

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 111/MP/2019**

**Coram:**

**Shri P.K. Pujari, Chairperson**

**Dr. M.K. Iyer, Member**

**Shri I.S. Jha, Member**

**Date of Order: 28<sup>th</sup> January, 2020**

**In the matter of**

Petition under Section 79 of the Electricity Act, 2003 read with PPA dated 31.03.1997 against the illegal and unlawful refusal of the Respondents to accept declaration of availability from the 370 MW combined cycle power station at Vemagiri, East Godavari District, Andhra Pradesh and consequent refusal to schedule power from the Project and pay applicable tariff including capacity charges for deemed generation.

**And**

**In the matter of**

GMR Vemagiri Power Generation Limited (GVPGL)  
Skip House, 25/1, Museum Road  
Bangalore- 560025

**...Petitioner**

**Versus**

1. Andhra Pradesh Power Co-Ordination Committee  
Vidyut Soudha, Khairatabad  
Hyderabad -500082
2. Telangana Power Co-Ordination Committee  
Vidyut Soudha, Khairatabad  
Hyderabad -500082
3. Southern Power Distribution Company of A.P. Ltd  
19-13-65/A, Srinivasapuram  
Tiruchanoor Road  
Tirupati, Chittoor  
Andhra Pradesh-517503
4. Eastern Power Distribution Company of A.P. Ltd.  
P&T Colony, Seethammadhara  
Visakhapatnam-530013
5. Northern Power Distribution Company of Telangana Ltd.  
H.No: 2-5-31/2, Corporate Office, Vidyut Bhavan  
Nakkalgutta, Hanamkonda, Warangal- 506001



6. Southern Power Distribution Company of Telangana Ltd.  
Corporate Office: #6-1-50, Mint Compound,  
Hydrabad-500063

**Parties present:**

- 1) Shri Sajjan Poovayya, Senior Advocate, GMR VPGL
- 2) Shri Vishrov Mukherjee, Advocate, GMR VPGL
- 3) Shri Yashaswi Kant, GMR VPGL
- 4) Shri S. Vallinayagam, Advocate, AP Discoms

**ORDER**

The Petitioner, M/s GMR Vemagiri Power Generation Ltd. is a generating company under clause 2 of Section 28 of the Electricity Act, 2003 ("the Act"). The Petitioner established 370 MW combined cycle power station, which operates on Natural Gas. The Respondents 1 &2, as the name suggests are existing Power Purchase Coordination Committees for distribution licensees of respective states. The Respondents 3 to 6 are Distribution Licensees of Andhra Pradesh and Telangana. The Petitioner, through erstwhile companies entered into agreement on 31.3.1997 to supply electricity to respondents which was revised subsequently through amendments dated 18.6.2003 and 2.5.2007. The main prayers of the Petitioner are as under:

- “(a) Declare that the actions of Respondents in rejecting the Availability Declaration made by the Petitioner by using the Deep Water Gas, as illegal and contrary to the terms of the PPA and the Orders passed by the Ld. APERC;
- (b) Direct the Respondents to accept the availability declaration issued by GVPGL using Deep Water Gas from domestic sources;
- (c) In the interim, pending final adjudication, direct the Respondents to accept the availability declarations issued by GVPGL subject to such terms as this Hon’ble Commission may deem fit;
- (d) Direct the Respondents to pay capacity charges with effect from 01.11.2016 (from which date GVPGL had started declaring availability on deep water gas);



- (e) Direct the Respondents to pay interest / carrying cost / late payment surcharge on the amounts due and payable to GVPGL with effect from 01.11.2016; and
- (f) Pass such other orders as this Hon'ble Commission may deem fit in the interest of justice."

### **Submissions of the Petitioner**

2. The Petitioner has submitted chronology of events as under:

- a) On 15.12.2000, Government of Andhra Pradesh (short as "GoAP") allowed the Company to implement the gas based power Project in two stages viz. Stage-I for 370 MW and Stage-II for 150 MW and entered in agreement with Andhra Pradesh Electricity Board for supply of 468 MW power.
- b) After approval of Ministry of Petroleum and Natural Gas (MoPNG), Gas Supply Agreement (GSA) dated 31.8.2001 was entered between Gas Authority of India Ltd. (GAIL) and the Petitioner for supply of 1.64 MMSCMD of Natural Gas on firm basis from K.G Basin and from nearby fields and was renewed from time to time till date. As per agreement, this 1.64 MMSCMD of Natural Gas was priced through Administered Price Mechanism (APM) Gas. However, GAIL has been unable to supply additional gas under Administered Price Mechanism (APM) mechanism as per this Agreement.
- c) On 18.6.2003, the PPA dated 31.3.1997 was amended to revise Energy Charge formula under Article 3.3 to include three suppliers of fuel viz. Natural Gas from GAIL, Natural Gas from suppliers other than GAIL and Alternate fuel (Naptha etc.). On 2.5.2007, the PPA was again amended which inter-alia deleted alternate fuel use.
- d) On 26.4.2009, MoPNG allocated 1.48 MMSCMD of Natural Gas to the



Petitioner from RIL-Niko. The Petitioner submitted that the natural gas being procured from RIL-Niko was from a deep water field as recorded in the Judgment of the Hon'ble Supreme Court in Reliance Natural Resources Limited Vs. Reliance Industries Limited. Accordingly, on 17.4.2009, the Petitioner entered into a Gas Sales and Purchase Agreement and the source of gas was Block KG-DWN-98/3 which is a deep water gas field. Subsequently, though the quantity of gas to be supplied by RIL-NIKO to the Petitioner was equivalent to 75% of PLF, but due to lack of supply from KG D6 and change in priority, supplies were reduced drastically and from 1.3.2013 RIL-Niko stopped supplying gas to the Petitioner. Consequently, the Petitioner sought to use Re-gasified Liquefied Natural Gas (RLNG), which was disputed by the Respondents.

e) On 8.8.2013, the Andhra Pradesh Electricity Regulatory Commission (APERC) rejected the claim of the Petitioner to permit use of RLNG which was set aside by Appellate Tribunal for Electricity (APTEL) but upheld by Hon'ble Supreme Court vide judgment dated 16.2.2018 in Civil Appeal No. 8747 of 2018. On the issue, whether the RLNG falls within the meaning of 'Natural Gas' under the PPA, the Hon'ble Supreme Court observed as follows:-

- 1) RLNG cannot be understood to be equivalent to natural gas in the definition of Fuel under the PPA given that it is processed, imported and costlier;
- 2) Natural Gas means domestic natural gas in natural form;



- 3) The conduct of the parties reveal that the understanding was that RLNG was not natural gas given that GVPGL had sought permission to use RLNG;
- 4) None of the orders of APERC referred to RLNG.
- f) The Petitioner submits that unlike RLNG, Deep Water Gas is domestic natural gas in natural form. Further, APERC approved procurement of KG D6 gas which was i.e. deep water gas priced as per Government policy. On 21.3.2016 MoPNG issued a guideline pertaining to pricing of gas to be produced from Discoveries in Deepwater, Ultra Deepwater and High Pressure- High Temperature areas ("Deep Water/ deep water gas"). On dated 5.5.2016, the Petitioner wrote to the Respondents for supply of power based on gas supplied by ONGC from S1 and Vasishta ("VA") fields (Deep Water Gas) and the pricing would be as per MoPNG guidelines. On 6.10.2016 the Petitioner offered supply of power under the existing PPA with the Deep Water gas from KG Basin at a tariff of Rs. 4.52 per unit. The Petitioner on 31.10.2016 made an Availability Declaration for 1.11.2016 on the basis of Deep Water Gas to be provided by GAIL which was rejected by the Respondent and did not schedule generation on the ground that the Availability Declaration is without due allocation of Gas by MoPNG/ GoI and also without approval of APERC/ Telangana State Power Co-ordination Committee. Similarly, SLDC of Telangana also rejected stating to obtain approval from TSPCC/ commercial.
- g) On 1.11.2016 APPCC communicated rejection of availability declaration with deep water gas from KG Basin is not in consonance with the terms of the PPA



dated 31.3.1997 and subsequent amendments approved by APERC stating that this gas is more expensive than gas allocated by MoPNG.

h) On 12.5.2017, MoPNG wrote to the Petitioner providing clarification regarding Gazette Notification dated 21.3.2016. The letter inter-alia stated that:-

(i). Post July 2017, ONGC shall be in a position to sell EOA (Eastern Offshore Asset) deep water gas through e-tender based on ceiling price; and ONGC will sign GSA with customers and these customers will sign GTA with GAIL.

i) The Petitioner has repeatedly sought to use natural gas from deep water sources from KG Basin to declare availability. However, the Respondents have rejected use of deep water gas on the ground that such gas is without due allocation by MoPNG and approval of the Appropriate Regulatory Commission. The refusal of Telangana Discoms to accept deep water gas is evident from the Retail Supply Tariff Order dated 27.3.2018 passed by Telangana State Electricity Regulatory Commission ("TSERC"). Similarly, AP Discoms have rejected procurement of power from GVPGL as recorded in the Retail Supply Tariff Order dated 27.03.2018 passed by APERC. The aforesaid position has been continued by APERC vide its order dated 22.2.2019 for retail tariff for FY 2019-20. On 7.3.2019, AP Discoms have advised that they will only schedule power from the Project once price of Natural Gas from the KG basin is less than or equal to the Domestic Natural Gas price notified by MoPNG as per the 2014 Pricing Guidelines.

j) That Deep Water Gas is natural gas in natural form from the domestic market



which is evident from the fact that natural gas being procured by the Petitioner from RIL-Niko was also from a deep water field. Deep water gas is domestic gas which does not undergo the processing (like in the case of RLNG). Moreover, the pricing of deep water gas is as per the 2014 and 2016 Notification issued by Government of India.

k) According to Petitioner, refusal to accept deep water gas is in violation of the terms of the PPA and filed this petition to declare that the actions of the respondents is illegal and contradictory to the terms of PPA.

