



ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION
4th & 5th Floors, Singareni Bhavan, Red Hills, Hyderabad 500 004

O.P. No.32 of 2009

Dated 16.04.2013

Present

Sri A.Raghotham Rao, Chairman
Sri C.R.Sekhar Reddy, Member
Sri R.Ashoka Chari, Member

Between

M/s. Spectrum Power Generation Limited

... Petitioner

AND

1. Transmission Corporation of Andhra Pradesh Limited
2. Andhra Pradesh Eastern Power Distribution Company Limited
3. Andhra Pradesh Southern Power Distribution Company Limited
4. Andhra Pradesh Central Power Distribution Company Limited
5. Andhra Pradesh Northern Power Distribution Company Limited
6. Andhra Pradesh Power Coordination Committee

...Respondents

This petition has come up for hearing on 07.07.2012 in the presence of Sri S.Ravi, Advocate for the petitioner and Sri P.Shiva Rao, Advocate for the respondents, the Commission passed the following:

ORDER

This is a petition filed by the petitioner u/s 86 (1) (f) of the Electricity Act, 2003 seeking directions to the respondents;

- (a) To treat the amount of Rs.106.60 crores brought in by the Promoters of the petitioner company from State Bank of India as "Equity" within the meaning of Power Purchase Agreement (for short the 'PPA') and to consider the same for the purpose of payment of incentive to the petitioner and settle the incentive amount of the petitioner on the entire equity of Rs.224.53 crores;
- (b) To pay the interest as per clause 1.1 xx of PPA on the unsettled amount of incentive;

2. The case of the petitioner is briefly as follows:

Background of the petitioner and the respondents:

- a) The petitioner is a Generating Company within the meaning of Section 2 (28) of the Electricity Act, 2003 and has constructed, commissioned and is operating 208 MW Power Plant at Kakinada in Andhra Pradesh. It entered into a PPA on 20.06.1993. The said PPA was revised from time to time and final agreement was entered into on 23.01.1997. Enactment of the A.P. Electricity Reforms Act, 1998, constitution of the respondents and as to how they became successors-in-interest to the erstwhile A.P. State Electricity Board have been explained in detail.

Dispute:

- b) As per Schedule - E of the PPA, the capital cost as provisionally approved by the CEA shall be in the form of debt and equity of Rs. 523.90 crs and Rs. 224.53 crs respectively. In so far as the equity component is concerned, the promoters of the petitioner Company brought in an amount of Rs.117.93 crs. The balance amount of Rs.106.60 crs have been brought in from State Bank of India as a loan at an interest rate of 20.75% to fill up the gap in equity. The above situation arose due to orders of the Delhi High Court restraining the promoters from issuing further capital.
- c) The petitioner Company started selling power in terms of the PPA. The tariff comprises of the (i) fixed charges which include (a) Interest on debt; (b) Return on Equity; (c) Interest on working capital; (d) Depreciation; (e) Operation and maintenance expenses (f) Foreign Exchange Variation; and (g) Insurance premia, (ii) the variable charge payment, (iii) the incentive or disincentive payments, and (iv) taxes on income as set forth in Article 3 of the PPA.
- d) The expression 'Incentive' is defined in the PPA, according to which, the petitioner is entitled to incentive from the respondents if the former achieves a Plant Load Factor (for short, 'PLF') of 68.49%. The respondents have been paying interest on the entire provisional debt component as per the PPA and also 16% Return on Equity on Rs.117.93 crs. The respondents have also

been paying 16% on Rs. 106.60 crs brought in by promoters by way of loan from SBI.

- e) The incentive has to be paid at the rates mentioned in Article 3.10.2 of the PPA on the entire provisional equity of Rs. 224.53 Crs since promoters brought in this money and completed the project successfully. The respondents have been paying RoE at 16% on the entire provisional equity of Rs. 224.53 Crs, but have been paying incentive only on Rs. 117.93 crs, while refusing to pay the incentive on the balance amount of Rs.106.60 Crs stating that equity capital brought in by the promoters is only Rs.117.93 Crs. The stand of the respondents that the said balance amount of Rs. 106.60 Crs is only a bridge loan, but not equity is contended by the petitioner on several grounds.

