

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.71/MP/2019

Coram:

Shri P.K. Pujari, Chairperson

Shri I.S. Jha, Member

Shri Arun Goyal, Member

Date of Order: 25 January, 2021

In the matter of

Petition under Section 79 of the Electricity Act, 2003 read with statutory framework governing procurement of power through competitive bidding and Power Purchase Agreement dated 7.8.2007 executed between Sasan Power Limited and the Procurers for compensation and restoration of project economics due to unprecedented, unforeseen and uncontrollable depreciation of the INR vis-a-vis the USD pursuant to the judgment dated 18.1.2019 of the Appellate Tribunal for Electricity in Appeal No. 202 of 2016.

And

In the matter of

Sasan Power Limited,
c/o- Reliance Power Limited,
3rd Floor, Reliance Energy Centre,
Santa Cruise East,
Mumbai – 400055

... Petitioner

Vs

1. MP Power Management Company Limited
Shakti Bhawan, Jabalpur– 482008,
Madhya Pradesh

2. Pashchimanchal Vidyut Vitran Nigam Limited,
Victoria Park, Meerut -250001,
Uttar Pradesh

3. Purvanchal Vidyut Vitran Nigam Limited
Hydel Colony, Varanasi- 221004, Uttar Pradesh



4. Madhyanchal Vidyut Vitran Nigam Limited
4A-Gokhale Marg, Lucknow- 226001, Uttar Pradesh

5. Dakshinanchal Vidyut Vitran Nigam Limited
220 kV Vidyut Sub-Station,
Mathura Agra By-pass Road,
Sikandra, Agra-282007,
Uttar Pradesh

6. Ajmer Vidyut Vitran Nigam Limited
Hathi Bhata, City Power House,
Ajmer-300501,
Rajasthan

7. Jaipur Vidyut Vitran Nigam Limited
Vidyut Bhawan, Jaipur- 302005,
Rajasthan

8. Jodhpur Vidyut Vitran Nigam Limited,
New Power House, Industrial Area, Jodhpur,
Rajasthan-342003

9. Tata Power Delhi Distribution Limited
Grid Substation Building, Hudson Lines,
New Delhi- 110009

10. BSES Rajdhani Power Limited,
BSES Bhawan, Nehru Place,
New Delhi- 110019

11. BSES Yamuna Power Limited,
BSES Bhawan, Nehru Place,
New Delhi- 110019

12. Punjab State Electricity Board,
The Mall, Patiala- 147001, Punjab

13. Haryana Power Generation Corporation Limited,
Shakti Bhawan, Panchkula- 134109,
Haryana

14. Uttarakhand Power Corporation Limited
Urja Bhawan, Kanwali Road, Dehradun-248001,
Uttarakhand

... Respondents

Parties present:



Shri Amit Kapur, Advocate, SPL
Shri Vishrov Mukerjee, Advocate, SPL
Shri Rohit Venkat, Advocate, SPL
Shri Janmali Manikala, Advocate, SPL
Shri M. G. Ramachandran, Senior Advocate, PSPCL, Rajasthan & Haryana discoms
Ms. Poorva Saigal, Advocate, PSPCL, Rajasthan & Haryana discoms
Shri Gaurav Gupta, Haryana discoms
Shri G. Umamathy, Advocate, MPPMCL
Ms. Ranjana Roy Gawai, Advocate, TPDDL
Ms. Vasudha Sen, Advocate, TPDDL
Shri Anurag Bansal, TPDDL
Ms. Shefali Sobti, TPDDL
Shri Rajiv Srivastava, Advocate UPPCL

ORDER

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

2. Based on the competitive bidding carried out by Power Finance Corporation Limited as the Bid Process Coordinator, Reliance Power Limited (hereinafter referred to as "RPower") having quoted the lowest bid was declared as successful bidder for the execution of the Project and accordingly, Letter of Intent (LoI) was issued to RPower on 1.8.2007 which was accepted. Consequently, in terms of the provisions of the Request



for Proposal (RfP), RPower acquired 100% shareholding of the SPV i.e. the Petitioner on 7.8.2007. A PPA dated 7.8.2007 was executed between the Petitioner and 14 procurers who are the distribution companies in the States of Madhya Pradesh, Uttar Pradesh, Rajasthan, Punjab, Haryana, Uttarakhand and Delhi. On 15.10.2008, a Supplementary Power Purchase Agreement (SPPA) was entered into between the Petitioner and the Procurers, primarily to pre-pone the dates of commercial operation (CODs) of the various units of the Project (Sasan UMPP). In the Joint Monitoring Committee meeting held on 17.9.2010, the date of commercial operation of various units of the project was revised by mutual consent. The dates of commercial operation of various units of Sasan UMPP as per the PPA and the Supplementary PPA are as under:-

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

Background

3. The Petitioner had filed Petition No.14/MP/2013 under Sections 79(1)(b) and 79(1)(f) of the Electricity Act, 2003 (hereinafter called 'the 2003 Act'), Article 17 of the PPA read with paragraph 5.17 of the Competitive Bidding Guidelines and Regulations 82, 93 and 113 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 seeking relief on account of depreciation in Indian Rupee (INR) vis-à-vis US Dollar (USD). The Petitioner in the said petition had submitted that the



depreciation of INR was unforeseeable and unprecedented and was a 'force majeure' event and that the same had adversely impacted the project economics for no fault of the Petitioner. Accordingly, the Petitioner had prayed that the Commission, in exercise of its regulatory power, may devise a mechanism to compensate the Petitioner for the financial impact on account of depreciation of INR. The Commission vide its interim order dated 21.2.2014 in Petition No.14/MP/2013 concluded that the depreciation of INR vis-à-vis USD was not a 'force majeure' event in terms of the provisions of the PPA executed between the Petitioner and the Procurers of Sasan UMPP and accordingly rejected the prayer of the Petitioner. However, the Commission in paragraph 70 of the order dated 21.2.2014 observed as under:

“.....Therefore, despite all points remaining against the petitioner, we are of the view that the unprecedented and unforeseen foreign exchange rate variations beyond the control of the petitioner and beyond the normal expectations may need to be considered for quantification and compensation by the procurers appropriately.”

4. Accordingly, the Commission decided to examine as to whether any relief on account of depreciation of INR can be granted to the Petitioner in exercise of its regulatory powers, under section 79(1)(b) of the 2003 Act and accordingly directed the Petitioner to submit certain additional information. The relevant portion of the Commission's order dated 21.2.2014 is as under:

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

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



5. Aggrieved by the decision of the Commission to examine the claims of the Petitioner in exercise of the regulatory powers under section 79(1)(b) of the 2003 Act, the discoms of Haryana and Rajasthan filed Appeal No.99 of 2014 and Appeal No. 104 of 2014 respectively, before the Appellate Tribunal for Electricity (in short, 'APTEL') contending that the Commission cannot, in exercise of its regulatory powers, grant relief to the Petitioner, since it was a case of adoption of tariff based on competitive bidding under Section 63 of the 2003 Act. The said appeals were clubbed with other related appeals (Appeal No. 100 of 2013 and Appeal No.98 of 2014) and the Full Bench of APTEL by a common judgment dated 7.4.2016 disposed of all the said appeals. As regards the power of the Commission to grant relief in exercise of the regulatory powers under section 79(1)(b) of the 2003 Act, in cases where tariff is adopted under Section 63 of the 2003 Act, the Full Bench of APTEL observed the following:

"163. In the ultimate analysis, we hold that the Central Commission has no regulatory powers under Section 79(1) (b) of the said Act to vary or modify the tariff or otherwise grant compensatory tariff to the generating companies in case of a tariff determined under a tariff based competitive bid process as per Section 63 of the said Act. If a case of Force Majeure or Change in Law is made out, relief provided under the PPA can be granted under the adjudicatory power."

6. Accordingly, the appeals filed by the discoms of Haryana and Rajasthan (Appeal No. 99 of 2014 and Appeal No.104 of 2014) were also disposed of by the Full Bench of APTEL as under:

"[N] Decision on Sasan Group Appeals

310. Appeal No.99 of 2014 and Appeal No.104 of 2014 have been filed against Order dated 21/02/2014 passed by the Central Commission in Petition No.14/MP/2013. Petition No.14/MP/2013 had been filed by SASAN Power inter alia for a declaration that the unprecedented, unforeseen and uncontrollable depreciation in the Indian Rupee vis-a-vis US Dollar as a Force Majeure Event under the PPA and to restitute SASAN to the same



economic condition as if the Force Majeure Event had never occurred. By Order dated 21/2/2014, the Central Commission held that the depreciation in Indian Rupees is not a Force Majeure Event within the meaning of Article 12 of the PPA. However, after referring to its Interim Order dated 15/4/2013 in Petition No.159/MP/2012 (CGPL v GUVNL & Ors.), the Central Commission proceeded to exercise its regulatory power under Section 79(1)(b) of the said Act and sought for certain documents from SASAN Power. Being aggrieved by the said order, Haryana Utilities have filed Appeal No.99 of 2014 and Rajasthan Utilities have filed Appeal No.104 of 2014. Admittedly, this matter relates to the generation and sale of electricity from the power plant of SASAN Power where the tariff was determined under the tariff based competitive bid process under Section 63 of the said Act. We have already answered Issue No.5 of the Agreed Issues that the Central Commission has no regulatory powers under Section 79(1)(b) of the said Act to vary or modify the tariff or otherwise grant compensatory tariff to the generating companies in case of a tariff determined under a tariff based competitive bid process as per Section 63 of the said Act. In view of this, Appeal Nos.99 of 2014 and Appeal No.104 of 2014 are allowed. The impugned Order dated 21/2/2014 is hereby set aside.”

