment and are stopped from questioning it. They cannot litigate again on the same cause of action nor can they litigate any issue which was necessary for decision in the earlier litigation. These two aspects are 'cause of action estoppel' and 'issue estoppel'. These two terms are of common law origin. Again once an issue has been finally determined, parties cannot subsequently in the same suit advance arguments or adduce further evidence directed to showing that issue was wrongly determined. Their only remedy is to approach the higher forum if available. The determination of the issue between the parties gives rise to as noted above, an issue estoppel. It operates in any subsequent proceedings in the same suit in which the issue had been determined. It also operated in subsequent suits between the same parties in which the same issue arises. Section 11 of the Code of Civil Procedure contains provisions of res judicata but these are not exhaustive of the general doctrine of res judicata. Legal principles of estoppels and res judicata are equally applicable in proceedings before administrative authorities as they are based on public policy and justice."

39. The present proceedings have been taken up for consideration of the compensatory tariff consequent to the submission of the report by the Committee appointed by the Commission. Therefore, the scope of the proceedings in the petition at this stage are limited to the quantification of the compensatory tariff in accordance with our order dated 15.4.2013 after considering the recommendations of the Committee, the suggestions/objections of the petitioner and procurers and the interest of consumers. In our view, the conclusive findings in order dated 15.4.2013 on various issues cannot be re-agitated before the Commission at this stage of the proceedings. Therefore, the submission of the Applicant that the order dated 15.4.2013 is in the nature of an interim order and also the prayer to revisit the findings in the said order is rejected.

(b) Re-determination of Tariff

40. The applicant has submitted that by the order dated 15.4.2013, the Commission has not directed payment of compensatory tariff over the bid tariff but has merely directed the parties to set down to a consultative process to find out an acceptable solution in the form of compensatory tariff. The mandate was Committee to discover a compensation package agreeable to all parties. Since the respondents have certain reservations on the Committee report, it cannot be said that the recommendations of the committee on the compensatory package have been agreed by all the parties. Therefore, no compensatory tariff can be granted to the petitioner. The applicant has submitted that if this Commission directs the respondents to agree to the compensatory tariff decided by the Committee, then it would amount to re-negotiations/redetermination of tariff and interference with the Section 63 process. The role of this Commission in relation to Section 63 bidding process has been expressly circumscribed by the Statutes and regulatory power in relation to it should be construed accordingly. In this connection, the applicant has relied upon the judgment of Appellate Tribunal in Essar Power Ltd Vs. UPSERC-[2012 ELR (APTEL) 182]. The Prayas has submitted that the Committee decision is also not unanimous as one of the important requisites for the Committee process was that the solution it proposes should be acceptable to both procurers and the project developers. However, it is not clear whether the procurers, who were also part of the Committee, agreed with the Committee`s findings and/ or recommendations as they participated in the process based on specific caveats and have not signed the final report. Therefore, whether the Committee`s recommendations can be considered or relied upon by the Commission is itself questionable.

41. The petitioner has submitted that the Commission in para 45-85 of the order dated 15.4.2013 has ruled that the petitioner needs to be compensated for the intervening period with a compensation package over and above the tariff discovered through the competitive bidding. As regards the lack of consensus between the parties, the petitioner has submitted that the draft report was circulated by the Committee to all concerned after addressing and dealing with various issues and concerns raised by the procurers. The issues and concerns were deliberated and response of a Committee with regard to those concerns/issues are provided in para 5.3.2 of the report. Learned counsel for the petitioner submitted that out of 8 members of the Committee, three members were given their full acceptance to the committee report and four procurers given their conditional acceptance with the exception of Punjab which has rejected the report. Therefore, there is consensus of the members of the Committee on the said report. Learned counsel for the petitioner has submitted that purpose of the consultation was to give opportunity to the concerned parties before the recommendations are made by this Committee for its considerations and passing of the final order with regard to quantum of the compensation to be granted to the petitioner. Learned counsel has submitted that consultation is different from consentaneity. In this regard, he has relied upon the Hon`ble Supreme Court Judgment in Chandrashekaraiiah Vs. Janekere C. Krishna: [(2013) 3 SCC 117, (Para 115)].

42. We have considered the submissions of the parties. The petitioner has expressed its acceptance of the recommendations of the Committee. Four of the procurers, namely GUVNL, Haryana Utilities, Rajasthan Utilities and MSEDCL have

conveyed their in-principal acceptance to the recommendations of the committee with certain suggested modifications. Only PSPCL has not accepted the recommendations of the Committee and has submitted that tariff and other terms and conditions for supply of electricity by the petitioner should be governed strictly by the PPA entered into between the parties. Therefore, it needs to be considered whether non-acceptance of the recommendations of the Committee by one the procurers will render the entire consultative process a nullity. The Commission in para 86 of the order dated 15.4.2013 had directed as under:

"86....In our view, under the peculiarity of the facts of the present case and also keeping in view the interest of both project developer and consumers, we consider it appropriate to direct the parties to set down to a consultative process to find out an acceptable solution in the form of compensatory tariff over and above the tariff decided under the PPA to mitigate the hardship arising out of the need to import coal at benchmark price on account of Indonesian Regulations..."

The mandate of the Committee was to find out an "acceptable solution" in the form of compensatory tariff. The term "acceptable" has been defined in the Law Lexicon as "worthy or likely to be accepted". Therefore, the Commission expected from the Committee a solution for compensatory tariff which is worthy of being accepted and which is adequate to mitigate the hardship of the petitioner. The Commission did not direct the Committee to submit a consensual solution which required agreement of opinion on the part of all concerned parties. The recommendations of the Committee are also not binding on the Commission. The recommendations of the Committee are inputs to enable the Commission to take a decision on the issue of compensatory tariff. It flows from the direction of the Commission in para 87 of the order which provides that "the committee shall submit its report.....for consideration of the Commission and for further directions." For this reason, the Commission invited comments from the

petitioner and procurers and permitted the consumer group and the consumer applicant to make their submission on the issues dealt with in the Committee report. Therefore, difference among the parties or non-acceptance of the report of the Committee by one of the parties does not prevent the Commission to grant relief to the petitioner in the light of the directions in order dated 15.4.2013. This Commission has already taken a view that depending on the situation, the Commission can grant relief in exercise of its power to regulate even in cases where the tariff has been discovered through competitive bidding. In this connection, the observations of the Commission in para 82 of the order dated 15.4.2013 are relevant which are extracted as under:

"82.... The power to regulate tariff will also extend to the tariff determined through the competitive bidding. Therefore, if the situation so demands, the Commission can fashion a relief even in case of the tariff of the generating stations, which have been discovered through the competitive bidding, by providing for suitable adjustment in tariff while retaining the sanctity of competitive bidding under Section 63 of the Act."

PSPCL has participated in the meetings of the Committee and also in the proceedings before this Commission. Irrespective of the non-acceptance of the Committee report by PSPCL, the directions of the Commission in this order will be binding on PSPCL, as the purpose is to save the PPA from getting frustrated in the interest of the project developer, procurers and the consumers at large.

43. In the present case, tariff has been discovered through the competitive bidding and the tariff so discovered has been adopted by this Commission. The Commission has made it amply clear in the order dated 15.4.2013 that the sanctity of the bids and PPAs shall be maintained and there is no question of reopening the tariff. The Commission consciously decided to grant compensatory tariff for the hardship suffered by the

petitioner for import of coal at benchmark price on account of operation of Indonesian Regulations. Further, the Commission has categorically clarified that such compensatory tariff would have three characteristics i.e. variable in nature, commensurate with the hardship and admissible over and above the tariff agreed in the PPA. The moment the hardship is removed, the compensatory tariff will no more remain operative. In our view, the process of grant of compensatory tariff does not result in re-determination of tariff or re-negotiation of tariff.

(d) Non-representation of the Consumers in the Committee

44. Prayas has submitted that the composition of the Committee is defective since no person representing the consumers was nominated to the Committee. Prayas has submitted that the Committee was comprised of procurers, who have opposed the said tariff increase but can entirely pass through these costs to their consumers, and the project developer, who has direct commercial interest in revising tariffs over and above the PPA agreed terms and conditions. Presence of independent banker and financial analyst can hardly be considered as adequate representation of the interests of the consumers and public at large. Prayas has submitted that this shortcoming in the Committee composition has had significant impact on the way the Committee has perceived the problem and the range of solutions considered by it.

45. The petitioner has submitted that the composition of the Committee was made strictly in accordance with the directions of the Commission made in order dated 15.4.2013. The issue is already settled and Prayas cannot be re-agitate issue at this

belated stage. The petitioner has further submitted that Prayas cannot assume that independent expert will give recommendation without keeping consumer interest in mind.

46. We have considered the submissions of Prayas and the petitioner. It cannot be said that the procurers do not have any stake since the compensatory tariff will be pass through to the consumers. Perusal of the correspondence made by the procurers States to the Committee clearly shows the anxiety and concern of the procurers towards the interest of the consumers within their area of supply. The Committee has also repeatedly emphasized about the consumers interest in its report. It is also pertinent to mention that the Committee`s recommendations on compensatory tariff are subject to the acceptance of the Commission before the same is implemented. The Commission has held extensive hearing of the petitioner, procurers and consumers including Prayas who have been given opportunity to make their detailed submissions on various recommendations of the Committee. The Commission has been vested with the power to balance the interest of the project developer and the consumers while deciding the question of tariff. Therefore, the Commission has taken a balance and progressive view after considering the submissions of parties including Prayas and other consumer regarding the compensatory tariff. In our view, non-representation of a consumer representative in the Committee has not compromised in the interest of the consumers in so far the compensatory tariff decided by this order is concerned.

(d) Public Process

47. Prayas has submitted that there is a requirement of public process in a matter so peculiar and having such long term implications for tariff as well as sector policy and therefore, the Commission should have held a public hearing in the matter. The applicant has submitted that tariff re-determined under section 79 of the Act must be done in accordance with the procedure prescribed under section 64 of the Act. The applicant has further submitted that since the present petition has not been published for the benefit of the general public, any order impacting the tariff already accepted would be illegal. The order directing the payment of tariff over and above the tariff already determined amounts to re-determination of tariff and would attract the mandatory provisions of section 64 of the Act and Regulation 3 (6) and (7) of the CERC (Procedure for making of application for Determination of Tariff, publication of the application and other related matters) Regulations, 2004, which have not been followed. The applicant has submitted that in the present case, the public notice ought to be issued in terms of Section 64 (2) of the Act.