3. The Petitioner has submitted following grounds in support of its claim:

a) That the possibility of procuring natural gas from suppliers other than GAIL including from Deep Water Fields and from private entities has been accepted in terms of APERC orders dated 12.4.2003, 30.12.2006, 28.4.2009 and 19.6.2009.

b) That the 2010 Pricing Guidelines clearly noted that with effect from 2005, the Gas Linkage Committee had been abolished and therefore there is no occasion for further allocation of gas. It is submitted that MoPNG vide letter dated 12.5.2017 has also clarified that there is no requirement for allocation / allotment of deep water gas in terms of the extant policy of Government of India.

c) That the Respondents had accepted that in the future, gas may be procured under NELP or from private players. Hence, it was within the contemplation of the parties that there may be procurement of any Natural gas other than APM gas. The only condition applicable in such event was that the pricing of natural



gas procured by the Petitioner should be in terms of the applicable pricing guidelines of Government of India. The pricing of deep water gas is in accordance with applicable pricing guidelines notified by Government of India.

- d) The Respondents have accepted and admitted in the Orders dated 12.4.2003 and 30.12.2006 passed by APERC that APM has been dismantled and pricing of natural gas will be as per the Policy or decision of the Government of India which indicates that they have accepted the price risk. Therefore, having taken such a position (which was accepted by APERC), the Respondents are estopped from contending otherwise.
- e) As per Retail Supply Tariff Orders, the Respondents have stated that they will schedule power only when the prices of natural gas supply from KG Basin is less than or equal to domestic natural gas price notified by MoPNG in terms of 2014 Pricing Guidelines. The 2014 Pricing Guidelines also regulate the pricing of Deep Water gas.
- f) A conjoint reading of the 2014 and 2016 notifications indicate that the pricing of deep water gas is (i) regulated by Government of India; and procurement of such gas is contemplated in various Orders passed by APERC. Therefore, deep water gas is natural gas in natural form and is clearly covered under the definition of fuel under the PPA.
- g) In terms of the PPA, gas may either be procured from GAIL/RIL or an alternate supplier and neither the PPA nor any order requires use of gas by the Petitioner from a particular supplier. The only condition to be fulfilled is that the price of gas is as per Government of India policy. The refusal of the



Respondents to accept deep water gas as fuel is not only contrary to the terms of the PPA but also contrary to the overall gas pricing framework in the country.

- h) That the stand taken by the Respondents, that only gas from a particular Supplier has no basis in fact or in law and is contrary to the terms of the PPA. It amounts to introduction of a new/ additional condition into the PPA which is legally impermissible. It is a settled position of law that where plain and simple language of a term in a contract is clear, the term will have to be given that meaning and that meaning only.
- i) That supply from RIL-NIKO has become NIL on account of policy decision of the Government, this is a fit case for the exercise of the powers of this Commission to direct the respondents to accept availability declaration from GVPGL with Deep Water Gas, the pricing of which is as per Pricing Guidelines of the Government of India. The present case is akin to the situation faced by coal-based thermal power stations wherein on account of a government policy (NCDP 2013), there was a shortfall in assured quantity of coal. The Hon'ble Supreme Court as well as the Hon'ble Appellate Tribunal have held such shortfall in assured quantum of coal to be a change in law event and allowed the generating company to recover additional cost of alternate coal as compensation and the present situation being squarely covered by the Energy Watchdog Judgment of the Hon'ble Supreme Court, this Commission ought to exercise its powers under Section 79(1)(b) in order to grant restitution relief to the Petitioner.



- j) Previously such power has been exercised by APERC in passing order dated 28.4.2009 and 19.6.2009 permitting the Petitioner to use RIL gas. The order also stated that such permission shall also be applicable to any further allocation that may be made by Gol from time to time allocating gas at the EGoM approved price. EGoM has been dismantled in 2014 and as per prevailing policies Gol/MoPNG has given marketing freedom for the Deep Water gas and price of same is notified from time to time. The Petitioner should be permitted to use MoPNG notified Deep Water gas as allocation mechanism is dismantled by Gol and same is covered under the “Change in law” provision of PPA.
- k) Pricing of deep water gas is as per applicable Government of India policy and as clarified vide MoPNG letter dated 12.05.2017. Procurement of natural gas at prices determined in accordance with Government of India policies has already been approved by APERC in terms of Orders dated 12.4.2003 and 30.12.2006.
- l) Non-availability of gas from GAIL/ RIL-NIKO has necessitated procurement of Deep Water Gas. This is similar in nature to GAIL/ RIL-NIKO inasmuch as it is domestic gas the pricing of which is as per Government policy.
- m) Without prejudice to the foregoing, necessity of using such gas has arisen on account of Government of India’s no cut-policy in terms of which the assured quantum of gas promised is not available. Principles regarding grant of compensation in this regard have been settled in judgments of Hon’ble Supreme Court and Appellate Tribunal.



The Respondent Nos. 2, 5 & 6 have filed reply vide affidavit dated 3.7.2019. The Respondent No.1, 3 and 4 have adopted the written submissions of Telangana distribution licensees vide affidavit dated 28.10.2019. The Petitioner has filed rejoinder and written submission vide affidavit dated 5.8.2019 and 28.10.2019.

#### **Submissions of the Respondent No. 2,5 and 6**

4. The Respondents have submitted as under:

- a) The PPA entered with the Petitioner was amended twice amending the fuel definition, initially from Naptha as Primary fuel and gas and other fuels as alternate fuels and subsequently the Natural gas as primary fuel and Naptha & others as Alternate Fuels. After deletion of alternate fuel provision, finally the fuel definition was modified as 'Natural Gas only'. The Natural Gas was referring to the firm gas allocation of 1.64 MMSCMD made by the MoPNG vide letter dated 5.6.2000, to generate 370 MW of power for supplying to the Respondents, at the APM price fixed by the MoPNG from time to time. No other category of Natural Gas like Non-APM gas, pre-NELP gas having different pricing other than APM gas, was envisaged in the amended PPA.
- b) That the Petitioner has entered Gas Supply Agreement (GSA) with GAIL on 31.8.2001 for supply of 1.64 MMSCMD of APM gas, which was renewed from time to time and last renewed on 30.8.2018 and as on date it is on force, which indicates that the Petitioner is still anticipating the natural gas allocation by the Government of India.
- c) APERC had approved the deletion of Alternate Fuel Provision in the PPA, vide its order dated 30.12.2006 passed in O.P. No. 19 of 2006, as the



Alternate Fuel Provision would result in payment of fixed Cost for deemed generation of plant availability declared with Alternate Fuel (Naphtha etc.) due to non-availability of natural gas, which would ultimately burden the consumers.

- d) Though the MoPNG had allocated APM gas to the Petitioner's project during the year 2000, the supply of Natural gas by ONGC/GAIL was not adequate to cater the demand of new IPPs viz., the Petitioner and others. Subsequently, in the year 2008/2009 the MoPNG allocated natural gas from RIL KG D6 fields, the price of which was fixed by Empowered group of Ministers (EGoM) at US \$4.205/ MMBTU. Further, the APM pricing was dismantled by the Govt. of India and the price of Natural Gas Produces from National Oil Companies (NOCs such as ONGC/OIL) was also revised to US \$4.20/ MMBTU.
- e) Clause 3.3 of the PPA vide its order dated 7.12.2009 provides the Petitioner to source gas supplies from other than GAIL and use RIL gas from KG D6 fields but cost of natural gas 'C' shall be taken as lesser of the two gases, in the formula for computation of Energy charges. Accordingly, the Petitioner operated its gas power plant with RIL KG D6 gas since 2009 onwards and supplied power to the Respondents till 2010-11 and thereafter the RIL gas supplies started dwindling and completely stopped to the Petitioner's Project during 2013.
- f) The Respondent submits that as per notified pricing Policy in March, 2016 granting Marketing & Pricing freedom with a Price Ceiling on gas produced from discoveries in Deepwater, Ultra Deepwater& High Pressure- High Temperature areas, a premium would be given on the price determined for



domestic gas, which makes the price of deepwater gas costlier. The Gas Ceiling price in respect of Deep water/Ultra Deep Water Fields, is invariably high as compared to the domestic natural gas price, being notified by Petroleum Planning & Analysis Cell (PP&AC). The plant availability (DC) based on Deep Water was not accepted, as the gas from ONGC deep water fields was costlier, and further deep water gas is not intended in the PPA/amended PPA as deep water gas being a premium priced gas. The Petitioner was not permitted to supply power generated with deep water gas, as it is not viable for power generation and would burden the consumers.