7. In view of the aforesaid decision of APTEL, the possibility of the Commission granting relief to the Petitioner on account of FERV, in exercise of its regulatory powers under section 79(1)(b) of the 2003 Act, did not survive in Petition No.14/MP/2013. Accordingly, the Commission vide its order dated 26.4.2016 disposed of the said petition as under:

“6. The Commission had already held in order dated 21.2.2014 that depreciation of INR vis-a-vis US Dollar is not a force majeure event in terms of the provisions of the PPA between Sasan Power Limited and the procurers of Sasan UMPP and accordingly, rejected the prayers of the petitioner. This finding has neither been challenged by the petitioner nor by any of the respondents. The only issue on which the petition was under consideration of the Commission was the possibility of granting relief to the petitioner in exercise of regulatory power under section 79(1)(b) of the Act. The Appellate Tribunal has held that the Commission has no regulatory powers under section 79(1) (b) of the Act to vary or modify the tariff or otherwise grant compensatory tariff to the generating companies in case of a tariff determined under a tariff based competitive bid process as per Section 63 of the said Act. In view of the said findings of the Appellate Tribunal, nothing survives in Petition No.14/MP/2013.

7. Petition No.14/MP/2013 is disposed of in terms of the above”

8. Aggrieved by the Commission’s order dated 26.4.2016 in Petition No.14/MP/2013, the Petitioner filed Appeal No. 202 of 2016 before APTEL mainly on the ground that the said order has been passed without granting any opportunity of



hearing to the Petitioner. Also, against the Full Bench judgment of APTEL dated 7.4.2016, the Petitioner filed Civil Appeals (C.A. Nos. 9643-9644/2016) before the Hon'ble Supreme Court of India and the same was tagged with Civil Appeals filed by other parties against the said judgment of APTEL viz., C.A No. 5399-5400 of 2016 (Energy Watchdog v CERC & ors), C.A No. 5347-5348 of 2016 (M/s Prayas Energy v CERC & ors), C.A No. 5364 of 2016 (PSPCL v CGPL & ors), C.A No. 5346 of 2016 (AVNL v CERC & ors), C.A Nos. 5351-5352 of 2016 (MSEDCL v CERC & ors), C.A No. 5415 of 2016 (GRIDCO v GMRKEL & ors), C.A Nos. 9635-9642 of 2016 and C.A No. 9035 of 2016 (CGPL v CERC & ors).

9. Thereafter, the Hon'ble Supreme Court vide its judgment dated 11.4.2017 disposed of the said Civil Appeals in Energy Watchdog v CERC & ors (2017 14 SCC 80) (*commonly referred to as 'the Energy Watchdog case'*) and set aside the Full Bench judgment of APTEL dated 7.4.2016. The Hon'ble Supreme Court in the said judgment dated 11.4.2017 held, amongst others, that the general regulatory powers under section 79(1)(b) of the 2003 Act may be exercised by the Commission in situations where no guidelines have been framed at all or where the said guidelines do not deal with a given situation. The relevant portion containing the observations of the Hon'ble Supreme Court in its judgment dated 11.4.2017 is extracted hereunder:

"20.....Considering the fact that the non-obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways – either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act, (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission



under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with “determination” of tariff, which is part of “regulating” tariff. Whereas “determining” tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to “regulate” tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission’s general regulatory powers under Section 79(1)(b) can then be used.”

10. In terms of the aforesaid judgment dated 11.4.2017, the Civil Appeal (C.A Nos. 9643-9644 of 2016) filed by the Petitioner were also disposed of by the Hon'ble Supreme Court on 2.5.2017.

11. In the backdrop of the judgment of the Hon'ble Supreme Court dated 11.4.2017, the Petitioner, filed IA No. 163 of 2018 in Appeal No. 202 of 2016 (SPL v CERC & ors) pending before APTEL and prayed that the matter may be remanded to the Commission for fresh consideration of the claim of the Petitioner. APTEL, in the light of the Energy Watchdog case, allowed the said IA along with the appeal filed by the Petitioner, vide its judgment dated 18.1.2019 and directed the Commission to hear the compensation claims of the Petitioner, only on the ground of exercise of the regulatory powers under Section 79(1)(b) of the 2003 Act and not on the ground of 'force majeure' event. The relevant portion of the judgment dated 18.1.2019 is extracted under:

“16. In that view of the matter, we are of the opinion that the instant appeal and IA No. 163 of 2018 deserve to be allowed. The Commission is directed to hear the Appellant’s claim of compensation only on the ground of exercise of regulatory powers under Section 79(1)(b) of the Act and not the ground of force majeure event.’

Present Petition



12. Pursuant to the judgment of APTEL dated 18.1.2019 in Appeal No.202/2016, the Petitioner has filed the present petition with the following prayer:

“(a) Allow the present Petition and mould appropriate relief to compensate SPL for the unprecedented, uncontrollable and unforeseen steep depreciation of the INR vis-à-vis USD as detailed in the paragraphs above.”

Submissions of the Petitioner

13. In support of the above prayer, the Petitioner in this petition, has submitted the following:

- a) At the time of submission of the bid, the total project cost was around ₹19600 crore. The exchange rate at the time of bid submission was ₹40.27 per USD indexed as per the Commission’s INR depreciation rate i.e. 0.74% per annum issued vide Notification dated 4.4.2007.
- b) The total outflow on account of servicing of currently availed USD denominated debt over the repayment period of the project would be about ₹6516 crore. Against this, the actual exchange rate which prevailed till date with the depreciation rate of 5% per annum, till completion of repayment, the aggregate outflow on account of servicing of currently availed USD denominated debt over the repayment period of the project will be about ₹11392 crore. This represents an increase of USD denominated debt service obligation by approximately ₹4876 crore i.e. 75%.
- c) The present project cost as approved by lenders is approximately ₹26405 crore, with an increase of approximately ₹1574 crore on account of depreciation of INR vis-à-vis USD.
- d) The Petitioner had entered into the following agreements with the lenders for financing the debt element:-



- i. Rupee and LC Facility Agreement (Facility Agreement) dated 21.4.2009 with certain lenders which included nationalised banks, private banks and financial institutions for an aggregate amount of Rs.11612 crore.
 - ii. Foreign Currency Facility Agreement (FCF Agreement) with India Infrastructure Finance Company (UK) Limited and State Bank of India for USD 486 Million.
 - iii. Credit Agreement dated 30.9.2011 with Deutsche Bank Trust Company Americas and Export-Import Bank of the United States for a credit limit of USD 650 million (Credit Agreement).
 - iv. Facility Agreement dated 1.11.2011 (Sinosure Agreement) with the Export-Import Bank of China, China Development Bank, Bank of China Limited and Standard Chartered Bank for loan facility of USD 1,109 billion.
 - v. Credit Agreement (Secured Facility Agreement) dated 30.9.2011 with Standard Chartered Bank, Mizuho Corporate Bank Limited and DBS Bank Limited for a credit limit aggregating to USD150 million.
- e) For every additional one percentage increase/ decrease in future expected INR depreciation rate beyond the rate as prescribed by the Commission for bid evaluation, the Petitioner is impacted by ₹360 crore approximately during the repayment of the currently drawn USD denominated loan, which is approximately 10% of the annual revenue and nearly 15% of the earnings before interest, depreciation and amortization of the project.
- f) The consideration of USD denominated loan was attributable to the fact that USD denominated long term loan had been a more competitive source of financing as compared to INR loan. The Petitioner approached Reserve Bank of India (RBI) for approval of External Commercial Borrowing (ECB) and RBI on 7.4.2008 had approved the request of the Petitioner for USD two billion.
- g) The 'Impact of the Global Financial Crisis on Investments in South Asia's Electric Power Infrastructure by the World Bank' report in 2010 (World Bank Report) elucidate an analysis of the trend of financial closures in the aftermath of the crisis and showed that the aggregate capacity as well as aggregate project



cost of the projects that achieved financial closure during the 2008-09 were much lower compared to the previous year.

h) The World Bank Report highlighted that ECBs were the most affected source of debt funds as the international financial markets witnessed turmoil in the banking sector and had gone through difficult times. Similar views have also been expressed in various other documents such as report by Rajya Sabha Secretariat in June, 2009 in Global Economic crisis and its impact on India and in Suo moto statement by the Prime Minister in Lok Sabha in October 2008.

i) The Petitioner got sanction of the USD denominated loans in 2011 to arrive at the envisaged levels of loans as acknowledged in the bid submission i.e. as per the envisaged mix of INR and USD.

j) The project was based on supercritical technology for generating power and also involved development of large coal mines. The Petitioner had to import mining equipment for the project from USA and the power plant equipment of the project from China. This was due to shortage of manufacturing capacity for supercritical technology power plant equipment and non-availability of large size technologically advanced coal mining equipment in India.

k) In terms of Article 4 of the PPA, the Petitioner was required to execute the project in a timely manner and in case of any failure, the Petitioner had to pay liquidated damages. Therefore, the Petitioner had to ensure that the project was executed as per schedule and the only feasible option was to import the equipment, which resulted in USD denominated capital expenditure.

l) The domestic supplier, M/s Bharat Heavy Electricals Limited (BHEL) was seeking a substantial amount (49%) of its quote in USD denominated terms which was equivalent to 91% of the total price offered by the lowest bidder i.e. Shanghai Electric Corporation (SEC). The Petitioner had no option but to take significant foreign currency exposure irrespective of the sourcing. The Petitioner had



exercised diligence and caution in adopting the optimal sourcing, as a result of which it was able to offer the most competitive tariff and pass on the benefit to consumers of 14 distribution companies in seven States.

m) The Hon'ble Supreme Court of India in the Energy Watchdog case had observed that in a situation where the guidelines issued by the Central Government under Section 63 of the 2003 Act covers the situation, then the Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b) of the 2003 Act. However, in a situation where there are no guidelines framed or where the guidelines do not deal with the given situation, then the Commission's general regulatory powers under Section 79(1)(b) of the 2003 Act can be exercised.

n) APTEL in its judgment dated 7.9.2018 in Appeal No. 336 of 2017 in UPPCL v Lanco & ors had considered the scope of the regulatory powers of the Commission. The claim of the Petitioner is required to be considered in the light of public interest, as the tariff of the Petitioner's project is one of the cheapest in the country, as recognized by the Commission in its order dated 21.2.2014 in Petition No. 14/MP/2013.

o) The Respondent, MPPMCL had conceded the fact that depreciation of INR vis-à-vis USD was unprecedented. Further, the said Respondent has submitted that in case the Commission holds that the Petitioner is entitled to compensation for Foreign Exchange Rate Variation (FERV), then the entire burden should not be passed on to the Procurers, but should be shared by the Petitioner as well.