48. The petitioner has submitted that the present petition has emanated from the disputes between the parties to the PPA. Therefore, the petition was filed under section 79 of the Act read with Articles 12, 13 and 17 of the PPA and clause 4.7 and 5.17 of the competitive bidding guidelines. The present petition is not a proceeding under section 62 of the Act which requires publication of notice. Therefore, section 64 of the Act is not applicable to the present proceedings. Neither the competitive bidding guidelines nor the PPA provides for any public notice. The petitioner has further

submitted that in order to determine compensatory tariff, this Commission sought aid and assistance of the Committee and such power was exercised by the Commission under Sections 91 (4), 92 (3), 97 of the Act read with Regulations 74, 76, 77 and 110-113 of the CERC (Conduct of Business) Regulations, 1999. The petitioner has also submitted that as per Regulation 77, the report or information obtained in terms of Regulations 74 to 76 is considered for forming its opinion then the parties to the proceedings shall be given a reasonable opportunity for filing objections. No such opportunity is provided for to a third party. The applicant not being a party to the present petition is not entitled to be heard.

49. We have considered the submissions of Prayas, the applicant and the petitioner. The Commission in its order dated 15.4.2013 had clarified that the compensatory package awarded to the petitioner is not a re-determination or re-negotiation of tariff but is a mere compensation package over and above the tariff agreed in the PPA. The process of grant of compensatory tariff does not result in determination of tariff under section 62 of the Act. We are not in agreement with learned senior counsel and representative of the Prayas that the grant of compensatory tariff should be granted after issuing a public notice and holding a public hearing. The petitioner had approached the Commission for relief under the provisions of the PPA for which no provision exists for public notice and public hearing. The Commission's Conduct of Business Regulations permits any consumer to participate in the proceedings before the Commission. Prayas Energy Group and the applicant, Shri Puspendra Surana have participated in the proceedings in the present petition. In our view, adequate opportunity

was available to the interested parties to participate in the proceeding and in fact, some consumers including the applicant have participated in the proceeding and filed their submissions. We do not find any merit in the submission of the applicant that a public process needs to be followed in the present case before the compensatory tariff is granted.

(e) Other general issues

50. Prayas has submitted that the Commission should independently evaluate and establish the need for compensation and clearly define the principles to be adopted for arriving at any solution. Prayas has further submitted that the Commission should ensure full transparency and provide adequate opportunity to all stakeholders. Prayas has further submitted that the petitioner should return the generation assets at the end of the economically useful life of the generating station.

51. We have considered the submissions of Prayas. The Commission has heard the petitioner and the respondents at the first stage of the proceedings as the claims were confined to the reliefs claimed under the PPA. The Commission after considering the materials on record and the pleadings of the parties and the prevailing price of the imported coal and other related aspects had taken a view to grant compensatory tariff to the petitioner to mitigate the hardship arising out of Indonesian Regulations and directed for constitution of a Committee to recommend compensatory tariff after examining all actual data. A Committee was constituted with the representatives of the petitioner and respondents and two independent members and other experts with the agreement of

the parties. The report of the Committee was posted on the website of the Commission. Afterwards hearings have been held where the petitioner, respondents, Prayas and a consumer (the applicant) have participated. The Commission has considered all aspects of the matter with due diligence while deciding the compensatory tariff awarded through this order. In our view, the apprehension of Prayas has been taken care of. As regards the suggestion of Prayas for return of the generation assets at the end of the useful life, we are of the view that this aspect will be governed as per the terms and conditions of the PPA and is beyond the scope of the present proceedings which is confined to compensating the petitioner for the hardship suffered by it on account of Indonesian Regulations.

B. Scope of the Compensatory Tariff

52. Before we proceed to consider the recommendations of the Committee on Compensatory tariff and the submissions of the parties and consumer groups, it is necessary to discuss the scope of the directions of the Commission in order dated 15.4.2013. Scope of the order of the Commission can be gathered from paras 45, 47, 70, 87,88, 89 and 90 of the order which are extracted as under:

"45. From the above analysis, we have come to the conclusion that the promulgation of Indonesian Regulations which required the sale price of coal in Indonesia to be aligned with the international benchmark price has, prima facie, altered the premise on which the energy charges were quoted by the petitioner in its bid.....Though the petitioner had quoted non-escalable energy charges to keep the bid price low, it was however factored on the basis of the then prevailing coal price for import from Indonesia....."

"47.However, promulgation of the Indonesian Regulations requiring the existing agreements to align with the International benchmark price has created problems regarding project viability of the Mundra UMPP to supply power at the rates agreed to between the parties in the PPA. Therefore, there is an imminent need to find out a practical and acceptable solution to the problem for ensuring supply of power to the consumers at competitive price while seeking to ensure sustainability of the electricity sector."

"70..... In our view, while it is expected that the parties to the PPA would factor all possible contingencies including price escalation, there are certain events which are beyond the contemplation of the parties and if the impact of such events are not taken into account, it would make the PPA unworkable and the project commercially unviable. If the price escalation is on account of some event which was beyond the contemplation of the parties, then the impact of price escalation needs to be duly considered and addressed in order to save the PPA from being frustrated....."

"71.... Therefore, in our view, ways and means need to be found to compensate the petitioner for the loss or additional expenditure incurred by it on account of procurement of coal from Indonesia at the international benchmark price as it was never in the contemplation of the petitioner and even the respondents that purchase price of coal from Indonesia will increase manifold on account of promulgation of Indonesian Regulations."

"85.Therefore, the petitioner needs to be compensated for the intervening period with a compensation package over and above the tariff discovered through the competitive bidding. The compensation package could be variable in nature commensurate with the hardship that the petitioner is suffering on account of the unforeseen events leading to increase in international coal price affecting the import of coal. As and when the hardship is removed or lessened, the compensatory tariff should be revised or withdrawn. In our view, this is the most pragmatic way to make the PPA workable while ensuring supply of power to the consumers at competitive rates."

"86.....The petitioner had quoted the bids on certain assumptions and those assumptions have been negated on account of the unexpected rise in coal price in international market coupled with the promulgation of Indonesian Regulations, required all long term contracts to be adjusted to the international benchmark price. In our view, under the peculiarity of the facts of the present case and also keeping in view the interest of both project developer and consumers, we consider it appropriate to direct the parties to set down to a consultative process to find out an acceptable solution in the form of compensatory tariff over and above the tariff decided under the PPA to mitigate the hardship arising out of the need to import coal at benchmark price on account of Indonesian Regulations....."

From the above directions of the Commission in the order dated 15.4.2013, it emerges that on account of promulgation of Indonesian Regulations which aligned the price of coal with international benchmark price and wiped out the discounts enjoyed by the petitioner in its concluded FSAs, the petitioner faced hardship to supply power to the respondents at the price agreed in the PPAs. Therefore, change in the price of imported coal as a result of Indonesian Regulations are the primary reasons for the petitioner to approach the Commission for relief under the PPAs and for devising a mechanism to

address the situation arising out of Indonesian Regulations. In other words, the hardship resulting in under recovery of fuel charges on account of Indonesian Regulations is the main scope of the order dated 15.4.2013 for which compensatory tariff was contemplated. Since the scope of the compensatory tariff was limited to the impact of the Indonesian Regulations, the Commission decided to grant the same over and above the tariff agreed in the PPAs and limited to the period of hardship arising out of Indonesian Regulations. The Commission strongly emphasized that the sanctity of the PPAs should be maintained and disapproved renegotiation of tariff as discovered through the competitive bidding. In other words, the terms of reference for the Committee were to make its recommendations regarding compensatory tariff after assessing the impact of the Indonesian Regulations without disturbing the bid parameters and terms and conditions of the PPAs. The Commission also directed the Committee to suggest further measures which would be practicable and commercially sensible to address the situation arising out of Indonesian Regulations. Therefore, it is crystal clear that the mandate given to the Committee through the order dated 15.4.2013 is for devising a compensatory package for **mitigating the hardship on account of alignment of the price of imported coal to the benchmark price consequent to the operation of Indonesian Regulations.**

(C) Date from which the Compensatory tariff should be granted

53. The Committee in Para 4.11 of the report has stated that as per the Commission's order, the compensatory tariff would be admissible to the limited period till the hardship persists and since the hardship commenced from COD of the respective

units, it was agreed during the Committee proceeding to quantify the past fuel energy losses of the CGPL since the date of commissioning of Unit 1. Accordingly, the Committee has arrived at ₹329.45 Crore for the year 2012-13 as under recovery of fuel energy charges. However, the Committee has left it to the Commission to take an appropriate decision on the payment of the Compensation for the FY 2012-13 as the order dated 15.4.2013 does not provide clear guidance to that effect. The procurers have submitted that the compensatory package is payable from date of final order of the Commission. The petitioner has submitted that in prayer (a), the petitioner has specifically asked for a mechanism to offset adverse impact due to the promulgation of Indonesian Regulations and the unprecedented increase in the price of coal and therefore, the claim of the petitioner for past losses is covered under prayer (a). The petitioner has further submitted that as per the Indonesian Regulations, all long term contracts for supply of coal from Indonesia were required to be amended to align with the Indonesian Regulations by 23.9.2011. Therefore, the impact of price of coal by way of cash losses was reflected in the audited financial statement from the COD of Unit 1 i.e. 7.3.2012 and the cause of action in favor of the petitioner arose from that date. Moreover the order of the Commission provided that the compensatory tariff payable to the petitioner would only be admissible for a limited period till the hardship persists. Since the hardship commenced from the COD of Unit 1, the compensatory tariff from that date. The petitioner has submitted that it is a settled position of law that the compensation is payable from the date of cause of action and not from the date of the order of court and relied upon the following judgments:

- (i) N. Narasimhaiah & Ors Vs State of Karnataka & Ors [(1996)3SCC 88],
- (ii) Assistant Collector of Customs Vs. Associated Forest Products Ltd. [(2000) 9 SCC 258];
- (iii) Shriram Fertilizers and Chemicals Vs Union of India [IV (2005) BC 287] ;
- (iv) DCM Shriram Consolidated Ltd. Vs Union of India [II (2005) ACC 371].

54. We have considered the submissions of the petitioner and respondents. The question for consideration is when did the cause of action for compensatory tariff arise? The sequence of events reveals that the Indonesian Regulations were promulgated on 24.9.2010 and was to come into effect from 24.9.2011. The parent company of the petitioner, Tata Power, made the representation on 12.12.2011 to the various authorities and joint monitoring committee comprising the representation of the procurers, Government of Gujarat, Government of Maharashtra and other procurers, emphasizing the gravity of the issue of rise in price of coal due to Indonesian Regulations. On 6.2.2012, the petitioner also raised the issue of change in price of coal due to Indonesian Regulations in the 11th meeting of JMC comprising the representation of all the procurers, It has been minuted in the 11th meeting of JMC that the procurers sought details from the petitioner regarding the impact of Indonesian Regulations which the petitioner furnished by its letter dated 6.3.2012. The first unit of the generating station came into operation 7.3.2012. It is therefore, crystal clear that the petitioner had put the procurer on notice prior to the date of commercial operation of 1st Unit of the generating station regarding the impact of Indonesian Regulations on the fuel energy charges of the generating station. The petitioner has also made efforts to approach the Indonesian Government vide its letter dated 6.2.2012 requesting to

exempt the existing coal supply contracts from the purview of Indonesian Regulations which did not yield any results. Indocoal Resources (Cayman) who supplied coal to the petitioner under the Coal Supply Agreement issued a notice to the petitioner on 9.3.2012 calling upon to align the original CSA with the Indonesian Regulations. The petitioner amended the Coal Supply Agreements on 23.5.2012 and 22.6.2012 to align them with the Indonesian Regulations. Thereafter, the petitioner approaches this Commission on 12.7.2012.