- g) The Petitioner did not have any Gas Supply Agreement with GAIL in respect of ONGC Deep Water Gas. Merely based on the 'Term Sheet' itself, which was valid only for one month, the Petitioner declared the Plant Capacity to the Respondents and seeks/claims payment of Capacity charges w.e.f. 1.11.2016. In the Petition at Para-36, the Petitioner has extracted the supply position of Natural gas from RIL KG-D6 from the 42<sup>nd</sup> Preliminary Standing Committee Report & Natural Electricity Plan 2018 to show that the supply from KG D6 was dwindling year on year from 2011-12 onwards and RIL-NIKO stopped supplying gas to the Petitioner's plant from 1<sup>st</sup> March 2013 onwards.
- h) The Parliamentary Committee recognized and recommended to the Government that the new formula for natural gas price as suggested by the Rangarajan Committee should be reviewed & reconsidered. The bottom line of the comments furnished by the Ministry of Power is that, it would be unviable for power sector if the base price of natural gas is increased beyond US\$5/MMBTU. Post-APM dismantling, the new domestic Natural Gas pricing



guidelines 2014 came into force and the earlier APM gas pricing was converted into domestic natural gas pricing being notified for every six months by PP&AC of MoPNG.

- i) The Respondent submits that as per APERC in respect of Clause 3.3 (Case-II), in case the purchase of Natural Gas is done from sources other than GAIL (APM/New domestic gas), the cost of the fuel shall be considered as the lower of two viz. GAIL price (APM/New Domestic gas price) (or) the price of Alternative Fuel supplier (deepwater gas) for the computation of Energy charges. The amended PPA is binding on the parties. Therefore, even if the Petitioner procures high priced gas from deep water fields, as per the amended PPA provision, the Petitioner is entitled to claim only the price of domestic natural gas being notified by PP&AC from time to time. The Petitioner was informed on 8.6.2017 that schedule of the power generated by the Petitioner's projects by using the ONGC deep water fields will be done subject to the condition that the gas price of the domestic natural gas as fixed by the MoPNG from time to time would be considered in the computation of Energy charges. However, the Petitioner did not come forward for such proposal. Therefore, the contention of the Petitioner that deep water produced gas is covered in the fuel definition (Natural gas only) is misconceived, erroneous and hence denied as the price reasonability of the fuel/natural gas is the basic criteria for scheduling the power from the Petitioner's projects, as observed by the Hon'ble Supreme Court in Appeal No. 8747 of 2014.
- j) The attention of this Commission is drawn to the MoPNG press note: EGoM decision on commercial utilization of gas under NELP dated 22.1.2009,



wherein the EGOM decided inter alia, to allocate the RIL KG D6 gas to the power projects in Andhra Pradesh, subject to availability of gas, which clearly indicates that the gas allocation made are subject to availability and the gas supply risk has to be assumed by the Generating Company. Even the GSA (between the Petitioner & RIL) categorically stipulated as the scope of seller's (RIL) obligation that Seller shall sell and deliver gas from the gas fields at the Delivery point on an as available basis at the sale price.

- k) The MoP notification dated 6.11.1995 stipulated at clause 4.3 that the responsibility of fuel linkage would be that of IPPs and any fuel supply risk would have to be shared between the IPPs & Fuel Suppliers. The said notification further stipulated that State Electricity Board would not take any fuel supply risk. As such, the Respondents cannot be held responsible or liable for non-availability of APM/New domestic gas.
- l) The CERC (Terms and Conditions of Tariff) Regulations issued for tariff determination will not be applicable in the present case as the Regulation was based on cost plus methodology. Therefore, the amended PPA provisions are binding on the parties to the agreement.
- m) The Respondents would be willing to consider the Plant availability declaration by the Petitioner and scheduled power, if the Petitioner would declare the Plant Availability with APM gas or Domestic natural gas by obtaining gas diversion from old gas power projects.
- n) The Petitioner, in the Petition O.P. No. 40 of 2019 before APERC, submitted that PPA include 'No alternate fuel' and Capacity Charge payment on basis of



actual generation. It could be seen from the said Petition that the Petitioner is claiming right on the APM gas being utilized by existing old IPPs and further stated that his power project is having advantage of Capacity charges paid on the basis of actual generation since the alternate fuel clause was not available. However, in the present petition, it seeks to claim Capacity charges for deemed generation on the basis of plant availability declaration with deep water gas (Term sheet valid for 1 month), which is in absolute contradiction to its own filing before APERC.

**Rejoinder of the Petitioner to the reply of Respondent No. 2, 5 and 6**

5. The Petitioner has filed its rejoinder to the Reply of Respondent No.2, 5 & 6 and has submitted the following:

a) In terms of the PPA, parties are obligated as below:-

- (i). GVPGL to source fuel as specified;
- (ii). Declare plant availability based on fuel;
- (iii). Distribution licensee to schedule GVPGL based on availability declaration;
- (iv). Distribution licensee to pay fixed cost based on availability declaration even if not scheduled;
- (v). Distribution licensee to pay variable cost as pass through on agreed normative heat rate.



- b) Sanctity of the PPA entered into between parties need to be maintained. The aforesaid position of law has been also upheld by the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Limited vs. EMCO 2016 11 SCC 182. In light of the aforesaid facts and circumstances, the Petitioner has fulfilled its obligation by making availability declaration on Deepwater Gas which is "Natural Gas" as defined under the PPA, qualifying as domestic natural gas in its natural form and accordingly entitled to payment of Capacity Charges in terms of the PPA.
- c) No other category of Natural Gas like Non-APM gas, pre-NELP gas having different pricing other than APM gas was envisaged in the amended PPA. The PPA defines 'Fuel' as Natural Gas only and does not limit Natural Gas to APM Gas as purportedly claimed by the Telangana Discoms. In fact, amendment dated 2.5.2007 to the PPA deleted the provision for alternate fuel as well as the term 'intended to be used'. Therefore, it is evident from the PPA that there is no limitation/restriction on supply of domestic gas.
- d) Given the changed scenario of domestic natural gas availability, Government of India (Gol) revised its policies from time to time based on the availability and the demand in various sectors. These changes in policy of Gol starting from allocation of APM Gas in the year 2000 to the latest Deepwater Gas Policy qualify as Change in Law under the PPA. The Petitioner is entitled to the landed price of gas supplied by the GAIL. Since the availability declaration on the basis of Deepwater gas from KG Basin is in terms of the PPA. Accordingly, the contention of Telangana Discoms that Deepwater Gas is not intended in the PPA is devoid of merit and is liable to be rejected.



- e) That the clauses in the agreement ought to be given the plain, literal and grammatical meaning of the expression used in the same and parties as well as courts can imply a clause only if it is found that the plain and literal meaning given to the expression used in the terms is ambiguous to make out the intention of the parties. The aforesaid position with respect to interpretation of contract have been reaffirmed by the Hon'ble Supreme Court in recent judgment dated 2<sup>nd</sup> July, 2019 in Civil Appeal No. 11133 of 2011, titled as M/s Adani Power (Mundra) Ltd. Vs Gujarat Electricity Regulatory Commission &Ors. In present case also the definition of Fuel provides for "Natural Gas" and does not limit or restrict supply.
- f) The cost of the RLNG was not the sole factor behind the Hon'ble Supreme Court. The primary reason was that RLNG is not domestic natural gas in its natural form as RLNG was processed gas. However, unlike RLNG, Deepwater gas is domestic natural gas in its natural form. Further, Deepwater gas does not undergo processing, which is the case with RLNG. In view of the foregoing submissions, Telangana Discoms' reliance on the RLNG Judgment to reject availability based on deep water gas based solely on price is erroneous and ought to be rejected by this Commission.
- g) That as per the PPA, price of Natural Gas, if purchased from other than GAIL, shall be lower of the two suppliers, i.e. GAIL (APM/domestic natural gas) or gas so from Deepwater fields other than GAIL is misplaced and ought to be rejected. The Petitioner submits that it is purchasing gas from GAIL in present case. However, the PPA permits the Petitioner to procure gas from suppliers other than GAIL. This refers to other entities (apart from GAIL) who supply



gas. For Example: Cairn, Reliance etc. In any event, the Petitioner has declared its availability based on deep water gas to be supplied by GAIL. Accordingly, no occasion arises for the Telangana Discoms to reject availability declared by the Petitioner for gas being procured through GAIL.