p) During the fiscal years 2006-07 and 2007-08, owing to anticipated growth of the economy, based on sound economic fundamentals, financial experts were of the unanimous opinion that INR would appreciate vis-à-vis the USD. The Projections based on the average exchange rate published by some expert global agencies are set out below:-



	Agency	As on	2007	2008	2009	2010	2011	2012	Projected INR Trend	
1	Bloomberg	Jan'07	-	41.7	40.7	39.8	40.9	-	Stagnant	
2	EIU	Jun'07	41.3	40.0	-	-	-	-	Appreciating	
3	Credit Suisse	Jul'07	Appreciation at around 5% over medium term							Appreciating
4	HSBC	Sep'07	39.0	37.5	-	-	-	-	Appreciating	
5	Bloomberg	Feb'08	-	37.9	38.3	34.3	33.3	-	Appreciating	
6		Dec'06	45.5	44.7	45.8	-	-	-	Stagnant	
7	CLSA-APM	Dec'07	-	39.9	39.0	40.1	-	-	Stagnant	

q) The Commission had arrived at the projected depreciation rate of INR vis-à-vis USD at 0.74% per annum based on the trend of the previous 9 calendar years starting from 1998 to 2006 (both inclusive) using 3-years moving average rate. In reality, the Compounded Annual Growth Rate ('CAGR') of depreciation of INR vis-à-vis USD, from July 2007 to till date has been nearly 5% per annum i.e. for extended period of nearly 12 years, which defies all logic and could not have been predicted.

r) A comparison between the actual rate of depreciation of INR vis-a-vis USD and the expected rate of depreciation as ascertained from the Commission's notification dated 4.4.2007 is below:

Year	Average rates prevailing during the period	Average rates as per Commission adjustment rate
2005	44.11	--
2006	45.33	--
Jan 01, 2007 to Jul 25,2007	42.35	
Jul 26, 2007	40.27	40.27
Jul 27, 2007 to Dec 31,2007	39.93	40.33
2008	43.42	40.55
2009	48.35	40.85
2010	45.74	41.15
2011	46.67	41.46
2012	53.49	41.76
2013	58.64	42.07



2014	61.04	42.38
2015	64.15	42.70
2016	67.18	42.93
2017	65.11	43.33
2018	68.41	43.65
2019* (upto 7.2.2019)	70.81	43.98

s) KPMG had made a presentation before the Commission on 10.10.2013 analysing the impact of the volatility of INR vis-à-vis USD, the risk mitigation measures available and a cost/ benefit analysis of hedging strategies. KPMG had concluded that depreciation of INR from 2008 has been unprecedented and unexpected which was triggered by various factors including the global crisis, global economic slowdown and measures taken thereafter by the developed nations which could not have been anticipated. KPMG had estimated that due to the sharp depreciation in the value of INR resulted in the total cost of the project moving up by over ₹3100 crore (as on 31.5.2013).

t) KPMG further observed that the hedging instruments were available for hedging short term exposures for managing the risk of FERV. However, it concluded that the cost of hedging was very high since the currency volatility was high. KPMG examined the risk of the Petitioner with respect to short term borrowings and long term ECBs and concluded that the Petitioner will be making a loss of approximately ₹122 crore by hedging.

14. The Commission on 4.4.2019 admitted the petition and directed the parties to complete the pleadings in the matter. Reply to the petition has been filed by the Respondents, MPPMCL, Rajasthan discoms, TPDDL, PSPCL and HPPC and the Petitioner has filed its rejoinder to the said replies of the Respondents.

Replies of the Respondents PSPCL, HPPC and Rajasthan Discoms



15. The Respondents PSPCL, HPPC and Rajasthan Discoms have filed separate affidavits dated 18.4.2019 and have mainly submitted the following:

a) The scope of the general regulatory powers under section 79(1)(b) of the 2003 Act, cannot be invoked in the present case as inadmissibility of FERV is provided in the Competitive Bidding Guidelines issued by the Central Government under Section 63 of 2003 Act. The Hon'ble Supreme Court has further observed that a mere rise in prices will not frustrate the PPA nor shall it amount to a force majeure event and the parties shall continue to be bound by the provisions of the PPA.

b) The Civil Appeal Nos. 9643-9644 of 2016 filed by the Petitioner were disposed of by the Hon'ble Supreme Court vide its order 2.5.2017 in terms of the Energy Watchdog case dated 11.4.2017 and there was no direction for remand by the Hon'ble Supreme Court. The Petitioner cannot, therefore, expand the scope of the present proceedings beyond the parameters provided under the Energy Watchdog case.

c) Clause 4.3 of the Bidding Guidelines and Clause 2.4 of the Request for Proposal provides that risk of FERV, if any, is to be borne by the bidder, with the only exception being that when the bid is premised on imported coal, then to the extent of fuel cost. Further, Clauses 5.4 and 5.6 of the said Guidelines provide for standard documentation, which deals with the risk allocation between a generator and the procurer, except in circumstances where the force majeure or change in law as provided in the model PPA.

d) RPower had quoted the bid with a non-escalable tariff and consequently had accepted the business risk of non-escalable tariff and FERV. If the Petitioner had chosen to include ₹122 crore for hedging its Foreign Exchange risk and quoted an escalable capacity rate, the Petitioner would have been able to sufficiently protect its commercial interests. However, the Petitioner cannot now



seek adjustment in the tariff payable by the Procurers as such a course would destroy the sanctity of the bidding process.

e) RPower had followed an imprudent practice to consider that FERV will not be more than 0.74% per annum and consequently hedging was not necessary. The Petitioner had erroneously relied on the FERV prescribed by the Commission in its notification dated 4.4.2007 at the time of bidding, as the stipulation in regard to the consideration of the FERV was restricted for evaluation purpose. The bidding documents nowhere mention that FERV beyond 0.74% is to be treated as unprecedented and consequently needs to be adjusted.

f) The Petitioner has admitted that the reason for considering USD loan was more competitive as compared to INR loan and hence the Petitioner now cannot seek relief for its own commercial decision in availing the foreign loan and accordingly has to bear the consequences for the same.

g) The project cost was to be funded in the debt equity ratio of 75:25 i.e. equity of ₹4900 crore and debt of ₹14700 crore. In April 2009, the Petitioner took domestic loan for ₹11612 crore as against the total debt component of ₹14700 crore. The foreign currency loan component indicated was only USD 486 million at the exchange rate of INR 50.06 = 1 USD that was ₹2432.916 crore. However, after the domestic loan was secured, there was no reason for the Petitioner to have switched to external commercial borrowing on 30.9.2011, when the exchange rate was ₹48.92 = 1 USD. The exchange rate had increased from ₹40.42 in July 2007 to ₹50.22 in April 2009 i.e. about ₹10. Having seen such an increase between 2007 and 2009, the Petitioner should not have proceeded on the basis of the depreciation rate of 0.74% while contracting external commercial borrowing on 30.9.2011.

h) The Petitioner had claimed the difference in outflow of about ₹3800 crore in Petition No.14/MP/2013. However, the Petitioner has in the present petition



claimed an amount of ₹6516 crore. The Petitioner cannot seek any relief which is in addition to the claim already made in Petition No. 14/MP/2013.

i) The Petitioner has placed reliance on APTEL judgment dated 7.9.2019 in Appeal No. 336 of 2017 (UPPCL v Lanco & ors), which is different from the present case. In the case of UPPCL v Lanco, the consequential relief methodology was not provided in the PPA and therefore, APTEL had exercised the regulatory powers to mould the relief admissible to Lanco. In the present case, the bidding guidelines contemplated that the FERV risk was on the account of the Petitioner.

j) In terms of Article 2.5 of the PPA, any admission on the part of the lead procurer in so far as the tariff is concerned, does not bind the other procurers. Further, the Hon'ble Supreme Court in its judgment dated 8.12.2016 in All India Power Engineer Federation v SPL [(2017) 1 SCC 487] had observed that there cannot be any waiver if any element of public interest is involved. The Hon'ble Supreme Court had held that consumer interest was paramount and any element effecting tariff cannot be waived by any one or even all of the Procurers.

Reply of the Respondent MPPMCL

16. The Respondent, MPPMCL vide its affidavit dated 22.5.2019 has mainly submitted the following:

a) The Commission vide its order dated 21.2.2014 in Petition No. 14/MP/2013 held that the unprecedented, unforeseen and uncontrollable steep depreciation of the INR vis-a-vis the USD does not constitute a 'force majeure' event. However, the Petitioner had not challenged the Commission's order dated 21.2.2014 on the aspect of force majeure. Hence, the finding that the depreciation of the Indian Rupee not being a force majeure event as per the terms of the PPA has attained finality.



b) This Petition has to be decided only in light of the guidelines of MOP, GOI and not in the exercise of regulatory powers by the Commission. The submission of the Petitioner that the rate of FERV from the date of submission of bid to the date of filing the petition translates to a depreciation of approximately 37% of the INR vis-à-vis the USD is contrary to Clause 4.3 of the said Guidelines.