55. In our view, the procurers were put on notice and were aware of the hardship faced by the petitioner on account of the impact of Indonesian Regulations before SCOD of the generating station. The Committee in its report has recognized that hardship commenced from COD of the respective units of Mundra UMPP. In our view, the cause of action arose when the petitioner was affected by the impact of Indonesian Regulations which was also in the knowledge of the procurers. Moreover, since the procurers have been benefited through supply of power generated by the petitioner by using the imported coal from Indonesia at the benchmark price on account of the Indonesian Regulations which we have held as hardship in our order dated 15.4.2013, we are of the view that the petitioner should be allowed compensation from the date of SCOD of the respective units. The Committee has computed the lumpsum compensation of ₹329.45 crore from the SCOD under the PPA till 31.3.2013. The Commission agrees to grant the compensatory tariff from the SCOD of respective unit subject to such modification as has been decided in the later part of this order.

(C) Price of imported Coal

56. The Committee has discussed the underlying technical assumptions and market assumptions which might have been factored while bidding and try to establish the prudence of these assumptions. The Committee has stated that CGPL had assumed configuration of 5x800 MW while bidding of the Mundra UMPP. The Committee attempted to establish the base price of imported coal assumed in the bid as under:

Particulars	Unit	Normative parameters	Actual for FY 2013	CERC norm
GCV of coal	kcal/kg	5350	4593	-
Station Heat Rate	kcal/kwh	2050	2124	2136
Allowable Variation in Heat Rate	%	6.50%	-	6.50%
Aux consumption	%	7.75%	8.24%	8.5%
Coal transit losses	%	0.8%	0.73%	0.8%

The Committee has considered the normative parameters of station heat rate and auxiliary consumption suggested by technical consultant, CERC norm for coal transit losses and allowable variations in SHR for calculation of compensatory tariff. Using the said technical assumptions and the quoted fuel energy tariff components, the Committee has attempted to establish the base price of imported coal assumed in the bid:

Parameter		Unit	Value
Fuel Energy Tariff Components			
QNEFEC – Year 1 (55%)	(1)	USD/kWh	0.00705
QEFEC – Year 1 (45%)	(2)	USD/kWh	0.00585
Total	(3)=(1)+(2)	USD/kWh	0.01290
Normative Parameters			
Station Heat Rate	(4)	Kcal/kWh	2050
Average GCV of coal	(5)	Kcal/kg	5350
Aux consumption	(6)		7.75%

Transit losses	(7)		0.8%
Bid Coal Price estimation			
Specific coal consumption	$(8) = (4)/(5)/(1-(6))/(1-(7))$	Kg/kWh	0.4187
Coal price at Landing port	$(9)=(3)/(8) \times 1000$	USD/ton	30.81
Effective import duty as per bid documents	(10)		6.33%
FOB Coal price assumed in bid	$(11) = (9)/(1+(10))$	USD/ton	28.97

Based on the above calculations, the Committee has arrived at FOB price of USD 28.97 per MT as bid assumption and has compared the same with the then prevailing market price of imported coal to establish whether the discount was really available against the market price. The market price of coal in December 2006 by using the Commission composite index method, was worked out by the Committee as USD 49.79/MT for GCV of 6322 Kcal/Kg and after making adjustment for GCV 5350 Kcal/Kg, the Committee arrived at market price of USD 42.13/MT. Thereafter, the Committee has established that CGPL had a discount of approximately USD 13/MT of coal at the time of bidding. The Committee has validated this assumption on the basis of the Coal Supply Agreement between Tata Power and PT Adarro and the Information Memorandum of October, 2006 prepared by Credit Suisse for PT Bumi Resources and KPC, Arutmin and Indocoal as per which the estimated selling price of Melawan coal of 5400 Kcal/Kg at USD 30.4/MT for financial year 2006. The Committee has established that the prevailing selling price of imported coal of 5350 Kcal/kg at the time of bidding was approximately USD 30/MT and there was a practice of contracting coal at a discount to the GCV adjusted market price. The Committee has stated that considering the possibility of additional volume discount on account of the huge volume requirement of

approximately 11 MMT for the project, the derived market price assumption of USD 28.97/MT appears reasonable. The Committee has concluded that since the Indonesian Regulations has the effect of aligning the existing Coal Supply Agreements with a notified prices, the Indonesian Regulations has eliminated the discount of 30% over the market price assumed by CGPL at the time of bid.

57. Based on the above, the Committee has calculated and recommended Option (IV) under which the actual hardship have been considered based on the normative plant parameters, prevailing coal prices and the tariff quoted in the PPA. The compensatory package has been worked out by the Committee under this option as under:

$\text{Gross Compensatory Tariff (GCT)} = \text{Normative Fuel Energy Charges} - \text{Tariff recovered from fuel energy components of PPA.}$

58. The procurers have submitted that the Compensatory tariff should be worked out in increase in Indonesian coal price over the price which was prevalent at the time of bidding. The respondents have explained that the market price at the relevant point of time was 42 USD whereas the petitioner has quoted USD 32 per MT and therefore, the existing tariff should be adjusted with the factor 42/32 and thereafter the Compensatory tariff should be worked out. In response, the petitioner has submitted that the suggestion of the procurers is not in accordance with the principle laid down in the order dated 15.4.2013 and fixing a ceiling on price of coal to restrict the amount of Compensatory tariff payable to the petitioner will defeat the purpose of mitigation of

hardship arising out of Indonesian Regulations. The petitioner has submitted that the Committee while suggesting Option (IV) has clearly stated that the said option addresses the hardship both on account of Indonesian Regulations and escalation in coal prices and does not involve any change in the existing tariff component or escalation indices.

59. The Prayas Energy Group has submitted four different alternative to consider the imported coal price as under:

Particular	Unit	Scenario(I)	Scenario (II)	Scenario (III)	Scenario (IV)
Imported coal price	\$/Ton	30.11	44.50	63.78	67.82
Station Heat Rate	KCal/Unit	2050	2050	2050	2050
Gross Calorific Value	KCal/Kg	5350	5350	5350	5350
Auxiliary Consumption	%	7.75%	7.75%	7.75%	7.75%
Transportation of coal	%	0.80%	0.80%	0.80%	0.80%
Coal requirement (Unit 1)	Kg/Unit	0.416	0.416	0.416	0.416
International coal price	₹ /Kg	1.798	2.657	3.808	4.049
Fuel cost incurred per Unit	₹ /Unit	0.748	1.106	1.585	1.685
Fuel cost as per PPA –(B)	₹ /Unit	1.1080	1.1080	1.1080	1.1080
Net profit/loss per unit (C)	₹ /Unit	0.36	0	-0.48	-0.58

Prayas has submitted that only FOB price of Indonesian coal has changed and not the import duty which has been 6.33%. Prayas has suggested that it would be appropriate to calculate the impact of only increase in FOB price beyond the point at which the bidder is revenue neutral. Based on the above table, Prayas has submitted that the project is revenue neutral till FOB price USD 44.50/MT and therefore, the only incremental price over and above this threshold should be considered for calculating impact of Indonesian Regulations on this project. Prayas has calculated the impact under Scenario II as under:

Particular	Unit	Amount
Total coal requirement for running project at normative availability of 80%	MillionTon	11.08
Incremental rise in price of fuel, due to change in FOB price of coal (63.78-44.50)	\$/ton	19.28
Accounting for import duty (6.33%) on the incremental price	\$/ton	20.50
Increased expense on fuel cost	Rs. crore	1356
Impact on fuel charge using this alternate approach	₹ /Unit	0.51
Impact calculated by Committee	₹ /Unit	0.59
Difference in compensation per year	₹Cr/Year	213

Prayas has submitted that adopting the above approach for calculating the impact on fuel cost, the need for compensation would be reduced by ₹213 crore every year.

60. In response to the Prayas submission, the petitioner has submitted that Prayas has wrongly considered the 0.416 Kg of coal instead of 0.4187 kg of coal for generating one unit of electricity. The petitioner has further submitted that Prayas has failed to consider that the fuel cost and the tariff in the PPA is inclusive of bid taxes and duties @ 6.33% p.a. and the fuel cost computed by Prayas is based on the FOB price of the imported coal which is exclusive of taxes and duties. The petitioner has further submitted that under scenario (II) with FOB price of USD 44.50/MT, the net profit/loss (Compensatory tariff) will not be NIL but it will be NIL at the FOB price of USD 41.68/MT. The petitioner has submitted that if this correction is made in table, the additional benefit of ₹213 crore will be NIL and the impact will be as per the Committee report.

61. We have considered the submissions of the petitioner, procurers and Prayas. In order to examine the issue of determination of price of imported coal for the purpose of Compensatory tariff, the Commission had directed the petitioner vide letter dated 6.9.2013 to submit the basis of energy charges quoted by the petitioner and the escalation considered for the bidding. The petitioner has filed the bid assumptions for the entire period of the PPA vide affidavit dated 11.10.2013. We have carried out a detailed analysis of the Committee report, bid basis and other data submitted by the petitioner and the objections and suggestions of procurers and Prayas.

62. It is noticed from the bid basis data that the FOB price of coal assumed by the petitioner at the time of bid is USD 32.24/MT which is the discounted price due to ownership of mine by the petitioner in Indonesia. This price has been factored in the bid by the petitioner to work out the fuel energy charges. If the FOB price at that point of time as suggested by the procurers and Prayas is considered, then this will result in under recovery of fuel energy charges by the petitioner, since the Indonesian Regulations has wiped out discount rate enjoyed by the petitioner. This has also been recognized in para 45 of the order dated 15.4.2013 in which the Commission has observed that "the competitive advantage of hedging in coal prices that the petitioner was enjoying by acquiring mining rights in Indonesia or by entering into long term contract with the coal suppliers in Indonesia appears to have been fundamentally altered/wiped out, after the coal sales are required to be aligned with international benchmark prices of coal". Therefore, in our view, the fuel energy charges should be considered corresponding to the difference between prevailing fuel price of 5350

Kcal/kg and discounted price of USD 32.24/MT after accounting for the escalation against the escalable component of the fuel energy charges. Since the import duty on imported coal is charged on the FOB price of coal, any increase in the FOB price of coal on account of Indonesian Regulations will have a consequential impact on import duty payable by the petitioner.