- h) That in terms of Article 11 of the PPA, the Petitioner is inter-alia required to propose amendments to the PPA in order to put the Petitioner in the same economic position had such Change in Law event not occurred.
- i) Further, Telangana Discoms reliance on the 19<sup>th</sup> Standing Committee on Petroleum and Natural Gas (2013-14) Report to state that as per Ministry of Power, increase of base price of natural gas beyond US\$ 5/MMBTU will make entire sector unviable, is misplaced. It is submitted that the recommendations also suggested for review and reconsideration of a new formula for natural gas price as suggested by the Rangarajan Committee. It is submitted that the entire scenario faced by the Petitioner, in particular and the gas based power industry in general necessitates exercise of general regulatory powers by this Commission. The 19<sup>th</sup> Standing Committee Report relied on by Telangana Discoms further necessitates the exercise of this regulatory power in light of the guiding principles enshrined under Section 61 of the Electricity Act, 2003.
- j) In terms of PPA, the Petitioner is free to declare availability on APM Gas as well as Deepwater Gas as both are fuel under the PPA. In Petition No. 40 of 2019, the Petitioner is exercising its right to optimise power procurement and procure gas at the lowest price. It is submitted that the same cannot take away from the Petitioner's right to use Deepwater Gas.



## **Written submission of the Respondent No. 2,5 and 6**

6. The Respondent No. 2, 5 and 6 in its written submission dated 28.10.2019, mainly reiterated the earlier submission and for the sake of brevity, not repeated again. The relevant submission has been given as under:-

- a) There were multiple pricing regimes that existed in the Country for natural gas supplies, prior to the issuance of New Domestic Natural Gas Pricing Guidelines, 2014. These were broadly divided into two categories such as APM gas (Administered Pricing Mechanism) and Non-APM gas (free market gas). There was differential pricing existed for different sectors such as Power Sector, Fertilizers, Consumers etc. The APM gas refers to gas produced by entities awarded gas fields prior to PSC (Production Sharing Contract) regime. The price of APM gas was set by the Government of India from time to time. Non-APM gas or free market gas is again broadly divided into two categories, namely domestically produced gas from JV (Joint Venture) fields and imported LNG. The pricing of JV gas is governed in terms of the PSC provisions. Further NELP (New Exploration Licensing Policy) was announced and the Government of India constituted an Empowered Group of Ministers (EGoM) to recommend the pricing for natural gas from NELP fields and approved the following price basic / formula for fixing the gas price in case of KG-D6 Block of RIL/Niko:

$$\text{Selling price (in US\$ /MMBTU)} = 2.5 + (\text{CP}-25)^{0.15}$$

Where, CP= Crude price in US \$ per Barrel, with a cap of CP=US \$60/barrel, which worked out to be US \$4.205/MMBTU

- b) The Government of India also hiked the APM Gas pricing of ONGC at US\$ 4.2/MMBTU, this APM price was made applicable to all existing gas projects.



Since the 1<sup>st</sup> amended PPA was based on sourcing of gas from GAIL/ONGC fields, further amendment to the PPA was approved by the then APERC under Case-II of Article 3.3 to source Natural gas from sources other than GAIL such as RIL KG D6, which was also priced at US\$ 4.205/MMBTU on par with GAIL/ONGC APM Gas.

- c) To protect the interest of distribution licensee and consumers, the Article 3.3 of PPA was amended to incorporate Case-II, which caps the cost 'C' of the Gas in the Energy Charge Formula pegged to the price of GAIL Invoice, which was obviously referring to the APM pricing for the gas allocated by the MoPNG, Govt. of India specified in the PPA. GAIL's invoice under Case-II of Article 3.3 has to be read together with the Gas allocation made by Government of India, but not in isolation as per the ratio decide by the Hon'ble Appellate Tribunal in Appeal No. 91 of 2010 dated 27<sup>th</sup> September, 2011.
- d) As is evident from the Hon'ble Supreme Court Judgment dated 16.2.2018 in Civil Appeal No. 8747 of 2014, that the cost of fuel was the prime consideration of the Respondents (DISCOMS) and the intention of the Parties have to be gathered by taking into consideration all surrounding facts and circumstances to understand the true scope of the agreement as the subsisting PPA is a Commercial document and same cannot be interpreted in a manner to arrive at a complete variance with what was originally have been the intendment of the parties;
- e) The contentions raised by the Petitioner that "after abolishing of APM pricing, GAIL would also supply deep water gas, and raise the Invoice on the Petitioner", which is a misinterpretation of acts. When the clauses/ Articles in



the amended PPA are read holistically, the GAIL invoice would be referring to the allocation of 1.64 MMSCMD gas allocated by Government of India, whose pricing was fixed under APM category.

- f) The deep water gas was not contemplated in the definition of fuel in the amended PPA, which is a premium gas and whose price is fixed by the National Oil Companies (ONGC/OIL) for the gas produced from nominated blocks, based on Marketing and Pricing freedom given to them by Government of India, and is market determined, however the Ministry of Petroleum & Natural Gas (MoPNG), Govt. of India fixes a Ceiling price on the said market determined price, periodically every 6 months and notifies the same through its Petroleum Planning & Analysis Cell(PPAC). It is submitted that when the deep water gas is not contemplated in the amended PPA, the Respondents cannot be compelled to accept the Plant availability declaration by the Petitioner based on high cost deep water gas which came into existence only during 2016-2017, in complete variance with the provisions of the PPA.
- g) GAIL is only a marketer of Natural Gas produced by National Oil Companies, (ONGC/OIL India) and it can market any product available in its basket, whether APM/Non-APM/ deep water/Ultra deep water/RLNG. However the same shall not confer any right to the Petitioner much less right under the PPA to compel the Respondent to accept the availability with deep water gas.
- h) It is evident from the aforesaid New Domestic Natural Gas pricing guidelines, 2014 (Para-3) that the Gas price determined under the said guidelines would be applicable to all gas produced from nomination fields given to ONGC, Oil



India marketed by GAIL and billed under APM pricing. In pursuance of the notification of the New Domestic Natural Gas pricing guidelines, 2014, the APM pricing has been converted into Domestic Natural Gas price, being notified by the Director General, Petroleum Planning and Analysis Cell (PPAC).

- i) It is also pertinent to submit that certain old gas IPPs like M/s. LANCO Kondapalli Power Limited, M/s. Spectrum Power Generation Limited, M/s. GVK Stage-I (which were allocated Natural Gas by Govt. of India under APM pricing) are also being supplied the Natural Gas by GAIL even after the completion of PPA tenure and are billed at Domestic Natural Gas price (earlier APM price) as notified by the PPAC of MoPNG, which clearly establishes that the earlier APM pricing is replaced with New Domestic Gas pricing. For instance, for a particular month of December 2015, GAIL billed M/s. LANCO Kondapalli, gas basic price at the rate of Rs. 252.58, considering the Exchange Rate at Rs. 66.12, which translates into US\$ 3.82/MMBTU, which clearly shows that the previous APM pricing is converted into new domestic gas price.
- j) The Respondents are willing to schedule power from the Petitioner's Project at the Domestic Gas price being fixed by PPAC for the natural gas, received from GAIL but not on high priced deep water gas, as the same is not contemplated in the subsisting PPA.
- k) From the Petitioner's own pleading before the APERC in O.P No. 40 of 2019, it would transpire that the Petitioner was always well aware that the subsisting PPA provisions do not permit deep water gas, in as much as the gas



allocation mentioned in the amended PPA was based on APM pricing fixed by the MoPNG, Govt. of India, whereas the price of deep water gas is market determined and is abnormally high, which results in huge financial burden on the Respondents and consequential burden on the end consumers.

- l) With regard to the other contention of the Petitioner that Article 3.3, Case-II is applicable for purchase of gas from sources other than GAIL, it is submitted that the erstwhile APERC had approved the amendment to source gas from RIL KG D6 Fields instead of the GAIL/ONGC fields based on the price fixation done by EGoM and price parity of NELP fields with APM pricing (US \$ 4.2/MMBTU). If the RIL Gas price were to be higher than APM Gas price, then APERC would not have approved the amendment. To ensure price reasonability of the price of gas to be sourced by the gas IPP, the Article 3.3 Case-II was incorporated in the amended PPA pegging the price of gas from alternative sources to GAIL's invoice, which would supply APM gas only but not any other category of natural gas.

### **Written submission of the Petitioner**

7. The Petitioner in its written submission dated 28.10.2019 mainly submitted the following:

- (a) The 1<sup>st</sup> PPA Amendment was affected on 18.6.2003, the source of natural gas was intended to be 1.64 MMSCMD gas allocated to GVPGL by Gol on 5.6.2000. The 2<sup>nd</sup> PPA Amendment dated 2.5.2007 ("**2007 Amendment Agreement**") made two changes:

- (i) Alternate fuel like Naphtha, Low Sulphur Heavy Stock etc. were



deleted.

(ii) The term “intended to be used” was also deleted because the 1.64 MMSCMD gas did not exist.

(b) That the contention of the Respondents with regard to reference to the GAIL invoice is an obvious reference to the APM gas price is misplaced as the amendments to the PPA remove reference to the same. As a consequence of the 2007 Amendment Agreement, the Petitioner was vested with the contractual right to procure natural gas from any domestic source at the cost limited to the cost of natural gas supplied by GAIL or from the alternative supplier whichever is less. This is borne out from the fact that if the intention was to only exclude Naphtha and other fuels, there was no requirement to delete the term “intended to be used” and further delete reference to the fuel supply committee in the PPA. It is noteworthy to mention here that prior to 2007 amendment AP Transco has the right to review and approve the fuel supply agreement through the Fuel Supply Committee in accordance with and subject to Schedule-1 and after the amendment in 2007 this right to AP Transco has been deleted. Therefore, it is pertinent to note that the 2007 Amendment Agreement made no mention of the earlier allocation of 1.64 MMSCMD of natural gas to the Petitioner. The Telangana Discoms have relied on the PPA between AP TRANSCO and GVK Industries Ltd. In the said PPA, the phrase ‘Natural Gas intended to be used’ was not deleted.

(c) The above is also borne out from the APERC Order dated 30.12.2006 in OP No. 19 of 2006 in terms of which:-



- (i) Use of natural gas was not limited or interdicted.
- (ii) The proposal for cap on variable cost on account of increase in gas price not accepted. Respondent Distribution licensee had submitted that it was not possible to cap the variable cost and that risk of increase in cost applies to all fuel. Accordingly, Distribution licensees of Telangana submitted that the PPA was amended which caps the price to GAIL invoice which means the APM gas is erroneous and ought to be rejected.
- (iii) The cost of the natural gas to be paid is limited to the cost of natural gas supplied by GAIL or from the alternative supplier whichever is less.
- (iv) Price risk due to high price of fuel and deemed generation charges applies to all fuel.

(d) That the contention of the Respondents Telangana distribution that GAIL is a mere marketer of gas and can market all sorts of gas including Deepwater Gas, but the same does not entitle the Petitioner right to use such gas is contrary to the amendments carried out to the PPA and Orders of the APERC in terms of which the parties had agreed that price of natural gas would be market driven and suppliers other than GAIL were permitted.

### **Analysis and Decision**

8. In the light of the above submission of the Petitioner, Respondents and documents placed on records, the following issues arise for consideration in the present petition:



- a) **Issue No.1: Whether the Deep-water gas is a natural gas in terms of the PPA between the Petitioner and the Respondents?**
- b) **Issue No.2: Whether the availability declaration by the Petitioner using the deep water gas is permissible under the provisions of the PPA?**
- c) **Issue No.3: Whether the Petitioner is entitled for payment of capacity charges from the date of availability declaration on the basis of deep water gas?**
- d) **Issue No.4: If the answer to Issue No.3 is in the affirmative, whether the Petitioner is entitled for payment of carrying cost for the capacity charges?**

9. These issues have been dealt with ad seriatim in the succeeding paragraphs.

**Issue No.1: Whether the Deep-water gas is a natural gas in terms of the PPA between the Petitioner and the Respondents?**

10. Before we go into the question whether deep water gas is a natural gas or not in terms of the PPA, it is considered relevant to first capitulate the policy framework for allocation of gas to different sectors including the power sector and how it has influenced the decision of the Petitioner to use deep water gas for generation and supply of electricity to the Respondents.

11. Upto early 1990s, natural gas was being produced only from the fields operated by the government companies, namely, Oil and Natural Gas Commission (ONGC) and Oil India Limited (OIL) out of the blocks given to these agencies on nomination basis. The pricing of natural gas was covered under the Administered Pricing Mechanism (APM) and was controlled by Government of India and allotted to



customers in priority sectors like fertilizers, power etc through the Gas Linkage Committee. Since APM gas was not available even for the existing allottees, Gas Linkage Committee was abolished in 2005 and no further allocation of gas was made since then. During mid 1990s, it was decided to open the sector to private sector investment under which certain blocks were awarded to private sector companies on competition under Production Sharing Contracts (PSCs). The contractors who signed the PSCs did not have the marketing freedom and were required to sell the gas produced and saved to Gas Authority of India Limited (GAIL) who marketed the gas as per the allocation made by the Government. In 1999, Government of India notified New Exploration Licence Policy (NELP) to attract private investment in Oil & Gas sector. As per the said Policy, private investment was sought on competition basis and certain blocks were awarded to private sector companies under Production Sharing Agreements (PSA) and freedom was given to the Contractors to market the gas subject to Gas Utilisation Policy of the Government. In April 2000, Production Sharing Contract was signed between the Government of India and the consortium of RIL and Niko Resources Limited for KG-DWN 98/3 (KG D6) Block. The Government constituted an Empowered Group of Ministers (EGoM) to take a decision on utilisation of gas produced under NELP. The EGoM decided the principles for allotment of natural gas according to which the contractors would sell gas from NELP to consumers in accordance with the marketing priorities determined by the Government and on the basis of the formula for determining the price as per approved by the Government. MoPNG notified the New Domestic Natural Gas Pricing Guidelines 2014. Under the said Guidelines, the pricing formula was prescribed based on the weighted average price of four global benchmarks namely, USA & Mexico, Canada, European Union and Former Soviet



Union countries excluding Russia and Russia. The gas price so determined was made applicable to all gas produced from the nomination fields given to ONGC and Oil India, NELP blocks and the periodicity of determination would be fixed half-yearly. Vide notification dated 21.3.2016, MoPNG notified the marketing including pricing freedom for the gas to be produced from deep water, ultra deep water and high pressure-high temperature areas subject to a ceiling price on the basis of landed price of alternative fuels. Further, the ceiling price in US\$ per mmbtu (GCV) shall be calculated as lowest of the (landed price of imported fuel oil, weighted average import landed prices of substitute fuels and landed price of imported LNG).

12. In May 1995, Andhra Pradesh State Electricity Board (APSEB) (predecessor of Respondent Nos. 3 to 6) invited bids for establishing short gestation gas/naphtha/fuel oil based power stations to bridge the demand supply gap of power in the erstwhile State of Andhra Pradesh. APSEB accepted the bid submitted by Nippon Denro Ispat (the holding company of M/s Ispat Power Limited, the predecessor of GVPGL/Petitioner) to set up a 468 MW capacity power plant with naphtha as the fuel. On 31.3.1997, M/s Ispat Power Limited entered into a Power Purchase Agreement with APSEB for supply of 468 MW of power. In Article 1.1 (27) of the PPA, "fuel" was defined as under:-

"1.1.27 Fuel: means gas, naphtha, low sulphur heavy stock or furnace oil, and the like, that is intended to be used as primary fuel by one or more units of the Project to generate power from the Project or in case of unavailability of Naphtha, any of the above as alternate fuel."

The PPA dated 31.3.1997 guaranteed operation of the plant at 80% PLF and the Petitioner was to be paid on 'deemed generation basis' irrespective of whether any generation was made or not.



13. Based on the strength of the PPA, MoPNG, on 5.6.2000, allocated 1.64 MMSCMD of APM natural gas to the Petitioner from ONGC fields in KG basin on firm basis and the Petitioner entered into a Gas Supply Agreement dated 31.8.2001 with GAIL for supply of gas till 31.12.2010 with provision for further extension as may be mutually agreed.

14. The Petitioner proceeded to set up a 468 MW combined cycle gas based power station located in Vemagiri Village in the East Godawari District of Andhra Pradesh. During the course of implementation of the project, Government of Andhra Pradesh decided to permit setting up of the power plants to be operated by using natural gas. Accordingly, Government of Andhra Pradesh wrote to the developers of power projects in the State to either restrict the plant capacity to the gas allocated or to adopt a two stages development process with available gas and balance after additional gas allotment. The Petitioner agreed to develop the project in two stages (370 MW in Stage-I with available gas of 1.64 MMSCMD and 150 MW in Stage-II after obtaining the gas) which was accepted by Government of Andhra Pradesh. The Petitioner also modified its decision and changed the plant design from naphtha based plant to natural gas based plant and requested the Government of Andhra Pradesh to recommend for allotment of gas for its project.

15. The Petitioner and APTRANSCO agreed and initialed a draft amendment agreement regarding the change of name, enhancement of capacity (taking into consideration the second stage), fixed charges, change of fuel, incentives etc. and approached the APERC through OP No.2/2002 for approval. APERC approved the draft amendment vide its order dated 12.4.2003. The PPA dated 31.3.1997 was



amended on 18.6.2003 to include the changes as approved by APERC. As per the amended PPA, the fuel source was agreed as under:-

“1.1.27 Fuel: means Natural gas that is intended to be used as primary fuel by one or more units of the Project to generate power from the Project or in case of unavailability of primary fuel, Naphtha or Low Sulphur heavy stock and the like as alternate fuel.”

Proviso under clause 3.3

Provided that

Case-I: “C” is the cost of Natural Gas which is primary fuel delivered at the metering point is inclusive of cost of Gas and transportation charges and other taxes as per the invoice(s) given by GAIL.

Case-II: In the event of purchase of Natural Gas from sources other than GAIL, the cost ‘C’ shall be the cost as per GAIL price or the cost of alternative fuel supplier whichever is less.

Case-III: “C” is the cost of Alternative Fuel shall be as decided by the Fuel Supply Committee.

Provided that the APTRANSCO has the right to review and approve the Fuel Supply Agreement through the Fuel Supply Committee in accordance with and subject to Schedule I”.

16. Since gas was available in lesser quantity than what was projected, Government of Andhra Pradesh vide letter dated 6.12.2004 recommended to MoPNG and GAIL to ensure a pro-rata supply of available gas to all the firm allottees including the Petitioner. Since the distribution companies of erstwhile State of Andhra Pradesh continued to remain bound by the ‘deemed generation’ obligations in relation to the old IPPs and some new IPPs did not agree to forgo ‘deemed generation’ advantage originally envisaged, Government of Andhra Pradesh vide its letter 22.11.2005 suggested to MoPNG and GAIL to make allotment of gas firstly to old IPPs to meet their obligations of achieving 80% PLF and to allot the left out gas, if any, to the new IPPs which included the Petitioner.



17. The distribution companies of the erstwhile State of Andhra Pradesh (Respondent Nos.3 to 6 in the present petition) apprehended that due to non-availability of natural gas, the alternative fuel provision may be invoked by the Petitioner which would result in payment of fixed cost for deemed generation of plant availability declared with alternate fuel (Naphtha etc.). Accordingly, they filed OP No.19 of 2006 before APERC seeking further amendments to the PPA dated 31.3.1997 and Amendment Agreement dated 18.6.2003 for substitution of the distribution companies of Andhra Pradesh in place of ASEB and deletion of alternative fuel source among others. APERC vide its order dated 30.12.2006 in OP No. 19 of 2006 approved the amendments and consequently, the PPA between the Petitioner and APTRANSCO was further amended on 2.5.2007. The fuel agreed in the PPA was as under:-

“1.1.27 Fuel: means Natural gas only.”

Proviso under clause 3.3

Provided that

Case-I: “C” is the cost of Fuel delivered at the metering point is inclusive of cost of Gas and transportation charges and other taxes as per the invoice(s) given by GAIL.

Case-II: In the event of purchase of Fuel from sources other than GAIL, the cost ‘C’ shall be the cost as per GAIL price or the cost of alternative fuel supplier whichever is less.”

Therefore, as per the PPA between the Petitioner and the Respondents as amended as on 2.5.2007, “natural gas” is the only agreed fuel for generation and supply of power by the Petitioner to the Respondents and cost of fuel will be inclusive of the cost of Gas and transportation charges and other taxes as per the invoices of GAIL. Further, in case of supply from alternative sources, the cost will be as per the cost of GAIL price or cost of alternative fuel supplier whichever is less.



18. On 25.6.2008, the Empowered Group of Ministers (EGoM) decided the policy for allocation of natural gas from KG D6 basin as per which upto 18 mmscmd of natural gas would be supplied to gas based power plants. A Gas Sale and Purchase Agreement was signed on 17.4.2009 between the Petitioner as the Buyer and Reliance Industries Limited and Niko (NECO) Limited as Seller for supply of gas from KG D6 Block. On 26.4.2009, MoPNG issued an allocation letter as per which 1.48 mmscmd of natural gas was allocated to the Petitioner. The Petitioner filed IA No. 6/2009 in OP No. 12/2009 before APERC seeking approval for usage of gas from KG D6 Block in the light of non-availability of natural gas from GAIL. APERC vide its orders dated 28.4.2009 and 19.6.2009 approved the supply of gas from RIL-Niko on the basis that price of such gas would be fixed as per the pricing methodology and formula approved by the Government of India. Since the actual supply of KG D6 was lesser than the projected supply, MoPNG vide its letter dated 30.3.2011 directed RIL-Niko for supply of gas on pro-rata basis in the priority order viz. fertilizer, LPG, power and CGD. Subsequently, supply from KG D6 was reduced and from 1.3.2013, supply of gas was completely stopped to the Petitioner. On account of non-availability of natural gas from GAIL and RIL-Niko, the Petitioner sought use of RLNG which was disputed by the Respondents. APERC vide its order dated 8.8.2013 rejected the claim of the Petitioner to cover RLNG under the definition of fuel in the PPA. The Appellate Tribunal for Electricity in its order dated 30.6.2014 in Appeal No. 222 of 2013 set aside the order of the APERC. On appeal, it was decided by the Hon'ble Supreme Court vide judgment dated 16.2.2018 in Civil Appeal No. 8747 of 2014 that RLNG cannot be treated as a natural gas in terms of the PPA between the Petitioner and the Respondents.



19. On account of the non-availability of gas from GAIL as well as RIL-Niko, the Petitioner vide its letter dated 5.5.2016 approached the Respondents for supply of power based on the gas supplied by ONGC from S1 and Vasishta fields to be priced as per the Gazette notification dated 21.3.2016 i.e. the future gas price would be notified from time to time. The Petitioner entered into a binding term sheet agreement with GAIL on 8.10.2016 for supply of deep water gas from KG basin at USD 5.05/MMBTU. The Petitioner made an availability declaration on 31.10.2016 for supply of power on 1.11.2016 on the basis of deep water gas to be provided by GAIL under the term sheet agreement. However, the Respondents rejected the availability declaration and did not schedule the power on the ground that the availability declaration without due allocation of gas by MoPNG/Gol and without approval of APERC would not be acceptable to them. Both APSLDC and TS SLDC rejected the use of deep water gas for the purpose of availability declaration on the ground that the gas is more expensive than the gas allocated by MoPNG. The Petitioner vide its letter dated 13.10.2016 approached the APPCC for supply of power under the long term PPA with available natural gas from ONGC's deep water field. However, APPCC vide its letter dated 1.11.2016 rejected the request of the Petitioner due to the following reasons:

- a) APERC in its order dated 8.8.2013 rejected the scheduling of power on the basis of RLNG as fuel on the ground that cost of per unit generation of power was of paramount consideration while granting consent to PPA and amendments granted from time to time.
- b) The pricing formula of gas to be produced from the discoveries in deep water, ultra deep water, high pressure and high temperature areas is based on the



landed price of alternate fuel oil, substitute fuels and imported LNG. Natural gas sourced from the discoveries in deep water, ultra deep water, high pressure and high temperature areas is a premium priced gas having much higher price than the gas allocated by MoPNG.

20. The Respondents vide their letter dated 8.6.2017 informed the Petitioner that the Respondents would schedule power generated by the Petitioner by using ONGC deep water field subject to the condition that the gas price of the domestic natural gas as fixed by MoPNG from time to time would be considered in the computation of the energy charges. AP Discoms vide their letter dated 7.3.2019 have also reiterated the above position.

21. In the above background, the question for consideration is whether the deep water gas is covered under the definition of fuel in the PPA i.e. "natural gas only" and accordingly, the Petitioner is entitled to give declaration. The Petitioner has submitted that the Respondents have rejected its claim to use deep water gas on two grounds, viz. non-allocation of deep water gas by Government of India and higher price of deep water gas as opposed to the APM gas. The Petitioner has submitted that as regards the allocation of deep water gas by Government of India, the 2010 Pricing Guidelines clearly notes that with effect from 2005, Gas Linkage Committee had been abolished and therefore, there was no occasion for further allocation of gas. The Petitioner has further submitted that MoPNG vide its letter dated 12.5.2017 has clarified that there is no requirement for allocation/allotment of deep water gas in terms of the extant policy of the Government of India. The Petitioner has submitted that the Respondents have accepted that in future, gas may be procured under NELP or from private players and therefore, it was within the



contemplation of parties that there may be procurement of natural gas other than APM gas. The only condition applicable in such event was that the pricing of natural gas should be in terms of the applicable Pricing Guidelines of the Government of India which is being complied with in case of deep water gas purchased by the Petitioner.

22. The Respondents have maintained that deep water gas is not covered under the definition of fuel namely, "natural gas only" as the price reasonability of natural gas is the basic criteria for scheduling power from the project of the Petitioner. In this connection, the Respondents have relied upon the observations of the Hon'ble Supreme Court in Paras 24 and 28 of the judgment dated 16.2.2018 in Civil Appeal No. 8747 of 2014. The Respondents have submitted that the claim of the Petitioner for capacity charges w.e.f. 1.11.2016 based on plant availability declaration using deep water gas which in turn is based on Term Sheet entered with GAIL without having approved Gas Supply Agreement in place in respect of ONGC deep water gas is contrary to the amended PPA provisions and also contrary to the ratio decided by the Hon'ble Supreme Court in Appeal No. 8747 of 2014. The Respondents have submitted that the Petitioner claim is not maintainable and consequently the interest claim is not maintainable.

23. The Petitioner has submitted that the Hon'ble Supreme Court in its judgment dated 16.2.2018 in Civil Appeal No. 8747 of 2014 has interpreted the term "fuel" under the PPA to mean natural gas in its natural form from the domestic market. The Petitioner has submitted that unlike RLNG, deep water gas is a domestic gas in natural form from the domestic market and does not undergo the processing as in the case of RLNG. Further, the pricing of deep water gas is as per 2014 and 2016



notification issued by MoPNG. The Petitioner has further submitted that the possibility of procuring natural gas from suppliers other than GAIL including the deep water fields and from private entities has been accepted in terms of the orders dated 12.4.2003, 13.12.2006, 28.4.2009 and 19.6.2009 passed by APERC.

24. We have considered the submissions of the Petitioner and Respondents. There is no dispute among the parties that as per the PPA dated 31.3.1997 as amended vide amendment dated 2.5.2007, the agreed fuel for generation and supply of power is “natural gas only”. The term “natural gas” has not been defined in the PPA. The definition of natural gas in Section 2(z a) (i) of the Petroleum and Natural Gas Regulatory Board Act, 2006 (PNGRB Act) includes both liquefied natural gas and re-gasified liquefied natural gas. Hon’ble Supreme Court in its judgment dated 16.2.2018 in Civil Appeal No. 8747 of 2014 (RLNG Judgment) has held that the definition of natural gas in Section 2 (za) (i) of the PNGRB Act has no relevance for interpretation of the PPA dated 31.3.2007. The Hon’ble Supreme Court in the said judgment while dealing with the question whether RLNG is covered under natural gas has laid down the following principles for interpretation of contract:

“20. It will not be a safe method to interpret a contract by picking out one clause of the same defining “fuel”, apply a technical scientific meaning to it as observed in Trutuf Safety Glass Industries and then conclude that being a form of natural gas, RLNG was intended to be impliedly included in the definition of “fuel”. The terms of a contract have to be given their plain meaning with regard to the intendment of the parties as to what was intended to be included and what was not intended to be included, as distinct from an express exclusion. The commercial parlance test will also have to be applied as to whether those in the business consider the two forms of gas as synonymous and interchangeable. Quite obviously, the answer has to be in the negative considering the importation of RLNG, additional processes involved and the consequent higher costs involved.

Further, in Para 28 of the said judgment, the Supreme Court held as under:-

“28. The aforesaid discussion, therefore, leads to the inevitable conclusion that the intention of the parties under the agreement, as amended from time to time, was to



generate power from fuel reasonably priced, so as to ultimately make available power to the consumers at reasonable rates. The choice of fuel as natural gas only has, therefore, to be understood as being confined to natural gas only in its natural form. The Respondent was well aware that RLNG was never intended to be included in the definition of “natural gas” as understood by the parties, notwithstanding that it may be a variant of “natural gas”.

As per the above judgment, RLNG was held to be not included in natural gas as intended by the parties to the PPA on account of various considerations as importation of RLNG, additional processes involved and consequent higher cost involved. Thus, the higher cost of RLNG was attributable to such factors as the importation of RLNG and additional process involved in RLNG. Natural gas in the context of the PPA has been interpreted by the Hon'ble Supreme Court as “the natural gas in its natural form”. As per para (B) of the MoPNG letter dated 21.3.2016 classifies the deep water discoveries of oil as under:-

- (a) Deep water areas: areas having water depth between 400 mts and 1500 mts.
- (b) Ultra-Deep water areas: areas having water depth greater than 1500 mts.
- (c) High Pressure- High Temperature Areas: Areas having shut-in well head pressure greater than 690 bars, bottom hole temperature greater than 150 degree centigrade.

Therefore, the depth of the well from which gas extracted from deep water areas, ultra deep water areas and high pressure-high temperature areas is the only distinguishing feature from the natural gas traditionally extracted by ONGC. There is neither any additional process nor importation involved in case of the aforementioned gas unlike the case of RLNG. In terms of the judgment of the Hon'ble Supreme Court in RLNG case, the gas extracted from deep water areas,



ultra deep water areas and high pressure-high temperature areas are natural gas in natural form and domestically produced.

25. The Respondents have referred to para 24 of the RLNG judgment to contend that deep water gas is not covered under the definition of “natural gas only” since price reasonability of the natural gas is the basic criteria for scheduling in terms of the PPA. Para 24 of the RLNG judgment is extracted as under:-

“24. The present was a contract for purchase of power generated from fuel which was reasonably priced so as to keep in check the cost of power generated from the same, in the interest of the consumer. Undoubtedly, cost of fuel was a primary consideration in the mind of the appellant. The contextual background in which the PPA originally came to be made, the subsequent amendments, the understanding of the respondent of the agreement as reflected from its own communications and pleadings make it extremely relevant that a contextual interpretation be given to the question whether RLNG was ever intended to be included within the term “natural gas”, as observed in Bihar SEB v. Green Rubber Industries.....”

The above observation of the Hon’ble Supreme Court is in the context of the use of RLNG as a form of natural gas which is evident from para 25 of the said judgment which is extracted as under:-

“25. In the facts and circumstances of the present case, there can be no manner of doubt that the parties by their conduct and dealings right up to the institution of proceedings by the respondent before the Commission were clear in their understanding that RLNG was not to be included within the term “natural gas” under the PPA.....”

It was never in the contemplation of the parties that the deep water gas etc. would not be used as natural gas in terms of the PPA. It is pertinent to note that the Respondents have agreed to schedule power generated by using ONGC deep water fields in their letter dated 8.6.2017. In this connection, para 31 of the reply of the Respondents filed by affidavit dated 3.7.2019 which is extracted as under:-

“31. As such, the Respondents addressed the Petitioner vide letter dated 8.6.2017 and informed that DISCOMs would schedule the power generated by the Petitioner’s Project by using the ONGC deep water fields subject to the condition that the gas price of the domestic natural gas as fixed by the MoPNG from time to time would be



considered in the computation of energy charges. However, the Petitioner did not come forward for such proposal.”

Therefore, the Respondents are agreeable to accept the gas from the deep water fields of ONGC as natural gas only if the price is comparable to the domestic natural gas fixed by MoPNG from time to time.

26. In the year 2005, Gas Linkage Committee was abolished and no further allocation of AMP gas was made. In 2008/2009, MoPNG allocated natural gas to the Petitioner from NELP blocks of RIL KG D6 fields at the price fixed by EGoM. APERC considered the case of the Petitioner for scheduling of power sourced from RIL KG D6 fields and approved the proposal of the parties in order dated 28.4.2009 in IA No. 6/2009 and order dated 19.6.2009 in IA No. 10/2009 in OP No. 12/2009 which are extracted as under:-

Order dated 28.4.2009

“12. In view of the above, the Commission is of the opinion that public interest will be met, if the applicant is permitted to avail gas from RIL to the extent of allocation made in Letter No. L-12013/9/08-GP, MoPNG, Gol dated 26.4.2009 at the price approved by EGoM mentioned therein. Accordingly, pending decision on approval of proposed amendments, including Clause 3.3 of the existing PPA, sought by the Second Party in O.P. No. 12 of 2009, and in supersession of Clause 3.3 (Case-II) of the existing PPA entered by First Party with Second Party, the First Party is hereby permitted to avail 1.8 mmscmd gas from RIL at the price approved by EGoM as mentioned above.”

Order dated 19.6.2009

“7. Therefore, in partial modification of earlier order passed by the Commission on 28.4.2009 in IA No. 6 of 2009 in OP No. 12 of 2009, Second Party is permitted to utilize 1.97 mmscmd of natural gas from Reliance D-6 fields at price approved by EGoM, Gol to produce energy at 100% PLF of the project for making the same available to the First Party.”

27. Subsequently, APERC vide its order dated 7.12.2009 approved the proposal to amend Clause 3.3 of the PPA to enable the Petitioner to source gas supplies from KG D6 field. Clause 3.3 (a) has been modified by inserting Case-II as extracted below:-



“Case-II (amended): In the event of purchase of natural gas from sources other than GAIL, the cost ‘C’ shall be the cost as per GAIL price or the cost of alternative fuel supplier, whichever is less.”

Accordingly, the Petitioner operated its gas power plant with RIL KG D6 gas since 2009 onwards and supplied power to the Respondents till 2010-11. Thereafter, the supplies from RIL KG D6 started dwindling and completely stopped during 2013. Therefore, the Respondents have scheduled the power based on the generation from a source other than GAIL, namely, RIL KG D6 with approval of APERC.

28. MoPNG vide its letter dated 12.5.2017 has clarified that there is no requirement for allocation /allotment of deep water gas in terms of the extent policy of the Government of India. Further ONGC deep water gas is supplied through GAIL as per the Pricing Mechanism notified through Policy of 2016. Case I under clause 3.3 (a) of the PPA introduced through the amendment dated 2.5.2007 provides as under:

Case-I: “C” is the cost of Fuel delivered at the metering point is inclusive of cost of Gas and transportation charges and other taxes as per the invoice(s) given by GAIL.

Therefore, the supply of deep water gas through GAIL meets the requirement of Case-I under Clause 3.3 (a) of the Amended PPA dated 2.5.2007.

29. In our view, since the deep water gas is a natural gas which is produced domestically and does not undergo processing as in the case of RLNG and it fulfils the requirement of Case-I under Clause 3.3 (a) of the Amended PPA dated 2.5.2007, it is covered under the definition of fuel as “natural gas only” as envisaged in the PPA.



**Issue No. 2: Whether the availability declaration by the Petitioner using the deep water gas is permissible under the provisions of the PPA?**

30. The Respondents have submitted that the deep water gas cannot be used for availability declaration by the Petitioner due to the following reasons:

- (a) The Gas Ceiling price in respect of Deep water/Ultra Deep Water Fields, is invariably high as compared to the domestic natural gas price, being notified by PP&AC.
- (b) As per Clause 3.3 (Case-II) of PPA, in case the purchase of Natural Gas is done from sources other than GAIL (APM/New domestic gas), the cost of the fuel shall be considered as the lower of two, namely GAIL price (APM/New Domestic gas price) and the price of Alternative Fuel supplier (deepwater gas) for the computation of Energy charges.
- (c) The Petitioner does not have any Gas Supply Agreement with GAIL in respect of ONGC Deep Water Gas. Based on the 'Term Sheet' itself, which was valid only for one month, the Petitioner has declared the Plant availability and claimed payment of Capacity charges w.e.f. 1.11.2016.

31. With regard to high price of deep water gas in comparison to the domestic natural gas price being notified by PP&AC, we are of the view that since the Gas Linkage Committee has been abolished and there is no allocation/allotment of deep water gas and its pricing is to be regulated in terms of the Policy Guidelines of 2014 and 2016 of MoPNG, the Petitioner is entitled to operate its plant by purchasing the gas from the designated agencies, namely, GAIL in terms of Case-I under Clause 3.3 (a) of the Amended PPA dated 2.5.2007. Merely because the price of deep water gas has been linked to the ceiling price as per the Policy Guidelines of 2016,



deep water gas cannot be excluded from the definition of natural gas in terms of the PPA between the Petitioner and the Respondents since it fulfils all ingredients of natural gas in terms of the PPA.

32. Respondents have submitted that since the case of the Petitioner is not covered under Clause 3.3 (Case-II) of PPA, the Petitioner is not entitled to give declaration on the basis of the deep water gas sourced through GAIL. We are of the view that the Petitioner's case is covered under Case I and not under Case-II of the proviso to Clause 3.3(a) of the PPA. Clause 3.3 (a) of the PPA as amended is extracted as below:

“(a) Computation Energy Charge

The Energy Charge will be computed based on the following formula:

$$U=Eu*(hC)/\{g(1-A/100)\}$$

Where:

U is the Energy Charge in Rs. in respect of a Billing Month (or in case of any bill for energy units generated by a Generating Unit prior to its COD. In respect of the period to which such bill relates).

Eu is the total number of Energy Units delivered at the Inter Connection Point in respect of such Billing Month (or in case of any bill for energy units generated by a Generating Unit prior to its COD. In respect of the period to which such bill relates).

h is the Station Heat Rate in Kcal/KWH as per Article 1.1.(57);

C is the cost of Fuel in Rs. per unit of Fuel; as delivered at the fuel metering point at the site.

g is the GCV of Fuel in Kcal/unit of Fuel;

A is a number equal to the Auxiliary Consumption expressed as a percentage of gross generation as per Article 1.1.(4).

Provided that-

**Case-I:** “C” is the cost of Fuel delivered at the metering point is inclusive of cost of Gas and transportation charges, and other taxes as per the invoice(s) given by GAIL.

**Case-II:** In the event of purchase of Fuel from sources other than GAIL, the cost “C” shall be the cost as per GAIL price or the cost of alternative fuel supplier whichever is less.”



The Commission is of the view that Case-II under clause 3.3 (a) is not applicable to the instant case since Petitioner has arranged natural gas (deep water gas) from the GAIL itself. This clause of the PPA is applicable in those cases where the Petitioner arranges natural gas including deep water gas from sources other than the GAIL and in such events, prices of the deep water gas would be restricted to the price of deep water gas being charged by the GAIL based on the price determined by MoPNG. The Petitioner's case is covered under Case-I under Clause 3.3 (a) of the PPA since the deep water gas is supplied by GAIL. Therefore, the Petitioner is entitled give declaration on the basis of deep water gas sourced through GAIL and be reimbursed the energy charges as per the invoice raised by GAIL containing the cost of fuel, transportation charges and other charges in accordance with Case I under proviso to clause 3.3(a) of the PPA.

33. Respondents have submitted that the Petitioner did not have any Gas Supply Agreement with GAIL in respect of ONGC deep water gas and the Petitioner declared the Plant Capacity to the Respondents and sought/claimed payment of Capacity charges w.e.f. 1.11.2016 merely on the basis of 'Term Sheet' valid only for one month. In response, the Petitioner has submitted that MoPNG vide its letter dated 12.5.2017 has clarified to the Petitioner that post July 2017, ONGC shall be in a position to sell EOA (Eastern Offshore Asset) deep water gas through e-tender based on ceiling price and ONGC will sign GSA with customers and these customers will sign GTA with GAIL. MoPNG has further clarified to the Petitioner that there is no requirement for allocation/allotment of deep water gas in terms of the extant policy of Government of India. The Commission is of the view that the purchase of deep water gas by the Petitioner through GAIL is in accordance with the extant policy of Government of India and is in conformity with the provisions of the PPA, particularly,



Case I under clause 3.3(a). Had the respondents allowed availability declaration based on deep water gas, the Petitioner would have signed the GSA/GTA as and when allowed by the MoPNG.

**Issue No. 3: Whether the Petitioner is entitled for payment of capacity charges from the date of availability declaration on the basis of deep water gas?**

34. The Petitioner vide its letter dated 6.10.2016 offered supply of power to the Respondents under the existing PPA with deep water gas from KG basin at a tariff of Rs. 4.52/unit. The Petitioner entered into a binding term sheet agreement on 8.10.2016 for supply of deep water gas from KG basin at USD 5.05/mmbtu. On 31.10.2016, the Petitioner made an availability declaration for 1.11.2016 on the basis of deep water gas to be provided by GAIL under the binding term sheet. On 31.10.2016, the Respondents rejected the availability of the declaration furnished by the Petitioner on the ground that the availability declaration is without due allocation of gas by MoPNG/GoI and without approval of APERC/TSERC. APPCC vide its letter dated 10.11.2016 communicated that availability declaration with a deep water gas from KG basin is not in consonance with the PPA dated 31.3.1997 and subsequent amendments approved by APERC and the gas is more expensive than the APM gas. We have already decided that the objections of the Respondents for not scheduling the power on the basis of the declaration given by the Petitioner by using deep water gas are not sustainable since the deep water gas is covered under the provisions of "natural gas" and Clause 3.3 (a) of the PPA dated 31.3.1997 as amended from time to time. In our view, the Respondents have unreasonably prevented the Petitioner to give declaration in accordance with the provisions of the PPA based on deep water gas sourced through GAIL. Therefore, the Petitioner shall



be entitled to deemed capacity charges for the period that it declared its capacity based on the deep water gas.

**Issue No. 4: If the answer to Issue No. 3 is in the affirmative, whether the Petitioner is entitled for payment of carrying cost for the capacity charges?**

35. Clause 5.11 of the PPA dated 31.3.1997 deals with late payment surcharge for payments made after the due date. Since we have held that the Petitioner is entitled for deemed capacity charges based on the capacity declaration by using deep water gas, the Petitioner shall be entitled for late payment surcharge in terms of Clause 5.11 of the PPA.

36. In view of above, we direct the Respondents to accept the availability declaration made by GVPGL using deep water gas from domestic sources and pay capacity charges, along with applicable late payment surcharge as per PPA, for the period for which the Petitioner has declared availability based on deep water gas arranged by the Petitioner from GAIL.

37. Petition No. 111/MP/2019 is disposed of in terms of above.

*Sd/-*  
**(I.S. Jha)**  
**Member**

*Sd/-*  
**(Dr. M. K. Iyer)**  
**Member**

*Sd/-*  
**(P. K. Pujari)**  
**Chairperson**