Reply of the Respondent TPDDL

17. The Respondent, TPDDL vide its reply affidavit dated 27.8.2019 has submitted the following:

a) The Petitioner had aggressively quoted in the bid process with the knowledge of the foreign exchange variation risks. Thus, the Petitioner cannot now seek adjustment either by way of compensation or otherwise as such a course would destroy the sanctity of the bidding process. Further, the Petitioner cannot claim any relief by invoking the regulatory powers of the Commission, contrary to clause 4.3 of the said Guidelines, the RfQ, RfP and the PPA.

b) The choice to proceed on the basis of a domestic loan or on external commercial borrowings was to be made by a prudent utility on the basis of the gain that can be made on the principal and interest outflow, duly factoring the cost of hedging. It was a speculative practice of the Petitioner to consider that FERV will not be more than 0.74% per annum and therefore, no hedging is necessary. The Petitioner cannot claim impact of FERV, as the Petitioner had decided against contracting external commercial borrowing, without hedging, to derive substantial reduction in the interest rate.

c) The Petitioner had admitted that the reason for considering USD dominated loan was on account of it being a competitive source of funding as compared to INR loan. The Petitioner had chosen to opt for a more competitive rate in comparison to a conservative rate, through domestic loan. Thus, the



Petitioner cannot seek any relief for its own commercial decision in availing the foreign loan.

d) The Petitioner cannot seek any relief, in addition to the claim already made in Petition 14/MP/2013. The matter has been remanded back to this Commission, only in terms of the parameters laid down by the Hon'ble Supreme Court in the Energy Watchdog case. The relief, if any, has to be adjudicated within the four corners of the said judgment, which recognizes that a mere increase in price does not render the contract frustrated or impracticable.

e) The Petitioner's reliance on APTEL judgment dated 7.9.2018 in Appeal No. 336 of 2017 is misconceived, as in the said case, APTEL had observed that the general regulatory powers of the Central/ State Commission can be exercised in exceptional circumstances, where there are no guidelines or in a situation which is not covered by the guidelines.

f) The Commission in its order dated 21.2.2014 had established the fact that the depreciation of INR vis-à-vis the USD is a norm and not an exception. The Commission has considered the time series data of about 40 years on Foreign Exchange Rate of INR vis-à-vis the USD and observed that, after 2007, the INR has depreciated during the years 2008 (5.2%), 2009 (11.3%), 2011 (2.1%), 2012 (14.5%) and 2013 (9.7%). Out of the 40 year period, depreciation has been experienced in 29 years and appreciation of INR is noticed in 11 years. Thus, the data shows a trend of depreciation of INR over the years with intermittent appreciation in a few years.

Rejoinder of Petitioner to the Replies of Respondents PSPCL, HPPC and Rajasthan Discoms

18. The Petitioner vide its rejoinder affidavits dated 13.6.2019 and 14.6.2019 has submitted the following:



a) The Hon'ble Supreme Court in Energy Watchdog case has held that the Commission has the regulatory powers in so far as tariff is concerned, including the tariff adopted under Section 63 of the 2003 Act following the competitive bidding process. The Petitioner has prayed for compensation in exercise of the regulatory powers of the Commission towards the depreciation of INR vis-à-vis the USD, as it had rendered the PPA commercially impracticable and has resulted in disruption of project economics.

b) The contention of the Respondents that the Hon'ble Supreme Court in Civil Appeal 9643-44 of 2017 has not remanded the matter is erroneous. The APTEL vide its judgment dated 18.1.2019 has remanded the matter to the Commission in light of the findings of the Hon'ble Supreme Court in the Energy Watchdog case.

c) The depreciation of INR vis-à-vis USD is unprecedented, unforeseen and uncontrollable and was beyond the contemplation of both the parties. Therefore, clause 4.3 of the Bidding Guidelines ought not to be considered as a bar against granting relief to the Petitioner in exercise of regulatory powers under Section 79 of the 2003 Act. Further, the Commission in its order dated 21.2.2014 in Petition No. 14/MP/2013 had observed that the unprecedented and unforeseen FERV was beyond the control of the Petitioner and needs to be considered for compensation by the procurers appropriately.

d) The Petitioner had followed prudent utility practices while quoting tariff. It was not possible for the Petitioner to hedge FERV risk for a variation of approximately 75%. Further, it would have been incorrect to conclude that hedging could have substantially avoided the losses, as the hedging rate is also determined by market forces and have increased significantly since the time of bid.

e) The Commission had arrived at a projected depreciation rate of INR vis-à-vis USD of 0.74% per annum based on the trend of previous 9 calendar years i.e. 1998 to 2006. Despite adoption of a sound approach in prescribing the



depreciation rate of INR vis-à-vis USD, the CAGR of the depreciation of INR vis-à-vis USD since July, 2007 to till date has been nearly 5% per annum i.e. for extended period of nearly 12 years and defied all logic. Further, no negative impact would have been cast on the economics of project because of not hedging against the depreciation of INR vis-à-vis USD. The presentation made by KPMG on 10.10.2013 stated that even if USD exposure had been hedged at the time of drawl, there would not have been any material change in the position, and perhaps in some case, losses would have increased.

f) The Respondent's contention that any additional impact on account of FERV is not to be considered in the quoted capacity charges for serving the capital cost of ₹19600 crore in the debt-equity ratio of 75:25, as well as all other elements of tariff including depreciation, O&M Expenses, Interest on working capital is erroneous. The exposure to USD denominated capital expenditure was unavoidable since the Petitioner was required to import machinery for the coal mines as well as equipment for the power plants.

g) The quantum of relief shall vary depending upon the actual prevalent exchange rate and capping it to a particular cut-off date will defeat the purpose of claiming the relief for the unprecedented, unforeseen and uncontrollable depreciation of INR vis-à-vis USD.

h) The Respondents had placed reliance on the Hon'ble Supreme Court judgment in All India Power Engineers Federation v Sasan Power Ltd and the same is not relevant to the present case as the tariff of the Petitioner is one of the cheapest in the country, which has been recognized by the Commission in its order dated 21.2.2014 and is in public interest.

Rejoinder of the Petitioner to the Reply of Respondent MPPMCL



19. In response to the reply of the Respondent MPPMCL, the Petitioner vide its rejoinder affidavit dated 19.7.2019 has submitted the following:

a) The Petitioner is claiming compensation in exercise of the Commission's regulatory power for depreciation of INR vis-à-vis USD and not in terms of the force majeure provisions of the PPA. The depreciation of INR vis-a-vis USD has rendered the PPA commercially impracticable and has resulted in disruption of project economics.

b) The extent of depreciation of INR vis-à-vis USD was not contemplated by the parties and the risk of such depreciation cannot be on one party alone. The Commission in its order dated 21.2.2014 in Petition No. 14/MP/2013 had recognized that the unforeseen FERV was beyond the control of the Petitioner and may be considered for compensation by the Procurers appropriately. Further, clause 4.3 of the Biding Guidelines ought not to be considered as a bar against granting relief to the Petitioner in the exercise of regulatory powers under section 79 of the Act.

c) The Hon'ble Supreme Court in Energy Watchdog case had set aside the APTEL judgment dated 7.4.2016 and, therefore, the claim of the Petitioner has to be allowed by the Commission in exercise of the regulatory powers. The claim of the Petitioner has not achieved finality and hence the Commission ought to have granted hearing to the Petitioner, since the appeals against APTEL judgment were pending before the Hon'ble Supreme Court.

Rejoinder of the Petitioner to the Reply of Respondents TPDDL

20. In response to the reply of the Respondent TPDDL, the Petitioner vide its rejoinder affidavit dated 27.9.2019 has submitted the following:

a) The Petitioner has agreed to bear the foreseeable FERV risk. However, in the present case, the depreciation of INR vis-à-vis USD is unprecedented,



unforeseen and uncontrollable and was beyond the contemplation of both parties. The Commission vide its order dated 21.2.2014 had observed that the risk of such depreciation cannot be placed on one party alone. Therefore, clause 4.3 of the guidelines ought not to be considered as a bar against granting relief to the Petitioner in exercise of regulatory powers under section 79 of the 2003 Act.

b) The Petitioner had followed prudent utility practices while quoting tariff. It would not have been possible to hedge foreign exchange risk for a variation of approximately 75%. Moreover, it will not be appropriate to conclude that hedging could have substantially avoided the losses, as hedging rate is also determined by market forces and have increased significantly since the time of the bid.

c) The Petitioner is not seeking to expand the proceedings beyond the Energy Watchdog case, as the Petitioner is seeking compensation in terms of the regulatory powers under Section 79(1)(b) of the 2003 Act, which has been recognized by the Hon'ble Supreme Court in the said judgment. The quantum of relief shall vary depending on the actual prevalent exchange rate and capping it to a particular cut-off date shall defeat the very purpose of claiming relief for unprecedented depreciation of INR vis-à-vis the USD.

d) APTEL vide its judgment dated 7.9.2018 in UPPCL vs Lanco & ors in Appeal No. 336 of 2017 had held that regulatory powers may be exercised in order to safeguard the interest of the consumers. Further, the reliance placed on the judgment of the Hon'ble Supreme Court in All India Power Engineers Federation vs Sasan Power Ltd (2017) 1 SCC 487 is erroneous.

21. The matter was heard on 30.6.2020 and the Commission, at the request of the Respondents MPPMCL and UPPCL, permitted the said Respondents to file written submissions.

Written Submissions of the Respondent, MPPMCL



22. The Respondent, MPPMCL in its written submissions dated 10.7.2020 has submitted the following:

a) In terms of the Energy Watchdog case, the claim of the Petitioner for FERV is not maintainable as the Hon'ble Supreme Court had observed that the provisions of the guidelines are statutory in nature and the exercise of regulatory function is to be in accordance with those guidelines. Furthermore, the claim of the Petitioner is required to be adjudicated in terms of the PPA, which has been entered into pursuant to the competitive bidding process and as per the standard bidding guidelines and documents.

b) In terms of competitive bidding guidelines issued by MOP, GOI on 19.1.2005, the Commission shall notify and update the escalation rate for coal and gas, inflation rate based on WPI and CPI, discount rate and dollar-rupee exchange variation rate, for the purpose of bid evaluation as well as for payment. Thus, in the present case, since these guidelines squarely cover the field in terms of the Energy Watchdog case, the Commission cannot exercise its regulatory jurisdiction under Section 79(1)(b) of the 2003 Act.

c) The Petitioner is bound by clause 4.3 of the bidding guidelines which provides that the FERV risk has been assigned to the Petitioner. The same has been reiterated by the Commission in its order dated 21.2.2014 and the said order had not been challenged by the Petitioner and hence attained finality. Further, the granting of relief to the Petitioner in exercise of the regulatory power would amount to re-writing the contract, which is contrary to the said judgment of the Hon'ble Supreme Court.

d) It was imprudent on the part of the Petitioner to consider that FERV will not be more than 0.74% per annum and, therefore, no hedging is necessary. If the intention was to treat FERV beyond 0.74% as unprecedented, the bid documents would have provided for adjustment of FERV beyond 0.74%. Thus, the contention



of the Petitioner that clause 4.3 of the guidelines was restrictive in nature and that it would apply only to foreseeable risk was erroneous.

e) The reliance placed on the judgment of APTEL in SPL v MPPMCL & ors by the Petitioner is misleading as the facts of the said case are different from the facts in the present case. Further, the contention of the Petitioner that a claim could be considered, keeping in mind the public interest, as tariff of the Petitioner's project was one of the cheapest in country, is unsustainable.