Grounds of the petition:

- f) The petitioner Company was restrained from raising further equity by means of an interim order passed by the Delhi High court. The promoters of the company were therefore, constrained to take a loan from the State Bank of India to the extent of Rs.106.60 Crs, by offering their personal guarantees, unlike the other debts where plant and machinery were offered as security. None of the assets of the Company have been charged and the Company has not given any guarantee, security or any assurance in favour of the SBI either on its behalf or on behalf of the promoters to secure the said loan of Rs.106.60 Crs.
- g) The said amount undisputedly has been utilized towards the balance equity component of the Capital Cost. It is well within the knowledge of the respondents and the respondents did not raise any objection for this course adopted by the petitioner Company. If the promoters of the Company did not bring the loan for the purpose of completion of the project, the project would have become a grinding halt, due to which generation and supply of power from the project would not have been possible in those days of acute power shortage in the State and the respondents could not have derived the benefit of getting the power at such cheaper cost.

- h) When the PPA clearly envisages that the amounts representing the debt and equity, shall go into the capital cost in a fixed ratio @ 70:30, there can be no other nomenclature like bridge loan which is obviously nothing short of debt that can legitimately be given to this balance amount of Rs.106.60 Crs. It shall come in either one of the expressions 'debt' or 'equity'. Further, treating this amount as bridge loan is nothing short of travelling beyond the limits of the PPA. It is not permissible to either of the parties to out step the limits of the PPA under law inasmuch as the rights and liabilities of the parties shall be worked out within the PPA. Therefore, the respondents cannot treat this amount of Rs.106.60 Crs, as bridge loan.
- i) Although the amount of Rs.106.60 Crs, has been brought in by the promoters of the Company by raising a loan on their personal guarantee, from the State Bank of India, this amount has been raised *in lieu* of equity and indeed has gone into the equity component in utilization of funds in completing the project. Therefore, regardless of the source from which the amount has been raised the avowed purpose being obviously to contribute towards the equity component of the Capital Cost and in fact has been contributed towards the balance of equity it shall not be construed as a debt.
- j) If the balance amount of Rs.106.60 Crs, were to be treated as debt the respondents shall have to pay interest at the rate actually being paid by the petitioner Company on the amount of Rs.523.90 Crs representing the 70% ratio of the debt. Admittedly, the respondents have been paying 16% over it as in the case of the other equity component of Rs.117.93 Crs and therefore, by the action of the respondents itself, this amount was not treated as 'Debt' in terms of PPA. When the rate of interest on the debt component is variable due to changes in the rates of interests of lenders, the 16% interest being paid on the balance amount of Rs.106.60 Crs cannot be static and fixed. If it were a debt, the respondents shall have to pay interest at 20.75% the rate actually being paid by the petitioner company. The fact that the respondents coined a new nomenclature to the balance amount of Rs.106.60 Crs. as bridge loan is an acid test which confirms that the respondents are not inclined to treat this amount as debt. Once it cannot be treated as debt for the above reasons there is no option except to treat this amount as equity

component and no other nomenclature can be given to it which is not envisaged by the PPA.