(E) Change in Operational Parameters

63. The change in operational parameters includes Station Heat Rate, Auxiliary Consumption and Transit Loss. The Committee in para 4.2 and para 7.3 of the Report has dealt with the technical assumptions considered for working out the Compensatory tariff. The Committee has noted that CGPL had assumed a configuration of 5X800 MW while bidding for the Mundra UMPP. The Committee has compared the normative operating parameters given the technical consultant in its report dated 31.7.2013, the actuals for the financial year 2013-14 and the norms as per the Tariff Regulations for the period 2009-14 as under:-

	Normative Parameters	Actual for FY 2013	CERC Norm
GCV of Coal kcal/kg	5350	4593	----
SHR kcal/kwh	2050	2124	2136
Allowable variation in Heat Rate %	6.50%	----	6.50%
Aux Consumption %	7.75%	8.24%	8.5%
Coal Transit Loss %	0.8%	0.73	0.8%

64. The Committee had sought explanation from CGPL regarding the auxiliary power consumption at the time of bid (4.75%) and the normative considered by the technical consultant. CGPL had informed the Committee that design was changed from Steam Driven Boiler Feed Pumps assumed at the time of bid to Motor Driven Boiler Feed

Pumps which has resulted in higher auxiliary consumption. CGPL has however, explained that the change in the design allowed it to use coal of lower GCV in an efficient and sustainable manner thereby resulting in the lower cost of generation. CGPL had also increased the gross generation capacity of plant from 4000 MW to 4150 MW in order to account for the additional auxiliary consumption due to use of Motor Driven Boiler Feed Pumps while maintaining the net generation capacity at the contracted level of 3800 MW. In Para 7.3 (Annexure 3 of the Report), the Committee has given the explanation for difference in the auxiliary consumption as under:-

"7.3 Annexure-III: Explanation for difference in Auxiliary Consumption

CGPL had considered steam driven BFP while bidding due to which they had taken the following assumptions as stated in their petition.

Assumption	Value	Remark
Gross Capacity	4000 MW	Configuration of 5x800 MW
Auxiliary Power Consumption	4.75%	190 MW
Net contracted Capacity	3800 MW	

Post bidding and once the detailed design and engineering was finalised, it was decided to use MDBFP (Motor Driven Boiler Feed Pump) instead of SDBFP (Steam Driven Boiler Feed Pump). However in order to maintain the same net contracted capacity, CGPL adopted the following configuration:

Assumption	Value	Remark
Gross Capacity	4150 MW	Configuration of 5x830 MW
Auxiliary Power Consumption	8.43%	350 MW
Net contracted Capacity	3800 MW	

The cost of generation using lower CV coal seem to be lower(without considering additional capex requirements) as compared to using design coal with respective efficiency parameters for steam driven BFPs despite higher auxiliary power required for the MDBFP. Also it is seen that proposed norms are competitive than the CERC norms.

Particulars	Bid Design	Proposed	CERC Norms
CV of Coal(Kcal/Kg)	5700	5350	5700
SHR(Kcal/Kwh)	1992	2050	2136

APC(%)	4.75	7.75	8.50
FOB cost USD/t	73.85	63.78	73.85
Cost(USD/Kwh)	0.0271	0.0265	0.0302
Exchange Rate	59.7	59.7	59.7
Cost(₹ /Kwh)	1.62	1.58	1.81

The choice of technology is evaluated based on overall competitiveness. CERC also provides both options to the developers and norms are stipulated for options of motor driven BFP and steam driven BFPs.

65. The procurers have submitted that the Commission may decide the base on actual SHR and Auxiliary Consumption as per guaranteed parameters with ceiling of CERC norms. The procurers have submitted that pursuant to the change in the design from Steam Driven Boiler Feed Pumps (as assumed at the time of bid) to Motor Driven Boiler Feed Pumps, the auxiliary consumption will increase but simultaneously the Station Heat Rate has to be reduced, resultantly the net SHR more or less remains the same or nullifies the change. However, the Committee has considered the SHR of 2050 Kcal/kWh which was considered by the petitioner at the time of bid submission with Steam Driven Boiler Feed Pumps while increasing the Auxiliary Consumption from 4.7% to 7.75%. As regards the Station Heat Rate, the procurers have submitted that the Committee ought to have considered the Gross SHR of 1991.48 Kcal/kWh and Guaranteed Turbine Cycle Heat Rate of 1777 Kcal/kWh, Guaranteed Boiler Efficiency of 89.23% and the Auxiliary Consumption of 4.75% and net SHR of 2090.795 Kcal/kWh. The petitioner has submitted that even though there is change in the Auxiliary Consumption, there is no change in the contracted capacity offered to the procurers under the PPA. The petitioner has submitted that the Technical Consultant after

carrying out necessary studies made recommendations on the normative parameters like allowable SHR @2050 Kcal/kWh with allowable heat rate of 2183 Kcal/kg and Auxiliary Consumption of 7.75% for the design coal (5350 Kcal/kg) which are more stringent than the CERC norms and with the periodic truing up, any additional burden on account of deviation in recommended technical parameters will not be passed on to the procurers and will have to be borne by the petitioner. The petitioner has submitted that the Committee after consideration of the submission made by the parties and the analysis of the Technical Consultant has rightly concluded that despite the higher auxiliary consumption for Motor Driven Boiler Feed Pump, the net generation cost is still lower as compared to the design coal resulting in lower Compensatory tariff.

66. We have considered the submissions of the parties. The Committee in para 7.3 Annexure-III has explained that net contracted capacity of 3800 MW gets maintained even if installed capacity of 4150 MW is considered with higher auxiliary consumption of 8.43%. However, the Committee in para 4.2 of the report (as extracted in para 65 above) has indicated the actual auxiliary consumption of 8.24% for FY 2013. As per the affidavit dated 14.10.2013, the petitioner has provided the auxiliary consumption based on installed auxiliaries list and used as normative number is 7.75%. Thus, there is considerable difference in the three numbers shown by the Committee, though the Committee has considered 7.75% in its computation. The difference between the maximum and minimum number is 0.68% (8.43% - 7.75%) which translates to 28 MW of capacity for additional generation. It is also noticed that the variation from bid parameters to normative parameters has an impact on Compensatory tariff computation

qua the tonnage of coal required for same contracted capacity. Since, the tariff quoted by the petitioner in the bid is dependent on the bid assumptions, we are of the view that parameters assumed in the bid should be considered for working out Compensatory tariff. The Technical Parameters submitted by the petitioner as bid assumption and the normative parameters adopted and recommended by the Committee are depicted in table below:

Normative parameters as per committee	Bid parameters as per affidavit 14.10.2013
1.GCV of Coal-5350 kcal/kg. 2. SHR- 2050 kcal/kwh. (allowable variation in HR- 6.5%). This implies that Heat rate considering 6.5% variation can go up to 2183.25 kcal/kwh. 3. Aux Consumption -7.75% 4. Coal Transit losses- 0.8% 5. Installed Capacity - 4150 MW	1. GCV of Coal-5350 kcal/kg. 2. SHR- 2050 kcal/kwh. (variation in HR- factored in bid itself). (2050 kcal/kwh for first ten years, 2062.3 kcal/kwh in 11th year and 2070.5 kcal/kwh from 12th to 20th year, 2082.92 kcal/kwh from 21st year onwards. 3. Aux Consumption-4.75% 4. Coal Transit losses- 0.2% (inferred based on bid mapping). 5. Installed Capacity - 4000 MW

67. It is also noticed from the petitioner's submissions dated 14.10.2013 that Guaranteed Turbine Cycle heat rate as furnished (along with Heat Balance Diagram) is 1777 kcal/kWh and Boiler efficiency at 100% TMCR is 89.23%. Further, it is noted that Performance Guarantee Test has not been conducted and as such the petitioner is not having the data which could be furnished as per Performance Guarantee Test result for perusal. It is also noted that the boiler is designed to use coal of GCV ranging from 4900 kcal/kWh (worst) to 5700 kcal/kWh (typical). The Heat Rate based on Guaranteed

Turbine Cycle heat rate of 1777 kcal/kWh and Boiler efficiency of 89.23% at 100% TMCR would work out to 1991.483 kcal/kWh.(1777/89.23%). In accordance with the tariff regulations for the period 2009-14, the allowable variation in heat rate is 6.5% which has been relied in the report dated 31.7.2013 by the Technical Consultant. If the variation of 6.5% is considered, maximum permissible Heat Rate in terms of the Commission's tariff regulations would work out to 2183.25 kcal/kWh. It is also seen from bid basis data submitted vide affidavit dated 14.10.2013 that the petitioner while bidding has considered Heat Rate Value of 2050 kcal/kWh for first ten years, 2062.3 kcal/kWh in 11th year and 2070.5 kcal/kWh from 12th to 20th year, and 2082.92kcal/kWh from 21st year onwards. This implies that the petitioner has factored degradation/variations in its bid from the guaranteed design value of Heat Rate, albeit at lesser margin of 2.9% to 4.59% and not to the extent of this 6.5% as per this regulations of this Commission. Since degradation has been factored in the bid assumptions and backward working approach has been adopted, no variation in heat rate should become allowable for working out the compensatory tariff and bid value of heat rate of the relevant year has been used for working out the Compensatory tariff.

68. The contracted capacity of Mundra UMPP is 3800 MW which remains same as considered in the bid as well as in the Committee's report. Bidding documents for the generating station contained a provision which permitted bidder(s) to have variation in the installed capacity, while retaining the contracted capacity specified (here 3800 MW). Within the framework of the decision of Commission's order dated 15.4.2013, the installed capacity of the generating station coupled with other technical parameters

(station heat rate, auxiliary consumption and transit loss) will have following implications on the quantum of coal required for generation of electricity for the contracted capacity:

S. No.	Description	As per Committee (A)	As per Bid (B)	Difference (A-B)		
1	Installed Capacity (MW)	4150	4000	150	MW	
2	Contracted Capacity (MW)	3800	3800			
3	Ratio (2/1)	91.57%	95.00%			
4	Difference in ratio (B3-A3)		3.43%			
5	Inference of above difference	Bidder would be benefitted by way of additional generation to the extent of the difference in ratio or would be comfortable to meet its commitment even if outages to the extent of the difference in ratio depicted above.				
6	Aux Consumption		7.75%	4.75%	3.00%	
7	Generation @ 80% wrt installed capacity in MUs		29083.2	28032	1051.2	MUs
8	Corresponding Aux. consumption MUs for above generation (6 x 7)		2253.948	1331.52	922.43	MUs
9	Ex bus generation at 80% wrt installed capacity (7-8)		26829.25	26700.48	128.77	MUs
10	Generation @ 80% wrt contracted capacity in MUs		26630.4	26630.4		
11	Corresponding Aux. consumption MUs for above generation (6 x 10)		2063.856	1264.944		
12	Ex bus generation at 80% wrt contracted capacity (10-11)		24566.54	25365.456		
13	Coal GCV Kcal/kg		5350	5350		
14	SHR Kcal/kwh		2050	2050		
15	specific coal consumption kg/kwh wrt 12		0.3832	0.3832		
16	Coal transit loss %		0.80%	0.80%		

17	effect of 16 on 15	0.3863	0.3863			
18	Coal transit loss %	0.20%	0.20%			
19	effect of 18 on 15	0.3839	0.3839			
20	Tonnage of Coal in MMT required for getting exbus generation stated at 12 with transit loss stated at 16 as considered by committee in illustration shown above	11.15	10.80	0.3512	MMT	
21	Tonnage of Coal in MMT required for getting exbus generation stated at 12 with transit loss stated at 18 as shown by committee in its report on page 36 first table in para 4.9	11.08	10.73	0.3491	MMT	0.4161