Written Submissions of the Respondent UPPCL

23. The Respondent UPPCL (on behalf of the UP discoms) in its written submissions filed on 10.7.2020 has submitted the following:

a) The Petitioner is not entitled for any relief and if any compensation is granted to the Petitioner in terms of the regulatory powers of the Commission under Section 79(1)(b) of the 2003 Act, then the same would be outside the mandated contractual obligations of the Procurers to the Petitioner. Moreover, the Procurers will be burdened with huge financial liabilities for no fault of their own.

b) In terms of competitive bidding guidelines issued by MOP, GOI on 19.1.2005, the Commission shall notify and update the escalation rate for coal and gas, inflation rate based on WPI and CPI, discount rate and dollar-rupee exchange variation rate, for the purpose of bid evaluation as well as for payment.

c) Clause 4.3 of the Bidding Guidelines states that the tariff shall be designated in Indian Rupees only. The Foreign Exchange risks, if any, shall be borne by the supplier i.e. Petitioner. The Commission had decided that unforeseen, uncontrollable and unprecedented depreciation of INR vis-a-vis USD was not a force majeure event and the matter had attained finality.

d) The Hon'ble Supreme Court in Energy Watchdog case has not defined the general regulatory powers under section 79(1)(b) of the 2003 Act and the



regulations framed thereunder. The wider source of power to regulate tariff under Section 79(1)(b) must be seen as amenable to the settled meaning of 'regulate' under law. 'To regulate' means 'to adjust by rule', 'method of established mode', 'to direct' the rule of restriction, 'to subject to governing principles or laws'. The regulatory power of the Commission under section 79(1)(b) of the 2003 Act is to be considered against some relevant laws.

e) The Hon'ble Supreme Court in PTC India Limited v CERC & ors (2010 AIR SCW 1950) had observed that the term 'tariff' is not defined in the 2003 Act. The term 'tariff' includes within its ambit not only the fixation of rates but also the rules and regulations relating to it. Further, it was observed in the said case that in the hierarchy of the regulatory powers and functions under the 2003 Act, Section 178 deals with making of regulations by the Commission, i.e. subordinate legislation, which is wider than section 79(1) of the 2003 Act, which enumerates the regulatory functions of the Commission, in specified areas, to be discharged by orders.

f) APTEL vide its judgment dated 18.1.2019 had remanded the matter to the Commission on the contention of the Petitioner that it had not been afforded an opportunity to address the Commission on the exercise of regulatory powers under section 79(1)(b) of the 2003 Act. APTEL has not touched upon the merits of the case. Further, the Petitioner has not filed the present petition under any relevant law, which enable the Commission to exercise its regulatory powers under section 79(1)(b) of the 2003 Act. Thus, the present petition is liable to be dismissed.

24. During the hearing of the Petition on 20.8.2020, the learned counsel for the Petitioner and the learned Senior counsel for the Respondents, Rajasthan discoms, HPPC and PSPCL circulated note of arguments and advanced extensive arguments by relying on the orders/ decisions of this Commission and the Hon'ble Supreme Court, the various clauses of the Bidding Guidelines and the Bid documents. The learned counsel



for the Respondents, MPPMCL and UPPCL adopted the arguments made by the learned Senior counsel for the Respondents and also reiterated the submissions made in their respective pleadings. The learned counsel for the Respondent, TPDDL also adopted the arguments made of the Respondents PSPCL and HPPC. Based on the request of the learned counsels for the parties, the Commission, after permitting the parties to file written submissions, reserved its order in the petition. In compliance thereof, the Petitioner and the Respondents UPPCL, MPPMCL, Rajasthan discoms, PSPCL, HPPC have filed written submissions in the matter.

25. The Respondent MMPCL and the Respondent UPPCL in their written submissions dated 26.8.2020 and 23.8.2020 respectively, have mainly reiterated the arguments made in their written submissions dated 10.7.2020 which has been noted in paragraphs 24 and 25 above and not repeated hereunder for the sake of brevity. The Petitioner and the Respondents PSPCL, HPPC and Rajasthan discoms have also filed their written submissions on 30.8.2020.

Written Submissions of the Petitioner

26. The Petitioner in its written submissions dated 30.8.2020 has mainly reiterated its submissions made in the Petition as under:

- a) The depreciation of INR vis-à-vis USD is unprecedented, unforeseen and uncontrollable. During the fiscal years 2006-07 and 2007-08, owing to anticipated growth of the economy, based on sound economic fundamentals, financial experts were of the unanimous opinion that INR would appreciate vis-à-vis USD.
- b) This Commission has methodically arrived at a projected depreciation rate of INR vis-à-vis USD of 0.74% per annum based on the trends of the previous nine



calendar years from 1998 to 2006 (both inclusive) using the 3 year moving average rate. In reality, the CAGR of depreciation of INR vis-à-vis USD from July 2007 till date has been nearly 5% per annum. This is contrary to all expectations and projections including the escalation Index notified by the Commission.

c) The Commission had provided for a projected INR-USD exchange rate variation of 0.74% per annum in 2007 and 0.20% in 2008 in its escalation index dated 4.4.2007, 24.9.2007, 31.3.2008 and 6.10.2008 which clearly establishes that even the benchmark index which was used for bid evaluation could not predict the steep depreciation of INR, thus making it an unforeseeable event beyond the contemplation of the parties.

d) The difference of the prevailing average rate of INR vis-à-vis USD as against the average rates as worked out by Commission is ₹30.11 (₹74.22-₹44.11), resulting in 68.26% more depreciation being witnessed in the actual value of INR vis-à-vis the USD.

e) M/s Mecklai Financial Services Limited is a consulting company which undertook a risk analysis of forex borrowings by the Petitioner and concluded that while hedging reduces the risk, it entails incurring hedging costs, which increase considerably in a volatile foreign currency scenario. It further concluded that the hedging strategy implemented by the Petitioner till date has been as per prudent market practices and 100% hedging of foreign currency loan which is a 'zero risk' strategy would have resulted in higher cost as compared to the cost incurred under the Company's hedging strategy.

f) In Hoosier Energy Rural Electric Coop. Inc. vs. John Hancock Life Ins. Co. 588 F. Supp. 2d 919 - (United States District Court for the District of Minnesota) and In re Old Carco LLC, 452 B.R. 100 - (United States Bankruptcy Court for the Southern District of New York), the financial crisis was considered to be an unforeseeable event.



g) The Hon'ble Supreme Court in Energy Watchdog case and All India Engineering Federation v SPL case had observed that the regulatory powers of the Commission are not limited by the guidelines or by the PPA.

h) APTEL in its judgment dated 7.9.2018 in Appeal No. 336 of 2017 (UPPCL v Lanco & ors) had observed that the shortfall of coal due to 'change in NCDP' had disturbed the basic fabric of the contract between the parties and such change in law events are to be decided by the State Commission by striking a judicial balance between the generator and the discoms/ consumers. APTEL vide its judgment dated 20.11.2018 in Appeal No.121 of 2015 (SPL vs CERC & ors) had observed that the Commission has regulatory powers in terms of Section 79(1)(b) of the 2003 Act.

i) The bidding guidelines pre-dated the global financial crisis and the same could not have been factored in the said guidelines. Further, clause 4.3 of the said guidelines will not apply in the present case as the stipulation does not cover unforeseen and unprecedented events.

j) The Respondent MPPMCL, the lead Procurer, had conceded the fact that depreciation of INR vis-à-vis USD was unprecedented. In response to the Commission's query on whether MPPMCL was willing to bear part of FERV, the said respondent had submitted that in case the Commission holds that the Petitioner is entitled to compensation for FERV, then the entire burden should not be passed on to the Procurers, but should be shared by the Petitioner as well.

k) The present case is a fit case for the exercise of regulatory powers as the Commission vide its order dated 21.2.2014 had observed that the trend of INR depreciation was unforeseeable and has adversely affected the industries who made payment for import or debt servicing in USD. Further, the Commission, being a quasi-judicial body, is bound by its earlier decision and it is not open for the Respondents to argue that the steep depreciation of INR vis-à-vis USD is not an unforeseeable event and that the Petitioner is not entitled for any relief.



l) The claim of the Petitioner is to be considered in light of 'public interest' since the tariff of the Petitioner is the cheapest thermal tariff in the country and the same was recognized by the Commission in its order in Petition No.14/MP/2013. Reliance is placed on the Hon'ble Supreme Court judgments in Transmission Corporation of Andhra Pradesh v Sai Renewable Power Private Limited (2011) 11 SCC 34 and in APERC v R.V.K. Energy (P) Ltd (2008) 17 SCC 769.

m) The Petitioner's inability to sustain and discharge its obligations under the PPA on the face of the steep Rupee depreciation is imminent and will affect the consumers in the seven Procurer States, as the Procurers will need to procure long-term, base load, thermal power from alternative sources ranging from ₹3.25/kWh to ₹4/kWh, which will be nearly 250% to 300% of the Project's nominal tariff of ₹1.32/kWh (without change in law).

n) The Project has been operating at more than 90% PLF from 2015-16 i.e. first full year of operation (barring 2016-17, when it operated at 85%), though the PPA requires 80% availability. The Petitioner had achieved PLF of 95% in 2018-19 and PLF of 96% in 2019-20. Moreover, in the first quarter of 2020-21, the PLF of 97.33% was achieved, which is the highest PLF in the country.

o) The Project with 95% PLF, supplies 3100 crore units of electricity to the Procurers. For supplies beyond 80% PLF, the Procurers pay only energy charges and incentive (in case of availability beyond 85%). The nominal tariff of the Petitioner is ₹1.32/unit against an APPC of ₹3.41/unit incurred by the Procurers. Hence, for 490 crore additional units beyond the normative availability of 80%, the Procurers save ₹1000 crore annually, in addition to ₹5500 crore for power supply upto 80% PLF. Thus, the Procurers save ₹6500 crore annually and ₹162500 crore over the 25 year term of the PPA.

p) The total outflow on account of servicing of currently availed USD denominated debt over the repayment period of the project would be about ₹6516



crore. Against this, the actual exchange rate which prevailed with depreciation rate of 5% per annum till completion of repayment, the aggregate outflow on account of servicing of currently availed USD denominated debt over the repayment period of the project will be about ₹11392 crore. This represents an increase of USD denominated debt service obligation by approximately ₹4876 crore i.e. 75% of the debt service obligation as per the exchange rate which prevailed at the time of bid submission i.e. ₹40.27 per USD.

q) The key indicators of financial stress on the Petitioner is the non-achievement of Debt-Service Coverage Ratio of 1:1 in any of the previous year since 2017, inability to maintain the Debt Service Reserve Account, non-payment of Statutory dues and Vendor payments, Credit Rating downgraded and the inability to fund equity requirement and raise debt finance from lenders has severely impacted the timely installation of FGD for the project.