- k) While denying the agreed rate of interest to the petitioner Company and paying only 16% over the balance amount of Rs.106.60 Crs, whatever may be the nomenclature given to it, the respondents cannot legitimately deny the incentive by treating the said amount as a debt. It is nothing but blowing hot and cold at the same time which is totally unreasonable.
- l) The philosophy behind payment of incentive is to encourage the private power producers to generate and supply maximum possible power to bring down the unit rate to the extent possible, which is beneficial to respondent No.1. Since there should be some norms for payment of such incentive, presumably, it has been linked as a percentage to the amount of equity. Therefore, the main criteria to be followed is the PLF achieved on the basis of which incentive has to be worked out as a percentage on the equity amount and not the actual amount of equity contribution. The equity amount only forms the basis to arrive at the value of incentive payable for achieving the performance above normative level of 68.49%. Therefore, it should not have any bearing with the mode of its contribution namely whether it is by issue of shares or by an advance or loan from any bank. The respondents failed to recognize the logic and rationale in the payment of incentive and discouraged the petitioner company by denying the same on some technical reasons.
- m) For the purpose of paying ROE as defined in sub-clause (lxxiii) of Article 1.1 (Definitions), the amount of 16% ROE is being calculated on 224.53 Crs. (which is equal to 117.93 Crs of promoter's equity plus 106.60 Crs being the amount brought in by the promoters by way of loan from SBI by furnishing their personal guarantees). Thus, the respondents themselves are treating the total amount of 224.30 Crs as Equity for the purpose of calculating ROE. But when it comes to calculating 'increased Return on Equity' under Art.3.10.2 the amount of equity taken into consideration is Rs.117.93 Crs. only. The amount of 'Equity' cannot be worked out differently for the two clauses under the same agreement (PPA).

- n) The methodology for the calculation and payment of incentive could be seen from Art, 3.10.2 of the PPA. It is obvious that incentive shall be calculated on the basis of PLF. If the PLF is above 68.5% then only the petitioner is entitled to the incentive. If it falls short of the requisite 68.5% it entails disincentive. Therefore, payment of incentive does not depend upon the amount of ROE, payable. On the other hand Art.3.10.2 clearly envisages that incentive to be paid shall be in the nature of ROE, calculated at 4% to 6% increase of ROE, on every 1% increase in PLF. If the PLF is above 68.5% for every 1% increase in PLF up to 80.5% the incentive shall be calculated at 0.4% increase in ROE. This incentive payable is only in the nature of ROE but not the ROE itself, regardless of the fact that ROE shall have to be taken into reckoning for calculating the incentive. The amount of incentive mainly depends on the generation of power. Therefore, for the purpose of calculating the incentive the total amount of Rs.224.53 Crs shall be taken into consideration which is admittedly the equity component of the capital cost. It is not permissible under the terms and conditions of PPA to split up this amount into two parts and calculate the incentive on a part of it.
- o) The petitioner was denied of interest at the prevailing rate of 20.75% on this amount of Rs.106.60 Crs since the erstwhile Board has been paying 16% flat on this amount on the premise that it is not a debt. The petitioner is denied of incentive on this amount on the premise that it is not equity. The petitioner thus made to loose on both sides which is irreparable. The balance amount of Rs.106.60 Crs, shall be either debt or equity as envisaged by the PPA. But it is quite unreasonable to say that it is neither. Such a stance is nothing short of approbation and reprobation which is not permissible under law.
- p) The promoters of the petitioner had to take a loan from SBI by furnishing their personal guarantee for the simple reason that the restraint order passed by the Delhi High Court restraining the Company from raising further equity. With all anxiety to complete the construction of the project well within the time, the promoters were constrained to raise the amount so as to circumvent the contingency with all the avowed good intention. Even the restraint order passed initially by a learned single judge of the High Court has subsequently

been vacated. The Division Bench and eventually the Apex Court confirmed it and therefore, there is no legal hurdle for treating it as equity capital.