69. In the light of our directions to compensate the petitioner for the hardship on account of escalation in the imported coal price on account of Indonesian Regulations, we are of the view that the variations in technical parameters including the variation of 6.5% for station heat rate should not be considered in the computation of Compensatory tariff. Moreover, if the variation in heat rate @6.5% is considered at the time of truing up of the compensatory tariff, this will affect the merit order dispatch and may result in situation for possible disagreement between the petitioner and the procurers. Keeping these factors in view, the Commission has worked out the implication of the technical parameters as discussed above for computation of Compensatory tariff as under:-

1	Units sold	mil kwh	26630.39
2	Fuel Charges as per tariff (FOB only)		
2a	QNEFEC	us\$/kwh	0.00707
2b	QEFEC	us\$/kwh	0.00585
3	CERC escalation index		196.41
4	QEFEC (2b) after indexation	us\$/kwh	0.01149
5	Fuel Energy tariff component (2a+4)	us\$/kwh	0.01856
6	Fuel charges recovered (1*5)	mil us\$	494.26

7	FOB cost of imported coal	us\$/ton	63.78
8	effective import duty		6.33%
9	FOB cost of imported coal-adjusted for duties	us\$/ton	67.82
10	Qty of imported coal for stated generation	mil ton	10.73
11	cost of imported coal tonnage as above (9*10)	mil us\$	727.98
12	gross compensation (11-6)	mil us\$	233.73
13	gross compensation per unit (12/1)	us\$/kwh	0.0088
14	Exchange rate	59.7	
15	gross compensation per unit in INR		0.5240

It is clarified that all number(s) used by the Committee have been used in the table above are for the purpose of comparison only and the Commission has not gone into the veracity of the said information except for the change in the quantum of coal which is primarily changing because of change of technical parameter(s) of installed capacity, auxiliary consumption and transportation loss from normative to bid values.

(F) Sharing of Mining Profit:

70. The Commission in para 86 of the order had directed that the Committee while recommending the Compensatory tariff may consider "the net profit less government taxes and cess etc. earned by the petitioner's company from the coal mines in Indonesia on account of the bench mark price due to Indonesian Regulations corresponding to the quantity of the coal being supplied to the Mundra UMPP should be factored in full to pass on the same to the beneficiaries in the Compensatory tariff". The Committee in para 5.1 of the report has stated that Tata Power which is the holding company of CGPL has 30% stake in the Indonesian mining companies, PT Kaltim Prima coal (KPC) and PT Arutmin, from which the coal for Mundra UMPP project is sourced. The Committee after deliberations arrived at the following formula for

adjustment of compensatory from Tata Power's share of profit from the Indonesian mining companies:

"Adjustment to compensatory tariff = [Dividend declared from Tata Power Share of PAT from Indonesian mines X (1 – Taxes)] + [(Tata Power share of PAT from Indonesian mines – Dividend declared)]

Where,

- ✚ Tata Power Share of PAT from the Indonesian mines + Net PAT Reported in Audited Financial Statements x (Revenue earned from coal sale to CGPL) / Total Revenue reported in Audited Financial Statements x Shareholding of Tata Power in the Mining companies
- ✚ Taxes as on date includes all taxes post declaration of dividend at Indonesia which currently includes withholding tax in Indonesia, Mauritius and dividend tax rate in India at Tata Power Level."

The Committee has recommended that the revenue earned by the mines from coal sale to CGPL shall be arrived at by an independent auditor appointed by offtakers and the net profit of KPC and Arutmin so calculated every year will be adjusted to the Gross Compensatory Tariff during the annual true-up operations.

71. The Committee had appointed KPMG to analyze the revenue earned by KPC and Arutmin from coal sale to CGPL for financial year 2012-13. KPMG conducted a due diligence on the coal sale invoices and estimated the net profit from KPC and Arutmin which is extracted as under:

'000 US\$

FY2013	Reference	PTKPC	PT Arutmin
Revenue from quantity supplied to CGPL	[A]	64782	176243
Total Revenues	[B]	3711091	1816774
Net Profit after Tax	[C]	195146	33126
Net Profit after Tax for quantity	[D]=[A/B*C]	3407	3213

supplied to CGPL			
Shareholding of Tata Power Ltd	[E]	30%	30%
Tata Power share of net profit after tax for quantity supplied to CGPL	[F]=[D*E]	1022	964

The Committee has stated in the report that Tata Power's share of net PAT from KPC and Arutmin for quantity of coal supplied to CGPL during FY 2012-13 aggregated to USD 1.986 million. These figures correspond to coal supplied to CGPL for a part load operation year of FY 2013, in which Units 2-5 were commissioned over the course of the year. During FY 2012-13, coal supplied to CGPL has been approximately 5.21 million MT. The impact of Tata Power's share of profit from the Indonesian mines (corresponding to the quantity of coal supplied to CGPL) for FY 2012-13 on the Compensatory tariff has been calculated by the Committee as under:

Particular	Reference	Unit	Value
Tata Power share of net PAT from KPC	(1)	mil USD	1.022
Tata Power share of net PAT from Arutmin	(2)	mil USD	0.964
Tata Power share of net PAT from KPC & Arutmin	(3)=(1)+(2)	mil USD	1.986
Exchange Rate	(4)	INR/USD	59.7
Tata Power share of net PAT from KPC & Arutmin	(5)=(3)*(4)	Mil/INR	118.564
Units supplied by CGPL to procurers in FY 2013	(6)	Mil units	11565
Impact on Compensatory tariff	(7)=(5)/(6)	INR/kWh	0.01

72. Based on the above calculation, the Committee has come to the conclusion that the impact of Tata Power's share profit from the Indonesian mines on the compensatory package for FY 2012-13 is about 1 paisa /kWh. However, this estimated figure of 1 paisa/kWh may not be representative of future because firstly, FY 2012-13 was a part load year, where coal consumption was approximately 5.0 MMT as against the normative requirement of approximately 11 MMT and secondly, almost 80% of the coal procured from the Indonesian mines was of Ecocoal grade (GCV 4200kcal/kg) to

support the blending trials and the profit margin for the mines on the Ecocoal grade is lesser than that of Melawan grade.

73. The Committee has also evaluated another method of calculating Tata Power share of net profit from the mines based on the incremental profit earned by the mines due to Indonesian Regulations on the Fuel Supply Agreements with CGPL. The underlying principle of this method is that the Indonesian Regulations had resulted in incremental profits accruing to the mining companies KPC and Arutmin, by mandating these companies to sell coal to CGPL at a price higher than that contracted in the Fuel Supply Agreements with CGPL. The methodology of calculating the Tata Power share of net profit from the mines is explained below:

Particular	Reference
FOB selling price of the Indonesian mining company as per invoice	[A]
Contracted Price as per FSA	[B]
Incremental revenue to Indonesian mining company per ton	$[C]=[A]-[B]$
Less: Royalty @ 13.5%	$[D]=[C]*13.5\%$
Revenue net of Royalty per ton	$[E]=[C]-[D]$
Less: Income tax at maximum marginal rate @ 45%	$[F]=[E]*45\%$
Incremental Profit to Indonesian mining company per ton	$[G]=[E]-[F]$
Quantity supplied to CGPL by the mining company	[H]
Net incremental PAT to Indonesian mining company	$[I]=[G]*[H]$
Tata Power share of net incremental PAT of mining company	$[J]=[I]*30\%$

However, the Committee has not favoured this method as CGPL was sourcing lower grade coal Ecocoal 35 for which there was no Fuel Supply Agreement at a discount to the market prices and no incremental profit accrued to PT Arutmin on account of Indonesian Regulations.

74. The procurers have submitted that the entire coal which has been tied up for Mundra UMPP is coming from the total share of 30% in the mine and therefore, 100% profit earned on coal tied up for Mundra UMPP should be considered since 30% share of coal in the mines is much higher than the total requirement of coal for Mundra UMPP. The petitioner has submitted that since the return of the Tata Power from its investment, either by way of income from dividend or from profits, is limited to 30% of the total dividend/profit declared by the mining companies, there is no rationale for seeking adjustment/sharing of the entire dividend/profits from the mining companies with the procurers. Moreover, the coal off-take agreement of Tata Power is only limited to the Coal Supply Agreement which for Mundra UMPP is 9.36+20% MTPA. Therefore, the total cost borne by the Mundra UMPP is only limited to the actual quantity supplied to Mundra UMPP and it has no relations with 30% sales of the mines.

75. Prayas has submitted that the Committee recommended approach is neither reliable in terms of addressing the issue of impact of the mining profits nor is it fair or equitable. Prayas has submitted that the mining company was making profits even at the fixed price it had quoted earlier in the FSA. Therefore, all the incremental revenue (after deducting royalties and taxes) from selling coal at a price higher than FSA quoted fixed price approach would imply allowing pass through of increase in mining cost and/or mining inefficiencies as well. Prayas has submitted an alternative approach in the table below:

Particular	Reference	Unit	FY-13	FY-14
FOB selling price of the Indonesian mining company as per invoice	[A]	\$/ton		63.67
Contracted price as per FSA	[B]	\$/ton		30.11

Incremental revenue to the mining company per ton	$[C] = [A] - [B]$	\$/ton		33.56
Less: Royalty @ 13.5%	$[D] = [C] * 13.5%$	\$/ton		4.53
Revenue net of Royalty per ton	$[E] = [C] - [D]$	\$/ton		29.03
Less: Income tax at marginal rate @45%	$[F] = [E] * 45%$	\$/ton		13.06
Incremental profit to Indonesian mining company per ton	$[G] = [E] - [F]$	\$/ton		15.97
Quantity supplied to CGPL by the mining company	[H]	Million Ton		11.083
Net incremental PAT to Indonesian mining company	$[I] = [G] * [H]$	Million \$		176.95
Tata Power share of net incremental PAT of mining company	$[J] = [I] * 30%$	Million \$	1.053	53.09
Dollar-rupee conversion rate	[K]	₹	59.7	59.70
TPC share of net incremental PAT of mining company	$[L] = [J] * [K] / 10$	₹ Cr	6.286	316.92
Total units to be sold		Mil kWh	11565	26630
Relief on this account factor		₹ /unit	0.005	0.12

Prayas has submitted that as per the alternative approach, in the coming years when significant coal will be procured from these mines, the impact on tariff will be greatly reduced.

76. The petitioner has submitted that Prayas suggestion has the following shortcomings: (a) Prayas has only considered the contracted price of coal under the Fuel Supply Agreements and has not considered the escalations as per CERC norms; (b) incremental fuel cost has not been taken into account while making the calculations; (c) Dividend Tax payment has not been taken into account. If these aspects are taken into account, the impact of per unit will be ₹0.0387/kWh instead of ₹0.12 as considered by Prayas.