Written Submissions of the Respondents PSPCL, HPPC and Rajasthan Discoms

27. The Respondents Rajasthan discoms, HPPC and PSPCL vide their common written submissions dated 30.8.2020 have submitted the following:

a) The primary question for consideration is whether the relief of FERV can be granted to the Petitioner in the exercise of the general regulatory powers of the Commission, more particularly, contrary to the specific provision contained in the Bidding Guidelines dated 19.1.2005 notified by the Central Government and the bid documents (RfQ and RfP), based on which the bidding was held and successful bidder was selected.

b) In terms of the decision of the Hon'ble Supreme Court in Energy Watchdog case, the claim of the Petitioner for grant of compensatory relief for FERV in exercise of the regulatory powers is not maintainable. It has been laid down that the provisions of the Biding Guidelines are statutory in nature and the exercise of regulatory functions is to be in accordance with the said guidelines. It



has also been observed in the said judgment that only when there are no guidelines or that the guidelines do not deal with a particular situation, there can be an exercise of the regulatory jurisdiction.

c) In the present case, the guidelines, the bidding documents and the PPA read together specifically and expressly provide that there can be no relief to the selected bidder towards FERV. As the guidelines, the bidding documents, the model PPA etc., specifically stipulate that FERV shall be to the account of the selected bidder, no relief can be granted to the Petitioner in exercise of the general regulatory powers of the Commission.

d) There is no condition in the above bidding documents to the effect that FERV will not be considered only if it is within a particular limit or a specific extent or within a specific escalation index or variation with reference to the past period or if it is within the anticipated or foreseen range, as claimed by the Petitioner. The plain wording of the above provision clearly shows that FERV claim is not admissible.

e) Even otherwise, it is settled law that FERV is a risk to be taken by the bidder and cannot be a ground for seeking relief from contract or for any higher consideration. This aspect has been considered by the Hon'ble Supreme Court in paragraphs 37 to 41 of the judgement in the Energy Watchdog case. The claim for exercise of regulatory powers for grant of relief made by the Petitioner is, therefore, ex facie erroneous and is liable to be rejected.

f) The principles laid down in the judgments of the Hon'ble Supreme Court in *Alopi Pershad & Sons Limited v Union of India* (AIR 1960 SC 588) and in *Numaligarh Refinery Limited v Dealing Industrial Company Limited* (2007) 8 SCC 466 clearly establish that FERV is a commercial aspect to be taken care of by the bidder. The tenor of the observations in Energy Watchdog case (in paragraph 20) and the fact that no relief was given to the Petitioner in the civil appeal filed by it,



clearly disentitles the Petitioner from claiming relief on account of FERV, in exercise of the regulatory powers of the Commission. The claim of the Petitioner has been duly considered and rejected by all forums and the Hon'ble Supreme Court has also laid down the said principle. Therefore, the claim of the Petitioner is liable to be rejected on the principle of res judicata.

g) The relief granted in Energy Watchdog case, was limited to New Coal Distribution Policy (NCDP, 2013) and no relief was granted for FERV. The remand made to the Commission was for considering the effect of NCDP on domestic coal in terms of Clause 13 (Change in Law) of the PPA. Similar claim for exercise of the regulatory powers to grant relief in respect of Indonesian Regulations sought for by Adani Power and CGPL were rejected by the Hon'ble Court in the Energy Watchdog case and the Civil Appeals filed by them. When the Hon'ble Supreme Court had disposed of the Civil Appeals filed by the Petitioner by following the Energy Watchdog case, the rejection of the exercise of regulatory powers is binding on the Petitioner.

h) The Hon'ble Supreme Court in its order dated 2.5.2017 did not remand any part of the issues raised by the Petitioner in appeal for consideration by the Commission. The present Petition has nothing to do with the consideration of NCDP, 2013 as a Change in law, which was the only issue that has been remanded by the judgement in Energy Watchdog case. The Petitioner cannot, therefore, claim any relief based on the expression 'disposed of' as used in the said judgment of the Hon'ble Supreme Court. If the intention of the Hon'ble Supreme Court was to require the Commission to consider the issue afresh, it would have remanded the specific issue as was done in the case of NCDP, 2013. This Commission, cannot, in exercise of the regulatory powers grant relief to the Petitioner, which is contrary to the provisions of the Bidding Guidelines, the bid documents and the PPA.



- i) Without prejudice to the above, the choice to proceed on the basis of domestic loan or external commercial borrowing is to be made by a prudent utility on the basis of the gain that can be made on the principal and interest outflow, duly factoring the cost of hedging. It was a speculative and imprudent practice on the part of the RPower to consider that FERV will not be more than 0.74% per annum and, therefore, no hedging is necessary.
- j) The necessity for taking a foreign loan, as compared to a domestic loan should be considered only when, after providing for hedging of FERV, the interest rate is lesser than the domestic loan rate. If the Petitioner had been rational enough to contract an external commercial borrowing without hedging, to derive substantial reduction in the interest rate and thereby, taking the risk of FERV, it is not open to the Petitioner to claim that impact of FERV should be given to them in tariff.
- k) The stipulation in regard to the consideration of FERV in RfP is restricted to evaluation purposes. There was no representation whatsoever that FERV can be an assumption, based on which tariff in the bidding process could be quoted by the participating bidders. If the intention of the bidding documents were to treat any FERV beyond 0.74% as unprecedented, the bid documents would have provided for FERV beyond 0.74% to be adjusted. The bid documents clearly provide that FERV risk is to the account of the bidder, with the only exception being provided for when the bid is premised on imported coal, when to the extent of fuel cost, the bid could be in USD. This shows that in all other respects, FERV is the risk to be assumed by the bidder.
- l) The bid documents permit the bidder to quote escalable tariff in order to take care of FERV. If the bidder chooses not to do so and had accepted the fixed tariff, he takes the risk and reward of the judgement made by him. This is the very essence of competitive bid procurement.



m) The Petitioner had taken loan in Indian currency, which it had converted to foreign currency in 2011, by which time, it was to the knowledge of the Petitioner on the extent of fluctuation qua the Indian Rupee. COD of the generating station is August, 2013 and the Petitioner had initially committed all the funding/ financing arrangement primarily with Indian currency. As against the claim of Rs.2800 crore in Petition No.14/MP/2013, the Petitioner has claimed a difference of Rs.6516 crore (Page 18 of the record) in this petition. The Petitioner cannot seek any additional relief in excess of the claim in Petition No.14/MP/2013. This is without prejudice to the fact that the Petitioner is not entitled to any relief on account of FERV.

n) The detailed calculation in regard to the above was placed by the Respondents for consideration before this Commission by affidavit filed in September 2013. The reply submissions dated 8.9.2014 (Pages 1233 – 1251 of the record) as well as the presentation submitted in Petition No. 14/MP/2013 may be read as a part of the present submissions.

o) The contention of the Petitioner that clause 4.3 of the Bidding Guidelines is restrictive in nature and that it would apply only to foreseeable risk, is frivolous. There is no such qualification in clause 4.3. As held in *Naihiti Jute Mills case*, FERV is an event which is to be covered by the bidder contractually and the extent of FERV cannot possibly change the principles of law laid down.

p) The reliance on the decision of APTEL in the case of *SPL v MPPMCL & ors* is misconceived. In the said case, APTEL was dealing with the validity of the formula incorporated in the PPA under Article 13.2(a) for Change in law compensation during the construction period. A necessary requisite for considering the adequacy of compensation was whether the event in question was a change in law event within the meaning of the PPA. In the present case, the depreciation of Indian Rupee vis-à-vis the USD is not a change in law event. Therefore, there is no question of restoring the Bidder i.e. the Petitioner to the same position. In



Appeal No. 121 of 2015, it was the specific finding of APTEL that 'neither the guidelines nor the PPA envisage any provision to deal with a situation of an erroneous formula' (Page 1982 of the record). In the present case, the Bidding Guidelines as well as the bid documents specifically stipulated that FERV shall be to the account of the selected bidder and, therefore, no relief can be granted towards FERV in exercise of the general regulatory powers of the Commission.

q) Any admission/ concession on the part of the lead Procurer insofar as tariff is concerned does not bind the other Procurers, in terms of Article 2.5 of the PPA. Further, there cannot be any waiver, if there is any element of public interest involved, as held by the Hon'ble Supreme Court in All India Power Engineer Federation v SPL.

28. Accordingly, these Respondents have prayed that the claim of the Petitioner in the said petition may be rejected.

Issues

29. Based on the submissions of the parties, the issues which emerge for consideration in this petition are as under:

a) **Issue No. A:** Whether the claim of the Petitioner is barred by the principle of res judicata?

b) **Issue No. B:** Whether the Petitioner's claim for compensation due to FERV can be granted in exercise of the regulatory powers of Commission under Section 79(1)(b) of the 2003 Act?

Issue No. A: Whether the claim of the Petitioner is barred by the principle of res judicata?