- q) There is no extra burden whatsoever either on the respondents or on the end-customers by making this incentive payment on the entire equity of Rs.224.53 Crs. since this was already approved cost towards the project by the competent authority and therefore, was already factored into the cost of power. This argument is further strengthened by the fact that the respondent No. 1 is required to file Aggregate Revenue Requirement (ARR) before this Commission for the purpose of receiving tariff approval. In the said ARR, the respondent No. 1 is required to disclose the various payments which are required to be made in respect of electricity purchased by them. In the ARR submitted by for the year 2000-01, the full incentive as due to the petitioner is specifically shown. Respondent No. 1 had thus used for the purpose of fixing the tariff from its customers, the full amount of incentive which is required to be paid to the petitioner. Respondent No. 1 has thus admitted that this amount is payable to the petitioner. In respect of the year 2000-01, respondent No. 1 has in the ARR claimed a liability to pay Rs.27.00 Crs as incentive whereas it has actually paid Rs. 13.17 Crs to the petitioner. Similarly, in respect of the year 2001-02, respondent No. 1 has in the ARR claimed a liability to pay Rs.18.75 Crs as incentive whereas it has actually paid Rs.7.76 Crs only to the petitioner. Therefore, respondent No. 1 after having obtained its necessary approvals from this Commission on the basis as above mentioned, cannot refuse to make this incentive payment to the petitioner. This act of the respondent No. 1 is absolutely *malafide* in nature and is a wrongful act.
- r) Thus, the action of the respondents in not paying incentive as required in PPA on the entire provisionally approved equity amount is totally arbitrary and unjustified apart from being detrimental to the financial health of the petitioner.
- s) As mentioned in clause 1.1 xx which defines 'Default Interest Rate', the respondents are liable to pay interest on the unsettled incentive amount as per the terms of PPA.

t) The petitioner bonafidely filed a Writ Petition No.11223 of 2003 before the Hon'ble High Court of Andhra Pradesh, on the above said grounds and the Hon'ble High Court was pleased to issue notice and the matter was awaiting final disposal. During pendency of the above said writ petition, the Hon'ble Supreme Court on 13.03.2008 pronounced its judgment in Appeal (Civil) 1940 of 2008 Gujarat Urja Vikash Nigam Ltd Vs. Essar Power Ltd., holding that after the advent of the Electricity Act, 2003 the disputes between the Generating Company and licensee are to be adjudicated by the concerned Regulatory commission and are not to be resolved through the Arbitration Mechanism as provided in Power Purchase Agreements. In view the said judgment of Hon'ble Supreme Court of India, the Hon'ble High Court of Andhra Pradesh, in the above said Writ Petition No. 11223 of 2003 passed an order on 25.11.2008 stating that "permission is accorded and the writ petition is accordingly dismissed as withdrawn, leaving it open to the petitioner to work out its remedies, in accordance with law", In view of the said order, the petitioner has filed instant petition before the Commission for redressal of the above said dispute between the parties.

3. The material averments mentioned in the counter by the respondents are briefly as follows:

Preliminary objections on the maintainability:

a) The petitioner's claim to treat the additional borrowed amount of Rs.106.60 Crs as equity for the purpose of payment of equity-based-incentive is hopelessly barred by limitation, having initially claimed way back in 2003 vide WP No.11223/2003 which was dismissed as withdrawn on 25.11.2008, and having not pursued the same in the competent court till 03.06.2009. Therefore all the claims pertaining to the period before 03.06.2006 are clearly barred by law and are not maintainable without going into the correctness or otherwise of the claim. The Hon'ble Supreme Court categorically held in more than one occasion about the application of S.14.1 of Limitation Act to the effect that if a party inspite of having information is proceeding before the wrong court, the time spent there under cannot be excluded for computation of limitation period. Therefore, the time spent during the said proceedings is not permitted to be excluded in computing the period of limitation of 3 years

because it cannot be said that the petitioner was prosecuting with due diligence under the bonafide mistake that the High Court had the jurisdiction to entertain the petition. Lack of bonafides is apparent from the delay in pursuing the matter before the proper competent court. More particularly, the Supreme Court held that S.14 of the Limitation Act does not apply when the petition is withdrawn from the earlier court. Thus at the very outset, the claims relating to the period prior to 03.06.2006 are to be held as not enforceable since barred by limitation.

- b) The petitioner's claim is based on the wrong presumption that the equity component amounting to Rs.106.60 Crs of the total capital cost which could not be procured by the promoters due to the restraint imposed by the High Court of Delhi and which was eventually raised as a loan from SBI; is nothing but a portion of the total equity Rs.224.30 Crs (30% of the total capital cost). This additional loan amount cannot be treated as equity for the purpose of payment of incentive.