77. The Commission in the Record of Proceedings for the hearing dated 13.11.2013 had directed the petitioner to submit the Shareholder Agreement of the petitioner with the coal companies of Indonesia. The petitioner in its affidavit dated 23.12.2013 has submitted the Shareholder Agreement dated 30.5.2007 and Novation Agreement dated 26.6.2007 between the Tata Power and Indonesian mining companies. On perusal of the agreements it is seen that the Tata Power is holding 30% of the share in KPC, Arutmin, Indocoal Resources and Kaltim. Through the Novation Agreement, the share in KPC, Arutmin and Kaltim have been transferred to Tata Power (Cyprus) Ltd. and the share of Indocoal Resources has been transferred to Tata Power (Mauritius) Ltd. which are wholly owned subsidiaries of Tata Power Ltd. Therefore, it is established that Tata Power Ltd. which is the holding company of CGPL is having 30% share in the above mentioned coal mines in Indonesia through its subsidiary companies.

78. The Committee has suggested two methods, namely revenue sharing method and incremental profit method. The Committee has recommended the revenue sharing method for the reason that no incremental profit arose from Arutmin mines. As per the media report, Arutmin mines have been sold by Tata Power, though the petitioner has not brought this information to the knowledge of the Commission. Therefore, it is presumed that the petitioner will source all its coal requirements (Melawan of 5350 Kcal/kg) in future from the PT KPC. Since, the subsidiary of Tata Power has a Fuel Supply Agreement with PT KPC, the Commission does not visualize any problem in case of the incremental profit from the said mines. Moreover, our order dated 15.4.2013 gives the guidance that "the net profit less government taxes and cess

earned by the petitioner company from the coal mines in Indonesia on account of benchmark price due to Indonesian Regulations corresponding the quantity of the coal being supplied to the Mundra UMPP should be factored in full to pass on the same to the beneficiaries in the Compensatory tariff". Our order clearly provides for calculation of net incremental profit from the mines owned by the petitioner proportionate to the coal supplied to Mundra UMPP which has accrued on account of the Indonesian Regulations requiring the long term contract to be aligned with the market price and adjustment of the same in the Compensatory tariff. Accordingly, the net incremental profit from the mines owned by the petitioner in Indonesia proportionate to the coal supplied to Mundra UMPP after deducting the incremental mining cost, if any, shall be computed to be adjusted in the Compensatory tariff. While calculating the incremental profit from the mines, the weighted average price of coal as per the bid should be considered instead of weighted average price of coal as per contracted Fuel Supply Agreement.

79. The Committee has also provided a formula for calculation of the incremental profit which is quoted in para 73 above. It is noticed that the Committee while working out Compensatory tariff has taken the weighted average cost of procurement as that considered while bidding. However, while working out profit from mines for sharing purpose it has considered weighted average cost of procurement as per Fuel Supply Agreements which is much more as compared to weighted average cost of procurement considered at the time of bidding. Calculations of quantum of coal on the basis of the bid and FSA are given below:

Bid Basis	QTY in mil MT	Escalable mil MT	Non-Escalable mil MT
55% required for generation	5.85	-	5.85
Balance 45% required for generation	4.88	4.88	-

FSA	QTY in mil MT	Escalable mil MT	Non-Escalable mil MT
1	5.85	2.6325	3.2175
1-optional	1.1700	1.1700	-
2 (reassigned)	3.51	3.51	-
2-optional	0.702	0.702	-
	11.232	8.0145	3.2175
		71.3542%	28.6458%

It may be noticed from the above that the ratio as per FSA has been used by KPMG and also by the Committee while working out profit sharing in case of incremental profit sharing method. For the coal quantity of 10.73 MMT required by Mundra UMPP for its contracted capacity based upon the bid parameters submitted by petitioner, the Weighted average cost of procurement as per Bid and as per FSA would be as under:

COST OF FUEL AS PER BID			COST OF FUEL AS PER FSA		
55%	17.73	5.85 MMT	28.65%	32.07	3.22 MMT
45%	61.50	4.88 MMT	71.35%	61.50	7.52 MMT
Wt. Average Cost	37.65	10.73 MMT	Wt. Average Cost	52.68	10.73 MMT

Implication of the computation based on bid assumption considered by the Commission and on the basis of FSA considered by the Committee has been depicted in the table below:

As per the Commission				As per Committee Recommendation			
		Incremental profit			incremental profit		
1	\$/MT	FOB Price	63.78	1	\$/MT	FOB Price	63.78
2	\$/MT	Bid Price	37.65	2	\$/MT	Contracted price	52.68
3	\$/MT	Incremental Profit #	26.13	3	\$/MT	Incremental Profit	11.10
4	\$/MT	Royalty @13.5%	3.53	4	\$/MT	Royalty @13.5%	1.50
5	\$/MT	Revenue net of royalty	22.61	5	\$/MT	Revenue net of royalty	9.60
6	\$/MT	IT @45%	10.17	6	\$/MT	IT @45%	4.32
7	\$/MT	Incremental profit	12.43	7	\$/MT	Incremental profit	5.28
8	\$/MT	TATA 30%	3.73	8	\$/MT	TATA 30%	1.58
9	MMT	Qty	10.73	9	MMT	Qty	10.73
10	mil \$	Product of Sr No 8 & 9	40.04	10	mil \$	Product of Sr No 8 & 9	17.01
11	\$/kwh	per unit profit	0.0015	11	\$/kwh	per unit profit	0.0006
12		Exchange rate	59.70	12		Exchange rate	59.70
13	INR/kwh	per unit profit	0.0898	13	INR/kwh	per unit profit	0.0381

#Incremental mining cost if any is to be reduced to work out Incremental Profit.

80. Since the Committee has recommended continuation of Coal GCV of 5350 kcal/kg from fuel security point of view, we are of the view that the incremental profit method should be considered for sharing of mine profit. Accordingly, the method considered by the Commission in the Table above should be adopted for deciding the profits from the Indonesian mine for adjustment in the Compensatory tariff.

(H) Sale of power to third party above 80%:

81. The Committee has noted that as per the PPA the entire power generation from the Mundra UMPP has to be sold to the procurers and third party sale is permitted only under two scenario, namely where power is not despatched by a procurer and the first right of refusal has not been exercised by other procurers and secondly, a procurer has made a payment default and the right of first refusal has not been exercised by other procurers. The Committee in the light of the guidance in para 86 of the Commission's

order dated 15.4.2013 has analyzed the third party sale beyond the normative availability of 80%, subject to the consent of all procurers for such sale. The Committee has noted that PPA has a provision for incentive payment of ₹0.25 per kWh for declaring availability beyond 85%. The Committee has suggested that in case the procurer agreed to waive or modify their rights normative availability of 80%, the right of CGPL to receive the incentive payment may be bilaterally discussed between CGPL and the procurer. The Committee has suggested that in such a case the provision can be modified so that the right to avail the contracted capacity above normative availability is relinquished by procurer and allowed to be sold to third parties, with equal sharing of excess realization of energy charges (including Compensatory tariff from such sale). The Committee has recommended that third party sale of power beyond the 80% may be permitted after making appropriate modification in the PPA and the net profit from such sale may be equally shared between the procurers and generators. The Committee has stated that the procurer's share of profit from such third party sale shall help in reducing the Compensatory tariff and the generator's share of profit shall help in reducing the hardship faced in under recovery of fixed charges. The Committee has made an analysis of sharing of profit of third party sale as under:-

		Scenario 1	Scenario 2	Scenario 3	
Normative Availability	%	80%	80%	80%	As per PPA
Third party Sale*	%	5%	10%	20%	If allowed sale to third party
Third party sale Price	INR/kWh	4.00	4.00	4.00	
Energy Charges	INR/kWh	2.24	2.24	2.24	

Per Unit Surplus	INR/kWh	1.76	1.76	1.76	Sale price – Energy charges
Incentive to generator	INR/kWh	0.00	0.13	0.19	Incentive beyond 85% apportioned on entire quantum of 3 rd party sale
Balance Surplus	INR/kWh	1.76	1.63	1.57	
Share of Procurers @50% of balance surplus	INR/kWh	0.88	0.82	0.79	50% share
Reduction in Gross Compensatory tariff	INR/kWh	0.055	0.1022	0.1965	Procurer share apportioned on 80%

82. Haryana and GUVNL have submitted that for the initial three years profits from sale of electricity to the third party should be distributed in the ratio of 60:40 between procurers and the petitioner, subject to a minimum of 0.10 paise per unit to the procurers. Rajasthan Utilities have suggested the sharing in the ratio of 60:40 only. Rajasthan Utilities and MSEDCL have submitted that they do not favour third party sale and would avail the full capacity.

83. Prayas has submitted an alternative approach for sharing of revenue from sale of power beyond normative availability as under:-

Particulars	Unit	Scenario1	Scenario 2	Scenario 3
Normative Availability	%	80%	80%	80%
Third party Sale	%	5%	10%	20%
Third party sale Price	INR/kWh	4	4	4
Normative Energy Charges	INR/kWh	2.24	2.24	2.24
Per Unit Surplus	INR/kWh	1.76	1.76	1.,76
Surplus Mus	MU	1664	3329	6658
Additional revenue	₹ Cr	293	586	1172
Impact on compensatory tariff	₹/Unit	0.11	0.22	0.44

Prayas has submitted that depending upon the extent of such sale, the project developer can earn additional revenue of around ₹300 crore to ₹1172 crore per year which will reduce the burden of Compensatory tariff on the procurers. The consumer applicant has submitted that third party sale would amount to giving double benefit to the petitioner, that too by varying the terms of the PPA.

84. The petitioner has submitted that it is in-principle agreeable to equal sharing of profit from third party sale above 80% availability in accordance with the recommendations of the Committee. As regards the submission of Prayas, the petitioner has submitted that for generation of electricity above 80% availability, the petitioner will have to incur additional expenses because of high wear and tear of the equipments. Therefore, forcing the generator to generate additional electricity without appropriate incentive will be fundamentally against the spirit of the order dated 15.4.2013, and would cause further hardship to the petitioner. The petitioner has further submitted that since different procurers have taken different views regarding sharing of profits from third party sale, the Commission may take a final decision in the matter.

85. We have considered the submission of the parties. We recognize that the procurers have full rights over the contracted capacity and third party sale is permissible only when power is not dispatched by a procurer or when a procurer has made a payment default and other procurers have not exercised a right of first refusal. With reference to the Committee's suggestion, MSEDCL and Rajasthan utilities have exercised their option to avail their full share in the contracted capacity, Punjab has not

agreed to the report and Gujarat and Haryana have suggested a sharing mechanism of 60:40 without incentive. Therefore, we are of the view that the sharing of profit beyond the target availability can be considered only when the procurers permit for such sale in writing to the petitioner. This will take care of the requirement of the PPA and amendment of the PPA will not be considered necessary for this purpose. As regards the sharing, we are of the view that the profit may be shared between the procurers and the petitioner in the ratio of 60:40 with incentive, subject to the procurers' written consent for third party sale above 80% target availability.