30. The Respondents PSPCL and the discoms of Haryana and Rajasthan have submitted that the Petitioner had raised the very same issue in Petition No.14/MP/2013 and the Commission had rejected the same on the ground that the bidding guidelines



prohibits the grant of relief for FERV. In the appeal filed before APTEL, the claim for exercise of the regulatory powers by Commission was rejected by APTEL vide its judgment dated 7.4.2016. In the Civil Appeal (C.A Nos. 9643-44 of 2016) filed by the Petitioner against the said judgment dated 7.4.2016 of APTEL, the Hon'ble Supreme Court had disposed of the same on 2.5.2017, in terms of its judgment dated 11.4.2017 in the Energy Watchdog case. The Respondents have submitted that the tenor of the judgment in Energy Watchdog case (in paragraph 20 supra) and the fact that no relief was granted to the Petitioner on account of FERV, clearly disentitles the Petitioner to claim any relief on FERV, in exercise of the regulatory powers of the Commission. The Respondents have further contended that the claim of the Petitioner having been considered and rejected by all the forums, including the Hon'ble Supreme Court, the same is liable to be rejected on the principles of *res judicata*. In response, the Petitioner has submitted that its claim for FERV had not achieved finality, since the appeals against the Full Bench judgment of APTEL dated 7.4.2016 were pending before the Hon'ble Supreme Court at the relevant time and the Commission ought to have heard the Petitioner before the disposal of Petition No.14/MP/2013 on 26.4.2016. The Petitioner has contended that the Hon'ble Supreme Court in Energy Watchdog case having set aside the Full Bench judgment dated 7.4.2016 of APTEL, the claim of the Petitioner for FERV has to be allowed in exercise of the regulatory powers of the Commission, in terms of the observations in the said judgment.

31. We have examined the submissions. In order to decide whether the Petitioner's claim for FERV is barred by *res judicata*, it needs to be examined if the said claim of the



Petitioner had attained finality. As noted earlier, in Petition No. 14/MP/2013 filed by the Petitioner for a declaration that the unprecedented, unforeseeable and uncontrollable depreciation of Indian Rupee vis-a-vis USD is a Force Majeure event under the PPA, the Commission vide its order dated 21.2.2014 held that the depreciation of Indian Rupee vis-a-vis USD was not a force majeure event. This decision was not challenged by the Petitioner and has, therefore, attained finality. However, the decision of the Commission in the said order to examine whether any relief can be granted to the Petitioner in exercise of the regulatory powers of the Commission, under section 79(1)(b) of the 2003 Act was challenged before APTEL by some of the Respondents and the Full Bench of APTEL vide its judgment dated 7.4.2016 held that the Commission has no regulatory powers under section 79(1)(b) of the 2003 Act to grant compensatory tariff to the generating companies in case of a tariff determined based on competitive bidding process as per Section 63 of the 2003 Act. In view of this, the question of granting relief to the Petitioner in exercise of the regulatory powers of the Commission did not survive in Petition No. 14/MP/2013. The Hon'ble Supreme Court in Energy Watchdog case dated 11.4.2017 had reversed the judgment dated 7.4.2016 of APTEL and remanded the matter for consideration of NCDP 2013 as a change in law event, it made certain observations with regard to regulatory powers of the Commission under Section 79(1)(b) of the 2003 Act, as extracted under:

“20.....It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used.”



32. Pursuant to the disposal of the civil appeal filed by the Petitioner by the Hon'ble Supreme Court on 2.5.2017 in terms of order dated 11.4.2017 in the Energy Watchdog case, the Petitioner, on the strength of the aforesaid observations, had sought the indulgence of APTEL by filing the IA (163/2018) in Appeal No.202/2016, for a fresh consideration of its claim for compensation in exercise of the regulatory powers of the Commission under Section 79(1)(b) of the 2003 Act. In the said appeal, some of the Respondents herein had contended that (i) the grant of relief under Force majeure had attained finality as the Petitioner had not challenged the Commission's order dated 21.2.2014 and that (ii) the Petitioner seeking remand of the matter in terms of the judgment in Energy Watchdog case would serve no purpose, as the competitive bidding guidelines would cover the field. APTEL, after taking note of the aforesaid submissions had, vide its order dated 18.1.2019, directed the Commission to consider the claim of the Petitioner in exercise of the regulatory powers under Section 79(1)(b) of the 2003 Act in the light of the judgment of the Hon'ble Supreme Court in Energy Watchdog case and by according opportunity of hearing. The relevant portion of the order dated 18.1.2019 is extracted hereunder:

"15.....Since the opinion of the Full Bench of this Tribunal so far as exercise of regulatory powers came to be reversed by the Apex Court in Energy Watchdog's case, it is incumbent upon the Commission to decide the said issue in the light of the Judgment of the Energy Watch Dog's case by affording an opportunity of being heard. No prejudice whatsoever is caused to the Respondents, since they will also be heard before the Commission."

33. In view of the aforesaid directions of APTEL to decide the issue in the light of the judgment in Energy Watchdog case, the submissions of the Respondents that the Petitioner's claim for compensation due to deprecation of INR had attained finality, is



not acceptable. Accordingly, we proceed to examine whether the Petitioner's claim for compensation due to FERV in exercise of the regulatory powers of Commission under Section 79(1)(b) of the 2003 Act is admissible.

Issue No. B: Whether the Petitioner's claim for compensation due to FERV can be granted in exercise of the regulatory powers under Section 79(1)(b) of the 2003 Act?

34. The Petitioner has submitted that at the time of the submission of the bid by RPower in July 2007, the exchange rate of USD was Rs.40.27 per USD and as on the date of filing of the present petition, the exchange rate stood at Rs.70 per USD (approx.) which translate to a depreciation of 75% (approx.) of INR vis-à-vis USD in the intervening period of about 12 years from the bid submission date. In other words, the compounded annual growth rate based on the exchange rate is approximately 5% p.a. The Petitioner has also submitted that taking into account the said exchange rate which prevailed at the time of bid submission indexed as per the Commission's INR depreciation rate of 0.74% p.a. at the time of bid submission, the total outflow on account of servicing of currently availed USD denominated debt over the repayment period of the project would be Rs.6516 crore. As against this, the aggregate outflow on account of servicing of currently availed USD denominated debt over the repayment period of the project at actual exchange rate which prevailed till date and the exchange rate arrived at with the depreciation rate of 5% p.a. till completion of repayment will be about Rs.11392 crore. This represents an increase of USD denominated debt service obligation by approximately Rs. 4876 crore (75%). The Petitioner has further submitted that the present project cost as approved by the lenders, is approximately Rs.26405 crore, with an increase of approximately of Rs.1574 crore on account of depreciation of



INR vis-à-vis USD. The Petitioner has furnished a comparison between the actual rate of depreciation of INR vis-à-vis the USD and the expected rate of depreciation based on the notification dated 4.4.2007 issued by this Commission as under:-

Date/Year	Average rates prevailing during the period	Average rate as per CERC adjustment rate
2005	44.11	-
2006	45.33	-
Jan 01, 2007 to Jul 25, 2007	42.35	-
Jul 26, 2007	40.27	40.27
Jul 27, 2007 to Dec 31, 2007	39.93	40.33
2008	43.42	40.55
2009	48.35	40.85
2010	45.74	41.15
2011	46.67	41.46
2012	53.49	41.76
2013	58.64	42.07
2014	61.04	42.38
2015	64.15	42.70
2016	67.18	42.93
2017	65.11	43.33
2018	68.41	43.65
2019	70.81	43.98
2020 (upto 31.7.2020)	74.22	44.11

35. In terms of the above, the Petitioner has submitted that difference of the prevailing average rate of INR vis-à-vis USD against the weighted average rate notified by the Commission is Rs.30.11, thereby resulting in 68.26% more depreciation in the actual value of INR vis-à-vis USD. The Petitioner has stated that the present scenario is not covered under the competitive bidding guidelines or the PPA as neither of these documents provides any allocation of risk for an unprecedented, unforeseen and uncontrollable steep depreciation of INR vis-à-vis USD. It has pointed out that in the absence of regulatory framework dealing with the situation, this Commission can



exercise regulatory powers in terms of the judgment in Energy Watchdog case and grant relief to the Petitioner. The Petitioner has further stated that paragraph 4.3 of the competitive bidding guidelines deals with day to day foreseeable risks only and will not cover unforeseen and unprecedented events, as in the present case. Referring to the Commission's order dated 21.2.2014 in Petition No.14/MP/2013, the Petitioner has submitted that the Commission in the said order dated 21.2.2014 had already considered it a fit case for exercise of regulatory powers in the matter by observing that the trend of INR depreciation was unforeseeable and uncontrollable and has adversely affected the industries which are making payment for import or debt servicing in USD. Accordingly, the Petitioner has submitted that the Commission is bound by its earlier decision and it is not open for the Respondents to argue that the steep depreciation of INR is not an unforeseeable event. The Petitioner has also stated that its inability to sustain and discharge its obligations under the PPA on the face of depreciation of INR is imminent and will affect nearly 47 crore consumers in Procurer States and, therefore, is a fit case for exercise of the regulatory powers in the interest of consumers, lenders and the power sector as a whole. The Petitioner has submitted that the depreciation of INR has struck at the very root of the project economics and threatened the viability and sustainability of the project. It has stated that the increased debt service obligation of the Petitioner due to unprecedented and uncontrollable steep depreciation of INR ought to be compensated to the Petitioner such that it is restored to the same economic position. The Petitioner has further submitted that the Commission by exercising its regulatory powers under Section 79(1)(b) of the 2003 Act can provide compensatory tariff to mitigate the impact of the unforeseen and uncontrollable steep depreciation vis-



à-vis USD. The Petitioner has, however, clarified that it is only seeking relief to the extent of being able to meet its debt servicing obligations and not towards equity infused for setting up and operating the power plant. The Petitioner has relied upon the judgment of the Hon'ble Supreme Court in Energy Watchdog case and All India Engineering Federation v Sasan Power Limited (2017) 1 SCC 497 and has stated that in terms of the said judgments, the Commission has the power to approve any increase in tariff and the regulatory powers of the Commission are in no way limited by either the competitive bidding guidelines or PPA. The Petitioner has added that its claims have to be considered in the light of the aforesaid principles and law and public interest is to be kept in mind since the tariff of the Petitioner is the cheapest thermal tariff in the country. It has reiterated that in cases where either there are no guidelines or where the guidelines do not cover a particular scenario, the Commission has the jurisdiction to excise its regulatory powers and grant relief. The Petitioner has also relied upon the judgments of the Hon'ble Supreme Court in AP Transco v Sai Renewable Power Private Limited (2011) 11 SCC 34 and APERC v RVK Energy (P) Ltd (2008) 17 SCC 769 and submitted that the Commission may exercise its regulatory power in public interest and grant relief to the Petitioner in accordance with the principles enshrined in Section 63 of the Act.