Merits of the case:

- c) Despite the deviation in the financial structure of the project and in order not to render the entire project infructuous and forestall a total *fiasco*, respondent No.1 in extreme sense of fair play had paid incentive on Rs.117.93 Crs and interest at the rate of 16% on Rs.106.60 Crs. As admitted by the petitioner, there was no other option than scrapping the entire deal *abinitio* on the grounds of not fulfilling the equity component as per the agreement, but respondent No.1 stood by its commitment and made all the payments which are due to the petitioner for purchase of power as set forth in the Art.3 of the PPA. The petitioner has accepted the incentive on Rs.117.93 Crs and the interest of 16% on Rs.106.60 Crs without raising any demur all through till date. In WP No. 1590/2006 filed by the petitioner before the Hon'ble High Court of AP, it has categorically admitted by way of affidavit, that subscribed equity capital of the company is Rs.117.92 Crs.
- d) The equity based incentive is calculated at 0.4% to 0.6% increase in ROE for every 1% increase in PLF above 68.5%. The respondents are not opposed *per se* to provide the developer with incentives in the form of a higher ROE as a reward for efficient operations or for demonstrating their achievements /

performance above 68.5%. However, the petitioner cannot resort to stretching or extending the meaning of equity (for application in the above formula) beyond the actual paid up and subscribed equity raised by the petitioner. Neither the PPA nor the provisions of law permit to any amount other than the paid up and subscribed capital as equity. The word 'equity' has special meaning as defined in the Companies Act.

- e) Rs.106.60 Crs brought in by the petitioners by way of loan from SBI *in lieu* of the balance of equity component. This short term additional debt financing has to be termed as a bridge loan by all definitions of the banking industry, though such term has not been specifically mentioned in the PPA, since it necessitated the petitioner in peculiar circumstances of being restrained by court orders not to raise further equity. Debt and equity are two distinct financial resources. Simply because there is no other component as per the PPA, the additional loan obtained by the petitioner to meet their financial requirements can never be treated as equity. Therefore, the respondents have been paying interest of 16% independent to the provisions of the PPA.
- f) The petitioner has pooled the resources of Rs. 523.90 Crs (Debt) + Rs.117.92 Crs (equity) + Rs.106.60 Crs (short-term/bridge loan), which is evidently a clear deviation from the approved financial structure of Debt: Equity ratio of 70:30. It is neither approved by the Commission nor incorporated in the PPA with the required amendment. Thus the petitioner has unilaterally decided to consider the additional amount as equity component for the purpose of incentive calculation to serve his purpose, which is not legitimate expectation.
- g) The petitioner's argument that the source of funds has no bearing on the incentive calculation is not convincing for the reason that the incentive is calculated based on the equity raised by the petitioner and not independent of it, and hence very much relevant in the incentive calculation and financing plan of the project plays a predominant role in the determination of tariff. There is neither collateral proof nor legitimate sanction / approval from the competent authority to the petitioner's claim of the loan-amount of Rs.106.60 Crs raised in lieu of the equity. In the absence of any express understanding between the parties to the PPA and the consent of the competent authority, anything construed beyond the terms of the agreement is not legally

permissible. The petitioner's interpretation of the term relating to equity is illogical and baseless. By no stretch of imagination can the bridge loan from SBI can be considered as equity component for the purpose of incentive calculation and doing so would amount to deviation of the terms and conditions of the PPA.

- h) For the aforesaid reasons/grounds, the respondent herein prays that this Commission to (i) dismiss the petition, rejecting the petitioner's claim, (ii) direct the petitioner to pay for the costs of the litigation and (iii) pass such other order / orders deemed fit and proper in the interests of justice.