(I) Use of blending with low GCV coal:-

86. The Commission in para 86 of the order had directed the Committee to explore the possibility of using coal with low GCV for generation of electricity for supply to the procurers without affecting the operational efficiency of generating station. The Committee has submitted that the technical consultant was asked to study the commercial feasibility of blending lower GCV eco coal (4200 Kcal/KG) with the Melawan coal to exploit the existing price differential between these two grades. The Committee has carried out a financial analysis of the impact of blending on the Compensatory tariff as under:-

		Scenario 1 (100:0)	Scenario 2 (80:20)	Scenario 3 (70:30)	Scenario 4 (30:70)
Melawan (GCV – 5400)		100%	80%	70%	30%
Eco coal (GCV – 4200)		0%	20%	30%	70%
Blended GCV	kcal/kg	5350	5120	5005	4545
Total coal consumption	mil MT	11.15	11.81	12.16	13.75
Base SHR*	kcal/kWh	2050	2073	2084	2130
Allowable SHR*	kcal/kWh	2207	2231	2243	2315
Aux Power		7.75%	7.96%	8.07%	8.50%

		Scenario 1 (100:0)	Scenario 2 (80:20)	Scenario 3 (70:30)	Scenario 4 (30:70)
consumption*					
Additional Capex*	mil INR	0	0	2129	13000
Blended price of coal	USD/ton	63.78	59.89	57.94	50.15
Gross savings in compensatory tariff (FOB)	INR/kWh	0.0000	0.0095	0.0160	0.0516
Increase in shipping and handling charges	INR/kWh	0.0000	0.0240	0.0377	0.1052
Increase in fixed charge due to additional capex	INR/kWh	0.0000	0.0000	0.0151	0.0921
Net savings in compensatory tariff	INR/kWh	0.0000	(0.0145)	(0.0368)	(0.1457)

* The figures for Base SHR, allowable SHR, auxiliary power consumption and additional capital expenditure have been taken from the report of the technical consultant dated July 31, 2013

87. The Committee has stated in the report that blending with the low grade coal had the impact of degradation in Station Heat Rate and increase in auxiliary power consumption on account of use of additional grinding mills, increase in shipping and port handling charges on account of increased quantity of coal consumption for the project, and increase in capital expenditure on account of modification in the boiler, mills, ID and FD fans. The Committee has stated that the savings in the Compensatory tariff at gross level with incremental blending of lower grade coal is more than offset by the increase in shipping and handling charges and the increase in fixed charges on account of additional capital expenditure. The Committee has recommended that blending of lower grade coal, although a technically feasible option, is not commercially viable. However, the Committee has suggested that the blending with lower grade coal especially Scenario II i.e. 80% Melawan and 20% Eco Coal may be explored in future if the cost economics becomes more favorable since same can be exploited by the Project without incurring any additional capital expenditure and any such benefits shall be passed on to

the procurers.

88. Prayas has submitted that within Indonesia, coal of slightly lower GCV is much cheaper than the higher quality of coal and the difference in the price of coal varieties is not proportional to the difference in their calorific values. Though the Committee has considered the option, it has not recommended it on the basis of higher freight charges and port handling charges assuming a long term situation. Prayas has submitted that since the Commission has noted in the order that increase in fuel cost is a transient phenomenon which will get self corrected whenever prices of coal fall down, there is no need for the Committee to double the freight rates assuming a long term situation.

89. We have considered the report of the Committee and submissions of Prayas. It is an accepted fact that blending with lower grade coal has implications of degradation of SHR, increase in auxiliary consumption, increased quantity of coal consumption including associated cost of shipping and port handling. Moreover, the petitioner is using the coal with GCV of 5350 Kcal/kg which is produced from the mines in which the petitioner's holding company has stake of 30%. Since, we have decided that profits from the mines owned by the petitioner's holding company will be adjusted proportionately to the extent of coal supplied to Mundra UMPP which will reduce the Compensatory tariff, we are in agreement with the recommendations of the Committee in this regard including the suggestion of the Committee to explore the cost economics of blending of 80% of Melawan coal and 20% of Eco Coal having regard to the impact on associated operational parameters if it results in reduction of Compensatory tariff.

(J) Curtailment of ROE by the petitioner

90. One of suggestions of the procurers pertained to sacrifice of some portion of ROE by the petitioner which the Committee has considered in para 5.2.1 of the report. The Committee has made an analysis of the fixed charges of CGPL for the year 2013-14 in para 5.2.1 of the report and has stated that the petitioner is making an under recovery of 13 paise without ROE and 48 paise with ROE. The Committee has attributed the under-recovery to higher debt servicing expenses and adverse foreign exchange fluctuations increasing the debt service of foreign loans. The Committee has recommended that with negative ROE earned by the promoters for the year 2013-14, no sacrifice seems to be possible on the ROE component. After analysing the escalable and non-escalable components of the capacity charges quoted by the petitioner and the present terms of debt servicing, foreign exchange rates and O&M charges escalated by CERC escalation rates, the Committee has stated that the under recovery of capacity charges is expected to persist throughout the period of the PPA.

91. As regards the issue of sacrifice of ROE, we are of the view that the under-recovery of the capacity charges can be attributed to the bid structure of the petitioner who has quoted 96% of the capacity charges as non-escalable element as noted by the Committee in para 5.2.1 of the report. This has got nothing to do with under recovery of fuel energy charges due to Indonesian Regulations which the procurers would be required to compensate in terms of our order. In our view, equity and fairness demand that the petitioner is made to bear a part of the shortfall in fuel energy cost. Accordingly,

we direct that the petitioner shall contribute 1% of the ROE invested by it in the project as on SCOD which will go towards reduction of compensatory tariff.

(K) Miscellaneous issues

92. The Committee has also considered other suggestions received from the procurers in Section 5.2 of the report. They include the suggestions for the banks and financial institutions to waive the interest or reduce the rate of interest, Government of India to reduce import duty on coal and other taxes, fixing a ceiling for compensatory tariff etc. The Committee's analysis and recommendations are discussed as under:

(a) The Committee has stated that Mundra UMPP is funded by a mix of domestic loans and foreign loans. The Committee explored the possibility of reductions of rate of interest and other measures by calling a meeting of major Rupee lenders in order to mitigate the hardship faced by the company on account of continued losses. After discussion with the lenders, the Committee has recommended that lenders should explore all possible options including reduction of interest rates, moratorium on principal payment for a period of 2-3 years and elongation of loan repayment tenor to reduce the hardship faced, and the domestic lenders with the support of the Commission may approach RBI for forbearance from the ambit of restructuring guidelines for reduction of interest rate and elongation of loan tenor for the Mundra UMPP project.

(b) The Committee has noted that Mundra UMPP is subject to royalty/duty on imported coal which is currently estimated to be 6.29%. The Committee has suggested that

Procurers and CGPL may jointly continue to pursue all possible options with the concerned authorities for reduction in duties and taxes. The recommended mechanism for deriving compensatory tariff is comprehensive and variable in nature and if there is any reduction/removal of duty/taxes, benefits of the same will be embedded in the methodology to derive compensatory tariff. The Committee has suggested the Commission to make recommendation to the Government of India to this effect which will mitigate marginally the burden of compensatory tariff for the Procurers.

(c) The Committee has stated that the compensatory tariff payable by the Procurers is a function of coal prices, which is subject to volatility and consequently compensatory tariff shall be subject to similar variation and therefore, the Committee felt the need to have a ceiling limit for the gross compensatory tariff determined by the present methodology. The Committee explored various options for fixing a ceiling limit of the gross compensatory tariff and finalized on four options based on (i) competitiveness of power procured from CGPL against other sources of procurement, (ii) historical coal prices, (iii) tariff realized from recent case-1 bidding, and (iv) fixed percentage increase from the compensatory tariff payable for FY 2014. The Committee after considering these options has recommended the first option of ceiling limit based on merit order. This option has been discussed in para 5.2.4.1 of the report which is extracted as under:

“5.2.4.1 Competitiveness of power procured from CGPL

In this option, the ceiling limit is fixed as a certain pre-determined percentile of the power procurement cost of the procurers in that particular year as per the approved power purchase plan. A summary of power purchase plan for FY 2014 of different procurers of CGPL, one representative procurer for each state is given below:

Power Procurement plan	Maharashtra INR/kWh	Gujarat INR/kWh	Punjab INR/kWh	Rajasthan INR/kWh	Haryana INR/kWh
Top 10 percentile	2.04	1.87	1.19	2.18	1.65
Top 25 percentile	3.01	2.14	1.66	2.90	2.35
Top 50 percentile	3.14	2.84	2.61	3.59	3.89
Top 75 percentile	4.10	3.37	4.49	3.88	3.89
Top 90 percentile	4.50	3.99	5.33	4.76	5.23
Present CGPL tariff (w/o compensation)	2.44				
CGPL tariff (with compensation)	3.03				

As can be observed from the table above, the tariff of ₹2.44 per kWh payable to CGPL is amongst the top 25 percentile in the power procurement cost of most of the procurers. With the compensatory tariff of ₹0.59 per kWh payable for FY 2014, as calculated in sec 4.9, the effective tariff payable to CGPL is ₹3.03. This tariff ranks amongst the top 50 percentile in the power procurement merit order of the power procurement plan of most of the procurers.

As an illustration, the following table provides the ceiling limit of compensatory tariff at different levels of ceiling in the merit order of MSEDCL

Ceiling Limit on Merit Order	Ceiling on Effective Tariff (INR/kWh)	Ceiling on Compensation (INR/kWh)
Top 50 percentile	3.14	0.70
Top 75 percentile	4.10	1.66
Top 90 percentile	4.50	2.06

93. We have considered the suggestions of the Committee as quoted above. We are of the view that the recommendations of the Committee are constructive and perspective in nature and the Commission has issued appropriate advice in the summary of recommendations in this regard. As regards the ceiling rate of compensatory tariff, we are of the view that the same should be mutually decided by the petitioner and the Procurers.