36. The Respondent, MPPCL has submitted that the claim of the Petitioner is required to be adjudicated in terms of the PPA particularly when it has been entered into pursuant to a competitive bidding process and as per the standard bidding process and guidelines issued by the Government of India. It has pointed out that the Hon'ble



Supreme Court in the Energy Watchdog case has held that this Commission is only authorized and permitted under law to exercise its regulatory power in the absence of guidelines or PPA on the subject matter. The Respondent has contended that the submission of the Petitioner that FERV from the date of submission of the bid to the date of filing of the Petition translate to a depreciation of approximately 37% of INR vis-à-vis USD and, therefore, needs to be compensated, is contrary to paragraph 4.3 of the competitive bidding guidelines. The Respondents, Rajasthan discoms, PSPCL and HPPC have submitted that the guidelines, bidding documents and the PPA read together specifically and expressly provide that there can be no relief to the selected bidder towards FERV. These Respondents have stated that in terms of the judgement in the Energy Watchdog case, the provisions of the Bidding Guidelines are statutory and the exercise of regulatory functions is to be in accordance with those guidelines. Only when there are no guidelines or the guidelines do not deal with the particular situation, there can be an exercise of a regulatory jurisdiction. There is no condition or limitation contained in the bidding documents to the effect that FERV will not be considered only if it is in the particular limit or a specific extent or within a specific escalation index or variation with the past period or if it is within the anticipated or foreseen range as claimed by the Petitioner. The Respondents have also argued that it is settled law that the exchange rate fluctuation is a risk to be taken by the contracted party and cannot be a ground for seeking relief from the contract or for a higher consideration for the contract. Accordingly, the Respondents have stated that it is not open to the Petitioner to claim relief under the general regulatory powers, when it is not legally permissible. Similar submissions have been made by other Respondents.



37. The matter has been examined. The Petitioner has submitted that the Commission vide its order dated 21.2.2014 in Petition No.14/MP/2013 had already held that the case of the Petitioner was fit for exercise of the regulatory powers considering the unprecedented, uncontrollable and unforeseen depreciation of INR vis-a-vis USD, the lowest thermal tariff (levelized tariff of Rs 1.196/kWh) and highest reliability in the country (PLF of 96% in 2019-20) offered by the Petitioner has benefitted the consumers in seven Procurer States and that the Respondent MPPMCL, the lead Procurer, has conceded the fact that depreciation of INR vis-a vis USD was unprecedented. According to the Petitioner, since there has been no change in the factual situation between the passing of the said order dated 21.2.2014 and now, the Commission, as a quasi-judicial body is bound by its earlier decision and it is not open to the Respondents to argue that the steep depreciation of INR vis-a-vis USD is not an unforeseeable event and that the Petitioner is not entitled to any relief.

38. This submission of the Petitioner is not acceptable since APTEL in its order dated 18.1.2019 in IA No. 163 of 2018 in Appeal No. 202 of 2016 has directed this Commission to consider the exercise of the regulatory powers, not in terms of the Commission's order dated 21.2.2014 calling for certain additional information, but only in the light of the judgment of the Hon'ble Supreme Court in Energy Watchdog case to grant of such relief. In other words, the Petitioner's claim for relief in exercise of the regulatory powers under Section 79(1)(b) is required to be considered in terms of the observations of the Hon'ble Supreme Court in its judgment in Energy Watchdog case read with the APTEL order dated 18.1.2019.



39. The Petitioner has submitted that in terms of the judgement in Energy Watchdog case and AIEF vs SPL, this Commission is empowered under the regulatory framework to any increase in tariff and that the regulatory powers of this Commission are in no way circumscribed or limited by either the Competitive Bidding Guidelines or the PPA. The Hon'ble Supreme Court in Energy Watchdog judgment has observed the following:

“.....In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with “determination” of tariff, which is part of “regulating” tariff. Whereas “determining” tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to “regulate” tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission’s general regulatory powers under Section 79(1)(b) can then be used.”

40. It is evident from the above that the general regulatory powers of the Central/ State Commission can be exercised only in exceptional circumstances, where there are no guidelines or in a situation which is not covered by the guidelines. The Petitioner has contended that the instant case is not covered under the competitive bidding guidelines or the PPA and neither document provides any allocation of risk for an unprecedented, unforeseen and uncontrollable steep depreciation of Rupee vis-à-vis USD. The Petitioner has contended that in the absence of a regulatory framework dealing with this situation, the Commission can exercise its regulatory powers to grant relief to the Petitioner, in terms of the judgment in Energy Watchdog case. The Petitioner has added that paragraph 4.3 of the Competitive bidding guidelines deals with day to day foreseeable risks and if the same is treated as an absolute bar to both foreseeable and



unforeseeable situations, it would be contrary to law. Therefore, we find it necessary to examine the provisions of the PPA with regard to the foreign exchange risks.

41. As already stated, the Petitioner was awarded the bid to execute the Sasan UMPP after being selected as the lowest bidder on the basis of competitive bidding carried out under Section 63 of the 2003 Act. Paragraph 4.3 of the Competitive Bidding Guidelines provides as under:

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

Provided that the foreign exchange rate variation would be permitted in the payment of energy charges (in the manner stipulated in para 4.1 (iii) if the procurer mandates use of imported fuel for coastal power station in case-2.

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

42. Thus, the Competitive Bidding Guidelines require that tariff shall be quoted in INR only except where the procurers mandate use of imported coal. In this case, there is no mandate of the procurers to use imported coal. In fact, the procurers have arranged a captive coal mine which was to be developed by the successful bidder to meet the requirement of fuel and the bidder was required to quote its bid after taking into account all expenditures on the project including development of the captive mines. Thus, as per the said Bidding Guidelines, the procurers are insulated from any foreign exchange risk and it falls within the exclusive domain of the Petitioner. It is noticed that paragraphs 2.4 and 2.7.1.1.3 of the RfP document provide the following:

"2.4 Tariff



The tariff shall be as specified in the PPA and shall be payable in Indian Rupee only. The Bidder shall quote Quoted Tariff for each Contract Year during the term of the PPA as per Format 1 of Annexure-4.

Each of the Procurers shall provide the Letter of Credit and Collateral Arrangement as per the terms of the PPA.

2.7.1.1.3 The Quoted Tariff in Format 1 of Annexure 4 shall be an all inclusive tariff and no exclusions shall be allowed. The Bidder shall take into account all costs including capital and operating costs, statutory taxes, duties, levies while quoting such tariff. Availability of the inputs necessary for generation of power should be ensured by the Seller at the Project Site and all costs involved in procuring the inputs (including statutory taxes, duties, levies thereof) at the Project Site must be reflected in the Quoted Tariff”

43. Thus, the RfP document makes it mandatory for the bidder to quote an all-inclusive tariff which shall reflect all cost including the capital & operating cost and statutory levies, taxes and duties. It is also the responsibility of the seller (the successful bidder to execute the project and supply power) to ensure availability of all inputs for generation of power at the project site and to reflect all cost in the quoted tariff. Thus, the RfP document does not require a bidder to quote the different elements of tariff such as equity, interest on loan, depreciation, O&M expenses and interest on working capital, but to quote an all-inclusive tariff, taking into account all expenditure for building and operating the project. Since the tariff is all inclusive, the bidder is expected to factor in all possible expenditures, including the expenditure on foreign exchange rate variation that may arise on account of depreciation of INR if the project has a component of imported equipment or foreign loan. Also, the bidders are required to quote non-escalable capacity charges, escalable capacity charges, non-escalable energy charges and escalable energy charges in Rupees/kWh only, as per format 1 Annexure 4. Therefore, both, the Competitive Bidding Guidelines and the provisions of the RfP require the bidders to quote in INR only. Further, the bidders have been granted liberty



to quote escalable capacity charges and escalable energy charges. The purpose of such escalable charges is to enable the bidder to factor in the variation in the prices of equipment and machinery, exchange rate variation, variation in interest rates, and changes in taxes, duties and levies etc. Since the quoted tariff is in INR only, it is the clear intention of the Competitive Bidding Guidelines and the bidding documents that the bidder should factor in the foreign exchange component of the project, including foreign exchange rate variation in the bid while quoting in Indian Rupees. The foreign exchange risk, if any, has been exclusively assigned to the bidder and the failure of the bidder to factor the same, cannot, therefore, be passed on to the Procurers. The Petitioner had consciously not quoted escalable capacity charge.

44. As stated, the Hon'ble Supreme Court in Energy Watchdog case has decided that in case the bidding guidelines issued by the Central Government under Section 63 of the 2003 Act cover the situation, the Commission is bound by those guidelines. In the present case, the competitive bidding guidelines, the bidding documents and the PPA specifically stipulate that FERV shall be to the account of the selected bidder. Hence, the Petitioner cannot say that the steep depreciation of Indian Rupee vis-a-vis USD is unprecedented and unforeseeable and that the same has threatened the viability and sustainability of the project.

45. In the above background, we find no ground for exercising the general regulatory powers of the Commission under Section 79(1)(b) of the 2003 Act to grant any claim for compensation due to FERV. Accordingly, the prayer of the Petitioner that it is to be



compensated and restored to the same economic position due to depreciation of Indian Rupee vis-a-vis USD stands rejected.

46. Petition No.71/MP/2019 is disposed of in terms of the above.

Sd/
(Arun Goyal)
Member

Sd/
(I.S. Jha)
Member

Sd/
(P.K. Pujari)
Chairperson