4. The learned advocate for the petitioner argued projecting the following points: in support of his contentions:

- (i) The petitioner brought an amount of Rs.106.60 Crs from the promoters of the petitioners-company from State Bank of India as 'Equity' within the meaning of Power Purchase Agreement (for short the 'PPA').
- (ii) If it is a debt and as per the PPA, they have to pay the interest charged by the banker which is 20.75% and the respondent has refused to pay the same by holding that it is bridge loan.
- (iii) In the PPA, the incentive is defined and the petitioner is entitled to incentive from the respondents if the former achieves a Plant Load Factor (for short 'PLF') of 68.49%. The respondents are paying interest on the entire provisional debt component and 16% Return on Equity (ROE) on Rs.117.93 Crs, though the same was brought in by promoters by way of loan from SBI.
- (iv) Hence, the petitioner is entitled to the payment of interest at 20.75% on the amount charged by the SBI.

5. On the other hand, the learned advocate for the respondents argued projecting the following points in support of his contentions:

- (i) The petitioner cannot resort to stretching or extending the meaning of 'Equity' beyond the actual paid up or subscribed equity raised by the petitioner. There is neither in the PPA nor in the provision of law to permit to any amount other than the paid up and subscribed capital as equity.

- (ii) The word 'equity' has special meaning as defined in the Companies Act.
- (iii) The petitioner has pooled up the resources of Rs.523.90 Crs (Debt) + 117.92 Crs (equity) + 106.60 Crs (short-term/bridge loan) which is evidently a clear deviation from the approved financial structure of debt: equity ratio. Since the debt ratio is 70:30, which is neither approved nor incorporated in the PPA with the required amendment?
- (iv) The bridge loan from SBI cannot be considered as an equity component for the purpose of incentive calculation and doing so would amount to deviation of the terms and conditions of PPA. Hence, the petition is liable to be dismissed.

6. Now, the point for consideration is, "Whether the petitioner is entitled for reimbursement of interest @ 20.75% on Rs.106.60 Crs as prayed for"?

7. The respondents have claimed that the claim made by the petitioner is barred by limitation as the very filing of the petition before the Hon'ble High court does not save the limitation. It is clear that the petitioner herein filed WP No. 11223 of 2003 when the above said additional amount of Rs.106.60 Crs was not treated on par with equity for payment of equity based incentive. The contention of the respondent is that the very filing of the above said writ petition by the petitioner is hopelessly barred by limitation as it was initially claimed in the year 2003 and the writ petition was later dismissed as withdrawn. On the aspect of limitation, the Hon'ble ATE has already given a finding in appeal No. 90 of 2011 filed by the petitioner therein against the orders passed in OP No. 39 of 2009. The petitioner in the above said OP and the petitioner in this petition are one and the same. In that Hon'ble ATE held that the appellant therein was entitled to the benefit availed u/s 14(2) of the Limitation Act. Against this order, no appeal is preferred by the respondents therein. The said finding has attained finality and binding. Therefore, the plea urged by the respondents on the aspect of limitation is not sustainable and the same is hereby rejected.

8. It is an admitted fact that the capital cost of the project is provisionally approved by the CEA in the form of debt and equity of Rs.523.90 Crs and

Rs.224.53 Crs respectively. So far as the equity component is concerned, the promoters of the petitioner company brought in an amount of Rs.117.93 Crs and the balance amount of Rs.106.60 Crs have been brought in from State Bank of India as a loan at an interest rate of 20.75% to fill up the gap in equity. The proportionate rate of debt and equity were at 70% - 30%. The debt component is in accordance with the said rate but equity component is not completely satisfied, as it is a short of Rs.106.60 Crs. The petitioner has brought in the said amount of Rs.106.60 Crs from SBI as a loan at interest rate of 20.75% and claimed that it is only with a view to fill up the gap in equity.

9. It is contended by the petitioner that the equity component amounting to Rs.106.60 Crs of total capital cost could not be procured by the promoters due to a restraint imposed by the High Court of Delhi and the same was fully raised as a loan from SBI. The petitioner has claimed that the said loan amount of Rs.106.60 Crs is only a part of total equity of Rs.224.30 Crs (30% of total capital cost).

10. The crucial issue that is to be adjudicated by the Commission is whether the amount of Rs.106.60 Crs which is treated as bridge loan from SBI can be treated as a portion of equity, as urged by the petitioner for the purpose of incentive payments as per the PPA.

11. The petitioner has requested this Commission to issue an order on respondents to treat the amount of Rs.106.60 Crs brought in by promoters of the petitioner – company as bridge loan from the SBI as equity within the meaning of PPA and consider the same for the payment of incentive to the petitioners and the said incentive amount on the entire equity of Rs.224.53 Crs.

12. The petitioner claims that as per PPA it is entitled to 30% of equity and that, though its nomenclature is shown as loan / bridge loan, the amount of Rs.106.60 Crs is a component of equity and therefore the petitioner is entitled to incentive by treating the said amount on par with equity. The respondents, on the other hand, are claiming that the petitioner is not entitled to treat this as an equity, since they have not claimed it as an equity and they have treated the same as loan and are now requesting to treat the same on par with equity unjustifiedly.

13. The Commission has examined the rival contentions of the parties herein. In the first place, the petitioner could not go ahead with raising further equity in view of the restraint imposed by the Hon'ble Delhi High Court. Notwithstanding the restraint as above, the petitioner herein, in good faith had obtained a loan to the extent of Rs.106.60 Crs. by offering their personal guarantees for the purpose of filling in the gap towards 30% equity (Rs.224.53 Crs) at an interest rate of 20.75%. However, the respondents have been paying only 16% on the amount of Rs.106.60 Crs. akin to the RoE of 16% and not 20.75% as interest. That being the case, the balance of convenience is in favour of the petitioner and the amount of Rs.106.60 Crs. is better treated as equity rather than as loan. Further, the attempt of the respondents to avoid reckoning the amount of Rs.106.60 Crs. as equity by terming it as "*bridge loan*" does not hold water in as much as the PPA does not define such a thing. The amount of Rs.106.60 Crs. has to be either treated as loan by paying the appropriate interest thereon or equity by paying the appropriate Return on Equity (RoE). The respondents have been consistently treating it as equity in view of the payment of 16% returned thereon. Further, it was also brought to our notice that the respondents have been following such a method while computing the incentives payable in their ARR proposals for the years 2000-01 and 2001-02. In the circumstances, as above, the Commission is inclined to treat Rs.106.60 Crs. as part of 30% equity and accordingly directs the respondents to compute and pay the incentive payable to the petitioner herein as per the PPA duly treating Rs.106.60 Crs. as part of the total equity of Rs.224.53 Crs.

14. The respondent filed I.A.No.8/2012 with a request to receive the documents filed by them. The case was reopened and posted for hearing on 19.01.2013. The counsel for the petitioner stated during hearing on 19.01.2013 that the petitioner has no objection to receive the same. Hence, the said petition is allowed and the documents are received for consideration by the Commission. The documents filed by the respondent are as hereunder:

- (i) The Special Officer/IPC addressed a letter dated 23.06.1998 to the petitioner treating Rs.11792.44 lakhs only as equity for payment of Fixed charges.
- (ii) The Chief Engineer/Commercial addressed a letter to the petitioner dated 07.09.1998 informing that the internal accruals cannot be taken as equity.

- (iii) The letter dated 08.10.1998 is also to the same effect.
- (iv) Member Secretary addressed a letter to the petitioner dated 03.11.1998 to the effect that they are looking into the directions given by the Hon'ble High Court of Delhi.
- (v) The Chief Engineer/Commercial addressed a letter dated 08.10.1999 to the petitioner showing equity as Rs.117,92,44,454/- and bridge loan as Rs.82,82,60,000/-.

In the above said letters it was never stated that they have accepted the same as equity. Therefore, the plea urged by the petitioner is not tenable.

15. In the result, the petition is allowed.

This order is corrected and signed on this 16th day of April, 2013.

**Sd/-
(R.Ashoka Chari)
Member**

**Sd/-
(C.R.Sekhar Reddy)
Member**

**Sd/-
(A.Raghotham Rao)
Chairman**