(L) Compensatory Tariff from 1.4.2013 onwards:

94. In view of the above discussion, compensatory tariff shall be determined as per the following formula:

$$\begin{aligned} & \textbf{Gross Compensatory Tariff (GCT)} \\ & = \textbf{Fuel Energy charges as per bid parameters} \\ & - \textbf{Tariff recovered from Fuel Energy componets of PPA} \end{aligned}$$

where,

1. **Fuel Energy Charges =**
Fuel Consumption as per bid parameters x HPB marker prices adjusted for GCV

2. **Fuel Consumption as per bid parameters =**
$$\frac{\text{Energy Supplied}}{(1-\text{Auxilliary Power Consumption})} \times \frac{\text{Station Heat Rate as per bid}}{\text{GCV of coal}} \times \frac{1}{(1-\text{Transportation losses})}$$

where,

- ✚ Station Heat Rate shall be 2050 kCal/kWh (without margin)
- ✚ Auxiliary Power Consumption shall be 4.75%.
- ✚ Transportation losses shall be 0.20%

3. **Tariff recovered from Fuel Energy componets of PPA = (QNEFEC + (QEFEC x CERC escalation index)) x Scheduled Energy**

95. Considering the issues discussed in this order, the compensatory tariff has been worked out with reference to the bid technical parameters only thereby ensuring maintenance of the bid sanctity. All Number(s) used by the Committee have been used for ease of comparison without getting into veracity or correctness of the same except for the change in the quantum of coal which is primarily changing as the technical parameter(s) such as installed capacity, auxiliary consumption, transit loss are changing

from normative to bid values. A sample calculation of the compensatory tariff is for the year 2013-14 is given as under:

1	Units sold	mil kWh	26630.39
2	Fuel Charges as per tariff (FOB only)		-
2a	QNEFEC	US\$/kWh	0.00707
2b	QEFEC	US\$/kWh	0.00585
3	CERC escalation index		196.41
4	QEFEC (2b) after indexation	US\$/kWh	0.01149
5	Fuel Energy tariff component (2a+4)	US\$/kWh	0.01856
6	Fuel charges recovered (1*5)	mil US\$	494.26
7	FOB cost of imported coal	US\$/ton	63.78
8	Effective import duty		6.33%
9	FOB cost of imported coal-adjusted for duties	US\$/ton	67.82
10	Qty of imported coal for stated generation	mil ton	10.73
11	Cost of imported coal tonnage as above (9*10)	mil US\$	727.98
12	Gross compensation (11-6)	mil US\$	233.73
13	Gross compensation per unit (12/1)	US\$/kWh	0.0088
14	Exchange rate	₹/US\$	59.7
15	Gross compensation per unit in INR	INR/kWh	0.5240

(L) Compensatory Tariff for past losses from 1.4.2012 to 31.3.2013

96. The Committee has calculated the fuel energy charges for the past losses in para 4.11 of the report as under:

"The past losses may be calculated as per audited accounts till the date of commencement of Compensatory Tariff as recommended in the Committee report. The CERC order had stated that Compensatory Tariff would be admissible for a limited period till the hardship persists and since the hardship commenced from COD of respective units, it was agreed during the Committee proceedings to quantify the past Fuel Energy losses of CGPL since the date of commissioning of Unit 1. The following table presents the calculation of losses accruing to CGPL for FY 2013⁴ on the Fuel Energy component of the PPA:

⁴Unit 1 of CGPL was commissioned in March 2012 and was operational only for 6 days in FY 2012. Hence losses for FY 2012 are not considered

Particular	Reference	Unit	Value
PPA sale (MU)	(1)	mil kWh	11565
Energy Charge recovered	(2)=(3)+(4)	INR crore	1730.25
<i>Energy charge (Fuel)</i>	(3)	INR crore	1274.54
<i>Energy charge (Transportation & Fuel handling)</i>	(4)	INR crore	455.71
Energy Cost (₹crore)	(5)=(6)+(7)	INR crore	2169.46
<i>Fuel cost (FOB)</i>	(6)	INR crore	1603.99
<i>Ocean Freight, Inland handling, Sec fuel</i>	(7)	INR crore	565.47
Under recovery in fuel cost	(8)=(6)-(3)	INR crore	329.45
Fuel Cost recovered per unit	(9)=(3)*10/(1)	INR/kWh	1.10
Fuel cost incurred per unit	(10)=(6)*10/(1)	INR/kWh	1.39
Under recovery in Fuel charges per unit	(11)=(8)*10/(1)	INR/kWh	0.29

As can be observed from the table above the under recovery in Fuel Energy charges is ₹329.45 crore for FY 2013. As the CERC order does not provide clear guidance to the Committee on the recovery of past losses, the Hon'ble Commission may take an appropriate decision on the payment of compensation to CGPL for FY 2013."

97. The Commission has already decided in the earlier part of the order that the compensatory tariff shall be applicable from the date of SCOD of first unit of Mundra UMPP. The Committee has considered the past losses from 1.4.2012 for the reason that Unit 1 was commissioned in March 2012 and was operational only for six days and

hence the Committee had not considered the losses from SCOD but from 1.4.2012. Therefore, the past losses from 1.4.2012 till 31.3.2013 shall be admissible. The Commission has counter checked the calculations by using the formula for computation of compensatory tariff to be admissible from 1.4.2013 onwards approved in this order. It is not clear from the details available as to whether the above final cost includes cost of carpet coal. It may be mutually settled and in case the cost of carpet coal is included in the above amount, the same shall be adjusted. Accordingly, the past losses of ₹329.45 crore shall be reimbursed by the Procurers in proportion to their contracted capacity in 36 equal monthly installments. In case of delay beyond the date of payment for each installment, the petitioner shall be entitled for carrying cost in terms of the PPA prescribed for late payment of dues.

(M) Process of recovery of compensatory tariff

98. The Committee has recommended an elaborate process for recovery of compensatory tariff in para 4.10 of the report. We have considered the same. We direct that the following procedures shall be followed for recovery of compensatory tariff:-

(a) Provisional Compensatory tariff to be charged in the monthly bill and quarterly reconciliation: Provisional energy charges for a particular year shall be calculated on the basis of the principles given in this order for calculating the compensatory tariff. The provisional tariff may be calculated using the coal prices at the beginning of each financial year and used for monthly billing. The petitioner shall submit quarterly statements of actual costs of coal within 30 days and reconcile

the cost of coal each quarter, compensatory tariff vis-à-vis the billing already done with Provisional Energy charges and get settled the same as per payment mechanism agreed for monthly bills.

(b) Calculation of Actual compensatory tariff at the end of the Particular Year: There may be certain differences in Actual energy charges and Provisional energy charges. Within 2 months from the end of a particular financial year, CGPL shall file a report with the respective Discoms providing detailed calculation of actual energy charges on the basis of principles given in this order. The report to be submitted must contain figures duly audited and authenticated by auditors of repute supported by the copies of the invoices for import of coal.

(c) Adjustments for profits accruing to the Promoters from the Indonesian mines: Within 2 months from the end of a particular financial year, CGPL shall file a report with the respective Discoms providing detailed calculation of net profit earned by Tata Power from the Indonesian mines corresponding to the quantity of coal supplied to CGPL on the basis of principles laid down in this order. The report to be submitted must contain figures duly audited and authenticated by auditors of repute.

(d) Truing up/ Reconciliation exercise: On the actual energy charges and adjustments of profits from the Indonesian mines being approved by the respective off takers, the compensatory tariff shall be trued up. The trued up

compensatory tariff, once approved, shall be payable by the respective party to other.

(e) In case of dispute, the aggrieved party is at liberty to approach the Commission for appropriate relief in accordance with law.

Summary of decisions

99. The summary of our decisions with regard to compensatory tariff is as under:

(a) The petitioner shall be entitled for a provisional lump sum compensation for an amount of ₹329.45 crore payable by the procurers for the period from 1.4.2012 till 31.3.2013. The petitioner is further directed to submit claim to Procurers with actual cost on month to month basis for final settlement. It is not clear from the details available as to whether the above final cost includes cost of carpet coal. It may be mutually settled and in case the cost of carpet coal is included in the above amount, the same shall be adjusted.

(b) The Procurers shall pay the amount as determined above in 36 equal monthly installments from the date of this Order with carrying cost for delay in payment beyond due date at the surcharge applicable as per the PPA. These parameters shall be used for calculation of compensatory tariff on monthly basis, w.e.f. 1.4.2013 till the hardship on account of Indonesian Regulations persists.

(c) The technical parameters as per the bid and considered in this order shall be adopted by the petitioner and procurers for calculation of the compensatory tariff.

- (d) The compensatory tariff for the period from 1.4.2013 shall be as per the formula and sample calculation in paras 94 and 95 above on monthly basis. The arrears in this respect from 1.4.2013 till 28.2.2014, in accordance with this order shall be recovered from the Procurers in equal monthly installments over a period of not less than 12 months from the date of this order.
- (e) True up of provisional compensatory tariff arrived at shall be done at the end of each financial year based on audited financial statements after adjustments of other receipts as depicted above in this order.
- (f) In regard to sharing of actual profit from coal mining operations in Indonesia, the same shall be calculated based on the total incremental revenue after payment of taxes and royalty as per Indonesian Regulations and incremental mining cost in proportion to the coal used for the generation of contracted power as per PPA in accordance with the decision in para 79 of this order.
- (g) Since the petitioner has approached the Commission for mitigation of the financial hardship on escalation of the coal prices in the Indonesian market, the Commission has decided to award compensatory tariff within the mandate already decided in our order dated 15.4.2013. We are of the view the petitioner should share the burden of hardship to some extent. Accordingly, the adjustment in the tariff towards sacrifice of ROE shall be made equivalent to 1% of ROE,

based on equity investment of contracted capacity, as on the SCOD. The amount would be adjusted from the compensatory tariff payable to the generator by the Procurers. Since the Commission has not examined the books of accounts of the petitioner, the Procurers and the generator may mutually settle the amount deductible from the compensatory tariff in this regard. The position will be reviewed after 3 years from the date of this order.

(h) The actual excess realization towards third party sale of power above the target availability of 80% (after adjusting Energy Charges including compensatory tariff) shall be shared in the ratio of 60:40 between the procurers and the petitioner only if the procurers agree in writing for the same.

(i) The petitioner shall provide along with the monthly bills, a certificate from the Auditor regarding the actual quantum and price of imported coal used during the previous month for supply of electricity to the procurers. Procurers are free to verify copies of such invoices.

(j) As recommended by the Committee, the petitioner and procurers shall jointly continue to pursue all possible options with the concerned authorities for reduction in duties and taxes. Whatever the gains made by the generator on account of any possible reductions shall be passed on to the consumers in reducing the compensatory tariff.

(k) As recommended by the Committee, the procurers and the generators shall jointly continue to pursue all possible options in approaching lenders to obtain reduction in interest rates, extending moratorium on principle repayment for a period of 2 to 3 years and possible extension of loan repayment tenor to reduce hardship on capacity charges.

(l) As recommended by the Committee, the generator and procurers may jointly approach RBI, Ministry of Finance and Ministry of Power for possible assistance to the power producers in getting relief on account of interest rates and restructuring of loan. The Commission requests RBI to favourably consider the request of the parties to make the project viable if such an application is made.

(m) The compensatory tariff shall be maintained as a separate account and shall be reflected in the monthly bill under separate head clearly segregating the installment of arrears and the compensatory tariff for the concerned month.

(n) The accounts so maintained shall be available for scrutiny/inspection at the discretion of the procurer. The Commission shall review the compensatory tariff after a period of 3 years unless the compensatory tariff is withdrawn earlier in terms of our order.

100. Before parting with this case, the Commission would like to place on record its deep appreciation to the Chairman and members of the Committee for assisting the Commission through their report with detailed analysis.

101. Petition No.159/MP/2012 is disposed of in terms of the above.

sd/-
(A.K. Singhal)
Member

sd/-
(M Deena Dayalan)
Member

sd/-
(V.S. Verma)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson