IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 257 OF 2014

Dated: 18th March, 2016

Present: HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER
HON'BLE MR. T. MUNIKRISHNAIAH, TECHNICAL MEMBER

IN THE MATTER OF

M/s Spectrum Power Generation Limited,
Having its registered office at
Plot No. 231, 8-2-293/82/A/231,
Third Floor, Road No. 36,
Jubilee Hills, Hyderabad-5000033 **..... Appellant**

VERSUS

1. **Andhra Pradesh Electricity Regulatory Commission,**
   11-4-660, 4th and 5th Floors,
   Singareni Bhavan, Red Hills,
   Hyderabad-500004.

2. **Transmission Corporation of Andhra Pradesh Limited,**
   Vidyut Soudha, Khairatabad,
   Hyderabad-500004.

3. **Central Power Distribution Company of Andhra Pradesh Limited,**
   11-5-423/1/A, First Floor,
   Singareni Collieries Bhavan,
   Lakdi-ka-pul, Hyderabad-506001.

4. **Southern Power Distribution Company of Andhra Pradesh Limited,**
   Upstairs, Hero Honda Showroom,
   Renigunta Road, Tirupati-517501.

5. **Northern Power Distribution Company of Andhra Pradesh Limited,**
   11-5-423/1/A, First Floor,
   1-7-668, Postal Colony,
   Hanamkonda, Warangal-506001.

6. **Eastern Power Distribution Company of Andhra Pradesh Limited,**
   Sai Shakti, Opposite Saraswati Park,
   Daba Gardens, Vishakhapatnam-530020.

7. AP Power Coordination Committee,
Vidyut Soudha, Khairatabad,
Hyderabad-500004. **..... Respondents**

Counsel for the Appellant ... Mr. Sanjay Sen, Sr. Adv.
Mr. Matrugupta Mishra
Mr. Tabrez Malawat
Mr. Hemant Singh

Counsel for the Respondent(s)... Mr. T. Mohan for R-1
Mr. Anand K. Ganesan
Ms. Swapna Seshadri for R-2 to 7

J U D G M E N T

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. The instant Appeal under Section 111 of the Electricity Act, 2003, has been preferred by M/s. Spectrum Power Generation Limited (in short, the **'Appellant'**), a generating company, against the Impugned Order, dated 12.8.2014, passed by the Andhra Pradesh Electricity Regulatory Commission (in short the '**State Commission**') in O.P. No. 87 of 2012, captioned as M/s. Spectrum Power Generation Limited vs. Transmission Corporation of Andhra Pradesh Ltd. (APTRANSCO) & Ors., whereby the petition filed by the Appellant/petitioner for recovery of an amount of Rs. 25,61,35,157/- (Rupees twenty five crores sixty one lacs thirty five thousand one hundred and fifty seven only), being towards the disincentive/proportionate reduction in fixed charges for non-achievement of target Plant Load Factor (PLF) of 68.49% by the Appellant during the years 2002–03 and 2003–04 has been dismissed.

2. The only ground of challenge is that the Appellant could not achieve the PLF of 68.49% only because of shortage of natural gas supply by GAIL and that the Appellant was not allowed to generate electricity using alternate fuel of Naphtha.

3. While dismissing the said petition of the Appellant, the State Commission has observed that gas quantity of 0.75 MMSCMD itself would be adequate for achieving the threshold PLF of 68.49%. The actual gas

available during 2002-03 and 2003-04 was 0.80 and 0.85 MMSCMD, respectively. The Appellant/petitioner is entitled for deemed generation benefit in the event of gas supply being less than 0.75 MMSCMD as per Article 3.10.3 of the Power Purchase Agreement (PPA). The Appellant could not achieve the threshold PLF of 68.49% primarily because the Steam Turbine Generator (STG) of the Appellant was in outage from 5.11.2002 to 16.12.2003 i.e., about five months in the tariff year 2002-03 and about eight months in the tariff year 2003-04. The learned State Commission has also observed that the said petition of the Appellant is not barred by the period of limitation.

4. The relevant facts for the purpose of deciding this Appeal, are as under:

(a) that the Appellant 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 combined cycle gas based power plant at Kakinada, Andhra Pradesh.

(b) that the Respondent No.1 is the statutory regulator constituted under Section 82 of the Electricity Act, 2003 for the State of Andhra Pradesh and is entitled to discharge various functions under the various provisions of the Electricity Act, 2003;

(c) that the Respondent No. 2 is engaged in the business of transmission and was earlier engaged in the business of purchase and sale of electricity in the State of Andhra Pradesh. Thus, the Respondent No. 2 is a successor in interest of the erstwhile Andhra Pradesh State Electricity Board (APSEB). The Respondent Nos. 3 to 6 are also engaged in the business of purchase and distribution of electricity, being distribution licensees, within their area of operation. The Respondent No.7 is responsible for sending the payments by cheques on behalf of the Respondent No. 3 to 6;

(d) that the Appellant for the purpose of selling the power generated by it, entered into a Power Purchase Agreement (PPA), dated 20.6.1993, and the same was revised from time to time and the final amended and restated Power Purchase Agreement was entered into between the Appellant and APSEB on 23.01.1997;

(e) that the capital cost for implementing the power plant was prepared by the Appellant with the help of National Thermal Power Corporation (NTPC), which was the technical consultant of the project as specified in the Detailed Project Report (DPR). The capital cost of the project was appraised by the then Andhra Pradesh State Electricity Board (APSEB) and the same was recommended for approval by Central Electricity Authority (CEA). Pursuant to the same, CEA after considering the relevant aspect, granted techno-economic clearance with a provisional capital cost of Rs. 748.43 crores;

(f) that the Appellant has set up a 208 MW capacity combined cycle based power station. It consists of 3 gas turbines and 1 steam turbine. The gas turbines have capacities of 44.852 MW, 44.240 MW and 44.184 MW respectively. The Appellant declared Commercial Operation Date (COD) of these units on 11.2.1997, 9.3.1997 and 11.7.1997 respectively. The steam turbine was commissioned on 19.4.1998;

(g) that under the PPA, the tariff rates are determined on the basis of two part tariff and are fixed for each tariff year period. As per Article 3.1 of the PPA, the tariff shall be the sum of fixed charge, the variable charge payment, the incentive or disincentive payment (if any), and taxes on income. The PPA also prescribes a procedure for arriving at the fixed cost and variable cost payable to the Appellant by the Board on monthly basis. The fixed charges include interest on debt, return on equity, interest

on working capital, depreciation, O&M Expenses, foreign exchange variation for foreign debt repayment and insurance premia. The variable cost include the cost of fuel i.e. delivered cost of gas/ Naphtha supplied under the respective fuel supply agreements entered into by the Appellant in consultation with APSEB, the minimum off-take charges, which are payable by the Appellant under the fuel supply contracts to the supplier, if the Appellant has not been able to comply with its obligations towards off-take of fuel due to reasons attributable to the Board. The incentive in the nature of the increased return on equity is payable to the Appellant for actual and notional generation above the threshold level of PLF of 68.49%;

(h) that as per the PPA, the power project of the Appellant is based on natural gas as a primary fuel to be supplied by Gas Authority of India Limited (GAIL). In absence of such primary fuel, the Appellant is entitled to the use of Naphtha as supplementary fuel for all gas turbines. In this pretext, the Appellant addressed a letter, dated 15.1.2002, to the Respondents stating that GAIL had reduced the supply of natural gas and, hence, it proposed to run the plant using Naphtha;

(i) that the Respondents, vide letter, dated 16.1.2002, directed the Appellant not to use Naphtha as supplementary fuel for the Project and, therefore, the Appellant was further directed to limit the generation to the extent of natural gas availability;

(j) that, accordingly, the Appellant did not use Naphtha as fuel and, vide its letter, dated 31.1.2002, informed the Respondents that its direction was being complied with and as per the PPA, the Appellant was entitled to deemed/ notional generation, since despite the capacity to generate the minimum threshold

level of PLF by the Appellant, it was forced to restrict generation pursuant to the direction made by the Respondents;

(k) that as per the provisions of Article 3.10.2 of the PPA and on the expiry of the tariff year 19.4.2002 to 18.4.2003, the Appellant calculated and raised a demand/ invoice, vide its letter, dated 11.7.2003, on the Respondent for Rs. 73.83 lacs towards the incentive payable in view of the fact that the Appellant had achieved a PLF of 69.312%, as against the minimum PLF of 68.49%. The Appellant submitted the power purchase bill, dated 10.7.2003, for the period from 9.6.2003 to 8.7.2003 of an amount of Rs. 21,89,68,134/-;

(l) that the Respondents had admittedly chosen not to respond to the letter, dated 11.7.2003. The Respondents, further, by a letter, dated 15.7.2003, unanimously deducted an amount of Rs. 10,97,85,001/- allegedly claiming to be the difference in fixed costs for the fifth tariff year and the same was said to have been based upon the recommendation of the Chief Engineer, who had allegedly arrived at such sum by computing the difference between 68.5% PLF and achieved PLF (excluding deemed generation) for the period from 19.4.2002 to 18.4.2003 without paying any heed to the Appellant's claim for incentive for Rs. 73.83 lacs for the said fifth tariff year of 2002-03;

(m) that the Appellant protested against such high handed deduction of the Respondents, vide its letter, dated 18.7.2003. The Appellant pointed out that such deduction had been made without verifying the generation details and PLF computation for the tariff year 19.4.2002 to 18.4.2003 submitted by the Appellant and such deduction has been made in violation of Article 6.5 of the PPA. The Appellant, further, raised a bill on 11.8.2003 for the billing period of 9.7.2003 to 8.8.2003, against

which the Respondents had again deducted Rs. 23,60,002/- for the same reason;

(n) that the Appellant, being aggrieved by such deduction, had again sent a letter, dated 20.8.2003, in protest of the above deduction. The Respondents had deducted a total sum of Rs. 11,21,45,003/-;

(o) that the Appellant, vide letter, dated 18.5.2004, communicated its incentive claim for the tariff year 2003-04. The incentive claim was detailed after taking into consideration the factors for calculating the amount of incentive payable to the Appellant during the tariff year 2003-04;

(p) that the Appellant had submitted power purchase bill, dated 12.7.2004, for the period from 9.6.2004 to 8.7.2004, under which it raised a sum of Rs. 24,26,56,379/-, which was payable by the Respondents after providing for necessary rebates in terms of the PPA. Against the above said bill, the Respondents, vide a letter/payment advice, dated 17.7.2004, against the above bill, unilaterally deducted a sum of Rs. 14,39,90,154/- on account of disincentives for the tariff year 2003-04;

(q) that as per Article 3 of the PPA, the Appellant is entitled to full fixed charges at the threshold level PLF of 68.49%. If the PLF for any tariff year shall be below the minimum threshold level, the fixed charges for that particular tariff year will be adjusted in accordance with the formula mentioned in Article 3.10.1. However, if the PLF is more than the threshold level then the Appellant is entitled to incentives in the manner provided in Article 3.10.2;

(r) that the Appellant Company is entitled to the usage of naphtha as supplementary fuel, in terms of the PPA and the Respondents had no power to restrict the use of supplementary

fuel. Since, the cost of naphtha is more than Natural Gas and since, the entire fuel charges is a pass through as per PPA and as it would cost more to the respondents;

(s) that as per PPA, in the preamble it is mentioned that the plant configuration with the allocated gas of 0.75 mcmd for the operation of two combustion turbines and the balance of any gas and supplementary fuel or with alternate fuel or with both shall apply for the first stage of 208 MW. Despite the capacity to generate and achieve the minimum PLF, the Appellant was forced to restrict the generation and in terms of the PPA, the generation that could have been achieved by using the supplementary fuel has to be considered as Deemed Generation;

(t) that the Appellant/petitioner filed W.P. No. 8955 of 2004 before the Hon'ble High Court of Andhra Pradesh seeking directions not to deduct any amounts from the monthly power bills of the petitioner payable in terms of the PPA. Subsequently, it made a presentation to the then Government of Andhra Pradesh and to the Respondents on 7.7.2008 in respect of several outstanding issues and also submitted a representation to Respondent No.1 on 29.8.2008. The Respondent No.1 - Transmission Corporation of Andhra Pradesh Limited (APTRANSCO), in principle, agreed to resolve and make payments together with interest of; (a) Excess Deduction of Rebate, (b) Tariff for Open Cycle Tariff (c) Disincentive deducted by respondent No.1 and (d) De-rated Capacity, upon withdrawing the writ petition. The Appellant/petitioner withdrew the said writ petition from the Hon'ble High Court in the month of November, 2008. Pursuant to the same, the Respondents have constituted a committee to interact with the Appellant/petitioner on the rate of interest to be adopted and also make recommendation with regard to excess rebate availed and payment of tariff for open cycle

period. However, the issue pertaining to deduction of disincentive was not resolved;

(u) that the petitioner made a representation on 9.12.2008 explaining the provisions of the PPA and for release of the deducted amount of Rs.25.61 crores. By reply, dated 6.8.2009, the Respondents stated that the disincentive for the years 2002-2003 and 2003-2004 are in accordance with the PPA;

(v) that the action of the Respondents deducting the amounts without getting them adjudicated in terms of the PPA, is irrational and arbitrary. The Appellant/petitioner had huge commitments regarding service of debt to financial institutions, payment to GAIL for supply of gas, etc. Unless the obligations are met, the Appellant/petitioner is not in a position to run the plant and will be forced to stop generation, which is detrimental to interest of Appellant/petitioner as well as Respondents and ultimately the public;

(w) that the Appellant/petitioner sought withdrawal of the said writ petition, being W.P.No.8955 of 2004, pending before the Hon'ble High Court. The Hon'ble High court granted leave to withdraw the writ petition on 10.11.2008. Even after 10.11.2008, when the writ petition was withdrawn in the Hon'ble High court, the Appellant/petitioner failed to file petition before the State Commission within three years from the said date i.e., 20.3.2012;

(x) that the Appellant/petitioner filed the aforesaid OP No.87 of 2012 before the State Commission under section 86(1)(f) of the Electricity Act, 2003 raising a dispute with regard to deduction of amounts from the monthly bills payable to the petitioner in violation of the terms of the Power Purchase Agreement (PPA), dated. 23.1.1997, and, consequently, seeking a direction to the respondents to refund the amounts, deducted during the tariff

years 2002-03 and 2003-04, totalling to Rs.25,61,35,157/- together with interest in terms of the said PPA;

(y) that the learned State Commission, after hearing both the parties at length, framed the following two issues:

Issue-1: Whether the claims of petitioner is barred by the limitation or not?

Issue-2: Whether deduction of Rs. 25,61,35,157/- from the monthly bills payable to the petitioner during the tariff years 2002-03 and 2003-04 is in violation of terms of the Power Purchase Agreement, dated 23.1.1997, and if so, whether the respondents have to refund the same together with interest?

(z) that, on issue no. 1, the State Commission, after analysis of the material on record, has held that the said petition is not barred by limitation and decided to examine the petition on merits;

(aa) that, on issue no. 2, the State Commission has come to the conclusion that the levy of disincentives to the extent of Rs.25,61,35,157/-, arising out of PLF being below the minimum level of 68.49% is in order and as per the provisions of the Power Purchase Agreement and, consequently, dismissing the said petition on merits.

5. We have heard Mr. Sanjay Sen, learned senior counsel for the Appellant, Mr. T. Mohan, learned counsel for the Respondent No.1 and Mr. Anand K. Ganesan, learned counsel for the Respondent No. 2 to 7, and gone through the written submissions filed by the rival parties. We have deeply gone through the material available on record including the impugned order passed by the State Commission.

6. The following issues arise for our consideration in this Appeal:

(A) Whether the State Commission was justified in rejecting the claim of the Appellant against the Respondents No. 2 to 7 for

refund of the amounts deducted by the Respondents towards levy of disincentive?

(B) Whether the State Commission has committed an error by concluding that the outage of steam turbine was the reason for not achieving the threshold PLF, whereas the same was not in outage throughout the tariff years in question and, further, in complete absence of Naphtha as supplementary fuel, the plant could not have achieved the threshold PLF?

7. Since, both the issues are interconnected; we are taking and deciding them together.

8. On these issues, the following submissions have been made on behalf of the Appellant:

(a) that that the Appellant has set up a 208 MW capacity combined cycle based power station consists of 3 gas turbines and 1 steam turbine. The steam turbine was commissioned on 19.4.1998;

(b) that under the PPA, the tariff rates are determined on the basis of two part tariff and are fixed for each tariff year period. The incentive is in the nature of the increased return on equity is payable to the Appellant for actual and notional generation above the threshold level of PLF of 68.49%;

(c) that as per the PPA, the power project of the Appellant is based on natural gas as a primary fuel to be supplied by Gas Authority of India Limited (GAIL) and in absence of such primary fuel, the Appellant is entitled to use of Naphtha as supplementary fuel for all gas turbines;

(d) that the Appellant addressed a letter, dated 15.1.2002, to the Respondents stating that GAIL had reduced the supply of natural gas and, hence, it proposed to run the plant using Naphtha; The Respondents, vide letter, dated 16.1.2002, directed the Appellant not to use Naphtha as supplementary fuel for the project and, therefore, the Appellant was, further,

directed to limit the generation to the extent of natural gas availability;

(e) that Article 3.10.1 of the PPA, dealing with disincentives, provides that subject to Article 11.2 (b) and (c), the company shall be entitled to claim the full amount of the Fixed Charge component applicable to each Tariff Year so long as the PLF for such Tariff Year shall not have been less than the Minimum PLF. For the purpose of said PPA, the minimum PLF shall be 68.49%, except that during any stabilisation period it shall be 51.37% and during any Tariff Year which includes any stabilisation period and any period after such stabilisation period, the minimum period shall be determined on a time and megawatt-weighted proportionate basis. In computing the PLF, the actual generation shall be increased by deemed generation. In terms of the PPA, the Appellant did not use Naphtha as fuel and, vide its letter, dated 31.1.2002, informed the Respondents that its direction was being complied with and as per the PPA, the Appellant was entitled to deemed/notional generation. Since, despite the capacity to generate the minimum threshold level of PLF by the Appellant, the Appellant was forced to restrict generation pursuant to the direction made by the Respondents. In terms of the PPA, the Appellant was fully competent to declare availability on the basis of Naphtha (i.e. supplementary fuel) and the same should be considered as deemed generation. However, the Respondents without considering this aspect had unilaterally made a total deduction of Rs. 25,61,35,157/- claiming to be the difference between fixed costs/disincentives for the fifth and sixth tariff year, which was said to be based on the recommendation of the Chief Engineer, who had in turn arrived at the PLF excluding deemed generation without taking into consideration (a) the fact that generation upto the threshold PLF of 68.49% was not possible

due to the written direction (under Article 10.3.1(a) not to use Naphtha and (b) that the Appellant, in fact, had a claim for incentive because had the use of Naphtha as a fuel (as envisaged in the PPA) was permitted, the Appellant could have supplied power beyond the threshold PLF of 68.49%;

(f) that in terms of Article 3.10.1 of the PPA, the Respondents are obligated to pay for the deemed generation and it is covered by the illustrations mentioned therein. Therefore, the Appellant Company has rightly claimed what it is entitled as incentives for achieving the higher PLF than the minimum prescribed in the PPA. The Respondents had no unilateral right to deduct any sum(s) from the bills payable to the Appellant;

(g) that there is a proviso in Article 3.10.2 of the PPA, which provides that, however, to the extent Notional Generational contributes to achieving a PLF above 85%, then such Notional Generation above a PLF of 85% shall not be considered for the purpose of payment of incentives;

(h) that Article 3.10.3 of the PPA, dealing with fuel availability, provides that in the event sufficient gas is not available to the company to permit the operation of two generating units, but supplementary fuel remains available to operate one generating units and alternate fuel is available to the company in substitution for the unavailable gas, the company will be credited with the deemed generation while computing PLF level of up to 68.49%, but will not be credited with National Generation for unused generation capacity otherwise available from the company through its use of Alternative fuel;

(i) that a bare perusal of the Article 3 of the PPA reveals that the Appellant is entitled to full fixed charges at the threshold level PLF of 68.49%. If the PLF for any tariff year shall be below the minimum threshold level, the fixed charges for that particular

tariff year will be adjusted in accordance with the formula mentioned in Article 3.10.1. However, if the PLF is more than the threshold level then the Appellant is entitled to incentives in the manner provided in Article 3.10.2;

(j) that as per Article 3.10.1, the Respondents are obliged to pay for deemed/ notional generation, which means the net electrical energy, which the Appellant was in a position to deliver to the Respondents during any period that begins on or after combined cycle COD based on capacity notices during such period, adjusted to take account of any difference between ambient temperature and 29^0 C in accordance with correction curve set forth in Exhibit A of the PPA but did not generate as a direct result of any direction in writing issued by the Respondents or any failure on the part of the Respondents to purchase energy due to any defect or deficiency;

(k) that the Appellant is legally entitled to the usage of Naphtha as supplementary fuel as per the PPA. The Respondent's power to restrict the use of supplementary fuel is subject to the terms of the PPA that protects the commercial interest of the Appellant, of not being penalized for disincentive (and to be eligible for incentive). Since, the cost of naphtha is more than Natural Gas and, since, the entire fuel charges is a pass through as per PPA and as it would cost more to the Respondents, so the Respondents restricted the usage of the same;

(l) that the Respondent Commission has failed to appreciate the terms and conditions of the PPA, and also to construe the provisions of the PPA in entirety. While passing an order, the Respondent Commission had relied upon Article 3.10.3 of the PPA, which is neither relevant to the present facts nor to the issues raised by the Appellant before the Respondent Commission;

(m) that as per preamble of the PPA, the plant configuration with the allocated gas of 0.75 mcmd for the operation of two combustion turbines and the balance of any gas and supplementary fuel or with alternate fuel or with both shall apply for the first stage of 208 MW;

(n) that in terms of PPA, Appellant's plant was designed to produce 26% of its power by using supplementary fuel i.e. Naphtha. However, on 16.1.2002, the Respondent No. 2 had issued a letter directing the Appellant not to use Naphtha as fuel for generation of power. This direction of the Respondents was squarely covered by clauses 3.10.1, explanation (a) and (d) of the PPA, therefore, the Respondent Commission had failed to appreciate that pursuant to the above provisions, the instruction of the Respondents to the Appellant, not to use Naptha as an alternative fuel, entitles the Appellant the benefit of deemed generation;

(o) that during the tariff years 2002-03 and 2003-04, there was a short supply of gas to Appellant and, consequently, Appellant lost generation of power. According to clause 3.10.1 explanation (a) read with (d) of PPA, any non-supply or short-supply of gas by the supplier thereof, beyond the reasonable control of the Company, subject to reduction for any compensation payable to the Company by the fuel supply contractor, under the terms of fuel supply contract, qualifies for deemed generation;

(p) that a fuel supply contract was entered into with GAIL by the Appellant for supply of Gas after due consent obtained from the Respondents as per the terms of PPA. In the said fuel supply contract, there is no provision or term or clause that GAIL shall pay any compensation to Appellant on account of non-supply or short-supply of Gas, and as such the question of payment of compensation by GAIL to Appellant does not arise at all. As

such the Respondents must credit the deemed generation to Appellant for the said non-supply or short supply of Gas by GAIL in the respective tariff years;

(q) that the State Commission, while taking on record the quantity of gas supplied during tariff year 2002-03 and 2003-04, failed to appreciate that even though the gas supplied to both units were sufficient to generate the threshold level PLF, the absence of naptha contributed towards failure of the Appellant to achieve such level of PLF, since, the entire project was designed envisaging consumption of Naptha for generation of 26% of the total capacity. Naphtha is required for the project for generation of 26% of its total capacity, therefore, even in the absence of Naphtha, the proportionate unavailability of Naphtha, had contributed in lowering down the PLF, against which the Appellant is entitled to get deemed generation;

(r) that the State Commission has not agreed that the Appellant's case falls under 3.10.1 Explanation (a) and (d) of the PPA. The Appellant was directed not to utilize Naphtha gas as per the direction of the Respondent No. 2. Further, the PLF of the STG is lower in comparison to the GT units. Therefore, bringing the issue of outage of the STG is erroneous and out of the context. STG was in outage from 5.11.2002 to 16.12.2003; however, the same was functional for the remaining period of 11 months in two relevant tariff years. Further, the absence of Naphtha, had contributed in lowering down the PLF. The Appellant on the contrary was entitled to grant of incentive after calculating and taking into consideration Notional Generation. The provision of Article 3.10.3 is not at all applicable to the present facts and circumstances of the case;

(s) that the observation of the State Commission that gas quantity of 0.75 mmscd itself would be adequate for achieving the

threshold PLF of 68.49% is erroneous. The actual PLF achieved by a project during any tariff years is dependent upon several factors such as scheduled maintenance, unscheduled maintenance and the rate at which actual gas supply takes place on a day to day basis. Also, when plant is operated at part loads due to either gas supply is not available for full or due to backing down instructions, the actual generation of PLF will vary considerably. Relying purely on the average quantity of gas supplied to the plant to link it to the generation of PLF is not correct. The State Commission has proceeded on the basis that a generation plant will not suffer forced and planned outages during its operation phase. This assumption is impractical and contrary to established industry practices;

(t) that it may also be appreciated that the minimum threshold PLF of 68.49% was fixed for the PPAs of that time based on the average industry performance levels of the projects in India. The fixation of the threshold at 68.5% is taking into consideration both scheduled and unscheduled maintenances. Even though, the steam turbine generator was in forced outage for part of the tariff year, for the remaining period of the tariff year when the STG was available and the plant had declared full capacity of 208 MW, the Respondent issued backing down instruction not to generate on supplementary fuel Naphtha which resulted in PLF lower than 68.49%, but PLF calculation as per the definition of PLF achieved is more than 68.49%, which entitles the Appellant for recovery of full fixed charges;

(u) that the Appellant generating company is entitled to full fixed charges (without deduction or alleged disincentive) and also claim the incentives for achieving the higher PLF than the threshold prescribed in the PPA. The Respondents had no unilateral right to deduct any sum(s) from the bills payable to the Appellant. This Appellate Tribunal should declare that the

deduction of Rs. 25,61,35,157/- is erroneous and bad in law. Accordingly, the same amount may be refunded along with interest @ 18% per annum from the date of deduction.

9. ***Per contra,*** the following submissions have been made on behalf of the Respondent Nos. 2 to 7 on these issues:

(a) that the claim of the Appellant for full fixed charges was rejected by the Respondents and to the extent the fixed charges was not paid and the disincentive was recovered by the Respondents for the years 2002-03 and 2003-2004 respectively on 15.7.2003 and 11.8.2003 as the Appellant could not achieve the target of PLF for the aforesaid period;

(b) that after the withdrawal of writ petition from the Hon'ble High Court on 11.10.2008, the Appellant filed the impugned petition before the State Commission only on 20.3.2012. The said petition was filed before the State Commission after about 9 years of the cause of action arose in relation to the claim for 2002-03 and about after 8 years of the cause of action in relation to the claim for the year 2003-04, which is clearly beyond the period of limitation;

(c) that even giving the benefit of the pendency of the writ petition in the Hon'ble High Court, the pendency was only till 10.11.2008 but the said petition was filed before the State Commission only on 20.3.2012, which is clearly beyond the period of 3 years even after the disposal of the writ petition;

(d) that the State Commission, while relying on the earlier judgment of this Appellate Tribunal, has in the impugned order, held that limitation Act is not applicable to the proceedings before the State Commission and, hence, the claim of the Appellant was not barred by limitation;

(e) that the Hon'ble Supreme Court in the case of A.P. Power Coordination Committee & Ors. vs. M/s Lanco Kondapalli Power Limited & Ors. In Civil Appeal No. 6032 of 2012, dated 16.10.2015, held that the provisions of the Limitation Act are applicable to proceedings and claims made under Section 86(1)(f) of the Electricity Act, 2003 and time bared claims cannot be entertained by the State Commission. Thus, the said judgment of the Hon'ble Supreme Court is squarely applicable to the present case and in the circumstances, the present appeal is liable to be dismissed on the sole ground that claim of the Appellant is barred by limitation;

(f) that the Appellant's contention that since the Respondent has not challenged the impugned order of the State Commission, they cannot raise the issue of limitation in the present appeal. The said contention of the Appellant is not acceptable because the State Commission, even after, holding the claim to have been made within limitation, has dismissed the petition filed by the Appellant on merits and, hence, the Respondents are free to raise the issue on limitation, being Respondents to the instant appeal;

(g) that the contention of the Applicant that the decision, dated 16.10.2015, of the Hon'ble Supreme Court in the case of A.P. Power Coordination Committee & Ors. vs. M/s Lanco Kondapalli Power Limited & Ors is applicable to only to new claims filed after the date of the decision and not to existing pending claims is also misconceived because the said decision of the Apex Court is only declaratory interpreting the provisions of the Electricity Act, 2003 and only consequence would be that claims, which have been adjudicated and have attained finality, cannot be reopened;

(h) that the claim of the Appellant that during the years 2002-03 and 2003-04, there was shortage of natural gas supply and,

further, the Appellant was not permitted to use Naphtha as alternate fuel and in the said circumstances, PLF was below 68.49% not attributable to the Appellant, are factually misleading and incorrect and liable to be rejected on the following reasons:

(i) There was no shortage of natural gas for the years 2002-03 and 2003-04. While the total allocation was 0.75 MMSCMD, the actual availability was 0.80 MMSCMD (2002-03) and 0.85 MMSCMD (2003-04).

(ii) The Steam Turbine of the Appellant was under shut-down from 05/11/2002 to 16/12/2003. This was the real reason for lower generation, which is sought to be camouflaged by the Appellant citing shortage of gas.

(i) that the generation project comprised of three gas turbines of about 44 MW each and one steam turbine of about 74 MW. The natural gas was required only for the gas turbines. The steam turbine would run on the steam produced from the other three turbines;

(j) that the project was based on natural gas as a fuel, with the natural gas to be purchased by the Appellant under the gas supply contract from GAIL or any other supplier, subject to the approval of the APSEB. The PPA, further, provided for the recovery of full fixed charges at the Plant Load Factor of 68.49%. The Appellant had the fuel allocation for natural gas from GAIL for 0.75 MMSCMD and any shortfall in the availability of gas was to be by use of supplementary fuel which was naphtha. The PPA also provided for disincentive in case the PLF achieved by the Appellant was less than 68.49% and for payment of incentive in case the PLF was more than 68.49%;

(k) that the PPA provided for deemed generation, namely; when the Appellant was available for generation of electricity but did not

generate for various reasons as specified including in view of any direction given by the APSEB or failure of the APSEB to purchase electricity on account of any defect in the equipment etc. of APSEB, or force majeure event, or due to emergencies in the grid or due to non-supply or short supply of natural gas by the GAIL etc.;

(l) that the PPA further provided for notional generation, namely; where the electricity was capable of being generated but could not be generated as a result of dispatch instructions given by the APSEB, defect in the equipments of APSEB, instabilities in the grid systems etc. There was, however, no provision for notional generation for short supply of fuel for calculating the incentive. Further, it is provided that alternate fuel shall not be considered for calculation of notional generation;

(m) that upon the achievement of commercial operation (combined cycle)by the Appellant, the Appellant was required to achieve the Plant Load Factor of 68.49% for recovery of full fixed charges. As per the very definition of Project, the gas allocation of 0.75 MMSCMD is sufficient to generate for two units to full capacity and part of third unit, with only balance fuel for the third unit being alternate fuel;

(n) that the gas supply to the extent of 0.75 MMSCMD, which was allocated to the Appellant was more than sufficient to achieve the target Plant Load Factor of 68.49% and was, in fact, sufficient to achieve the Plant Load Factor of about 77%;

(o) that, during the year 2002–03 and 2003–04, the Appellant had achieved the actual Plant Load Factor of only 64.319% and 62.777% respectively. The said PLF has been calculated after adding deemed generation due to backing down instructions given by the answering Respondents for supply of electricity using natural gas from time to time;

(p) that it is an admitted position that during the said years of 2002–03 and 2003–04, the total gas available with the Appellant was much more than 0.75 MMSCMD. The actual gas made available to the Appellant during the said to tariff years are as under:

Tariff Year	Total gas received per annum (MMSCM)	Average gas supplies per day (MMSCMD)
2002-03	291.41	0.80
2003-04	309.01	0.85

(q) that in these circumstances, the question of using naphtha as fuel or applicability of the backing down instructions of the answering Respondent for use of naphtha does not arise for achievement of the target PLF of 68.49%;

(r) that the actual reason for loss of generation from the generating station of the Appellant is on account of the outage of the steam turbine for more than one year from 5.11.2002 to 16.12.2003, which is an admitted position between the parties;

(s) that it was in these circumstances that the appellant/petitioner was only operating its generating station on part load and, thus, could not achieve a higher Plant Load Factor. This was in no manner attributable to the answering Respondents or any other reason which would entitle the Appellant to claim deemed generation;

(t) that, however, the Appellant was seeking to camouflage the loss on generation as being on account of non-authorisation to generate using naphtha of fuel as against natural gas, when the real reason for less generation was the outage in the steam turbine of the Appellant. When the gas availability was much more than what was required by the Appellant to generate electricity up to the PLF of 68.49%, there could not be any question of the Appellant seeking deemed generation for

recovery of fixed charges on account of non-supply by using naphtha as fuel;

(u) that, so far as, reliance on the communications, dated 15.1.2002, of the Appellant and, dated 16.1.2002, of the Respondents in which the Respondents did not agree for off-take of electricity using Naphtha and to limit the generation using only natural gas, the above communications in no manner support the case of the Appellant, for the following reasons:

i. The use of naphtha as alternate fuel arises only if there is non-supply of gas for generation up to 68.49%. This was not the case for 2002-03 and 2003-04.

ii. Natural gas of 0.75 MMSCMD is available fully for first two units and partly for the 3rd unit with only balance using alternate fuel. For the year 2002-03 and 2003-04, naphtha was not required to achieve the PLF of more than 80%, much less 68.49%.

iii. The above communication did not seek or permit the generation of electricity using naphtha even when gas was available. For the years 2002-03 and 2003-04 there was no question of shortage of gas.

iv. The above communications were in the year 2001-02, which is not the years in issue of 2002-03 and 2003-04.

(v) that, in fact, for the years 2002-03 and 2003-04, the Respondents have been deprived of the electricity from the steam turbine which is very cheap electricity as there is no variable cost. The Appellant is only seeking to camouflage the outage in the generating station and the consequent non-generation of electricity as being due to non-availability of natural gas. Gas as a matter of fact was available much more than the allocation for the years 2002-03 and 2003-04 and,

hence, the Appellant was liable to pay disincentive for the short achievement of PLF;

(w) that in terms of the PPA, the bill for fixed charges at the end of the year was required to include the disincentive for the actual generation. However, the invoice was incorrectly raised by the Appellant, which was corrected and paid for accordingly by the Respondents;

(x) that the natural consequence of non-achievement of PLF by the Appellant is payment of disincentive. The Respondents are well within their right to pay the tariff to the Appellant in terms of the PPA after deduction of the amounts payable by Appellant to the Respondents in terms of the PPA. The payments made are strictly in terms of the PPA.

10. **OUR CONSIDERATION AND CONCLUSION**:

(a) We have cited above the details of the facts of the matter before us and also the details of the submissions/contentions raised by the rival parties on both the issues involved before us. Hence, there is no need to repeat the same here again. Now, we proceed directly towards our consideration and conclusion on the said issues.

(b) Since, the learned State Commission has in the impugned order held that the said petition is not barred by limitation and decided the petition on merits and, further, in the absence of any cross appeal, we do not find necessary to deal with the issue of limitation qua the impugned petition. There is no cross appeal against the impugned order challenging limitation. The Respondents have raised the issue of limitation and submitted that the State Commission's finding on the issue of limitation is not legal and the said petition is barred by limitation because the Hon'ble Supreme Court in A.P. Power Coordination

Committee & Ors. vs. M/s Lanco Kondapalli Power Limited & Ors. in Civil Appeal No. 6032 of 2012, dated 16.10.2015, held that the provisions of the Limitation Act are applicable to proceedings and claims made under Section 86(1)(f) of the Electricity Act, 2003 and time bared claims cannot be entertained by the State Commission.

(c) The contention of the Appellant on this point is that the said ruling of the Hon'ble Supreme Court will apply only to the claims which are made after the date of the judgment of the Hon'ble Supreme Court and not to the pending claims. We are unable to accept this contention of the Appellant because the judgment of the Hon'ble Supreme Court is to be given effect to all the claims or the matters which are considered after the date of the judgment of the Apex Court.

(d) The contention of the Appellant is that the State Commission has wrongly rejected the claim of the Appellant against the Respondent Nos. 2 to 7 for refund of amounts deducted by the Respondents towards levy of disincentive. The other submission of the Appellant is that the State Commission has wrongly concluding that the outage of steam turbine was the reason for not achieving the threshold PLF, whereas the same was not in outage throughout the tariff years in question and, further, in complete absence of Naphtha as supplementary fuel, the plant could not have achieved the threshold PLF. We have given our thoughtful consideration to the counter submissions on these issues but we are unable to accept the contentions of the Appellant as the said contentions of the Appellant are sans merit.

(e) The claim of the Appellant for full fixed charges was rejected by the Respondents and to the extent the fixed charges were not paid and the disincentive was recovered by the Respondents for the said tariff years as the Appellant could not achieve the target as PLF for the said period.

(f) The other claim of the Appellant that during the years 2002-03 and 2003-04, there was shortage of natural gas supply and the Appellant was not permitted to use Naphtha as alternate fuel and in the said circumstances, PLF was below 68.49% not attributable to the Appellant, appears to be factually incorrect and liable to be rejected due to the reasons that there was no shortage of natural gas for the years 2002-03 and 2003-04 because the total allocation was 0.75 MMSCMD, the actual availability was 0.80 MMSCMD and 0.85 MMSCMD during 2002-03 and 2003-04 respectively and, further, the Steam Turbine of the Appellant was admittedly under shut-down from 05.11.2002 to 16.12.2003 i.e. about 5 months in the tariff year 2002-03 and about 8 months in the tariff year 2003-04. Thus, outage of the steam turbine for more than one year in these two tariff years appears to us to be the real and actual reason for lower generation which is sought to be camouflaged by the Appellant citing reasons as shortage of gas.

(g) We may note here that the said generation project of the Appellant consists of three gas turbines of about 44 MW each and one steam turbine of about 74 MW. The natural gas was required only for the gas turbines. The steam turbine would run on the steam produced from the other three turbines. The project was based on natural gas as a fuel, with the natural gas to be purchased by the Appellant under the gas supply contract from GAIL or any other supplier, subject to the approval of the APSEB. The PPA provides for the recovery of full fixed charges at the Plant Load Factor of 68.49%. The Appellant had the fuel allocation for natural gas from GAIL for 0.75 MMSCMD and any shortfall in the availability of gas was to be met by use of supplementary fuel which was naphtha. The PPA, further, provides for disincentive in case the PLF achieved by the Appellant was less than 68.49% and for payment of incentive in

case the PLF was more than 68.49%. Further, the PPA provides for deemed generation, namely; when the Appellant was available for generation of electricity but did not generate for various reasons as specified including in view of any direction given by the APSEB or failure of the APSEB to purchase electricity on account of any defect in the equipment etc. of APSEB, or force majeure event, or due to emergencies in the grid or due to non-supply or short supply of natural gas by the GAIL etc. The PPA, further, provides for notional generation, namely; where the electricity was capable of being generated but could not be generated as a result of dispatch instructions given by the APSEB, defect in the equipments of APSEB, instabilities in the grid systems etc. **There apears to be no provision in the PPA for notional generation for short supply of fuel for calculating the incentive. Further, it is provided that alternate fuel shall not be considered for calculation of notional generation**.

(h) We, further, find that upon the achievement of commercial operation (combined cycle) by the Appellant, the Appellant was required to achieve the Plant Load Factor of 68.49% for recovery of full fixed charges. As per the very definition of Project, the gas allocation of 0.75 MMSCMD was sufficient to generate for two units to full capacity and part of third unit, with only balance fuel for the third unit being alternate fuel. Thus, the gas supply was allocated more than the extent of 0.75 MMSCMD, which was more than sufficient to achieve the target Plant Load Factor of 68.49% and was, in fact, sufficient to achieve the Plant Load Factor of about 77%.

(i) We may further note that during the relevant tariff years i.e. 2002–03 and 2003–04, the Appellant had achieved the actual Plant Load Factor of only 64.319% and 62.777% respectively. The said PLF has been calculated after adding deemed

generation due to backing down instructions given by the Respondents for supply of electricity using natural gas from time to time.

(j) The admitted position is that during the said years i.e. 2002–03 & 2003–04, the total gas available with the Appellant was 0.80 and 0.85 MMSCMD, which was much more than 0.75 MMSCMD. Hence, the question of using naphtha as fuel or applicability of the backing down instructions of the Respondent for use of naphtha does not arise for achievement of the target PLF of 68.49%. We again find that the actual reason for loss of generation from the generating station of the Appellant is on account of the outage of the steam turbine for more than one year from 5.11.2002 to 16.12.2003, which is an admitted position between the parties. It was in these circumstances that the Appellant/petitioner was only operating its generating station on part load and, thus, could not achieve a higher Plant Load Factor, which was in no manner attributable to the Respondent Nos. 2 to 7 or any other reason which would entitle the Appellant to claim deemed generation.

(k) The record shows that the Appellant/petitioner had been showing the less of generation as being on account of non-authorisation to generate using naphtha of fuel as against natural gas, when the real reason for less generation was the outage in the steam turbine of the Appellant. We, further, see that when the gas availability was much more than what was required by the Appellant to generate electricity up to the PLF of 68.49%, there could not be any question of the Appellant seeking deemed generation for recovery of fixed charges on account of non-supply of gas by using naphtha as fuel.

(l) We find from the record that the use of naphtha as alternate fuel arises only if there is non-supply of gas for generation up to

68.49%, which was not the case for 2002-03 and 2003-04. The natural gas of 0.75 MMSCMD was available fully for the first two gas-turbines units and partly for the 3rd gas-turbine unit with only balance using alternate fuel. In our opinion, for the year 2002-03 and 2003-04, naphtha was not at all required to achieve the PLF of more than 68.49%.

(m) We may further mention here that as per the PPA, Appellant's plant was designed to produce 26% of its power by using supplementary fuel i.e. Naphtha. The steam turbine of the Appellant remained under shutdown in the relevant two tariff years i.e. 2002-03 and 2003-04. We cannot lose sight of the fact that in fact, for the years 2002-03 and 2003-04, the Respondents Nos. 2 to 7 have been deprived of the electricity from the steam turbine which is very cheap electricity as there is no variable cost. The Appellant is seeking to camouflage the outage of the generating station and the consequent non-generation of electricity due to alleged non-availability of natural gas. Gas, as a matter of fact, was available much more than the allocation for the years 2002-03 and 2003-04 and, hence, the Appellant was liable to pay disincentive for the short achievement of PLF. The natural consequence of non-achievement of PLF by the Appellant is payment of disincentive. The Respondents Nos. 2 to 7 appear to be well within their right to pay the tariff to the Appellant in terms of the PPA after deduction of the amounts payable by Appellant to the Respondents in terms of the PPA. The payments made are strictly in terms of the PPA.

(n) **In view of the above discussions, we do not find any merit in the contention of the Appellant and both the issues are, accordingly, decided against the Appellant**.

11. Further, we find that the State Commission was fully justified in rejecting the claim of the Appellant against the Respondents No. 2 to 7 for refund of the amounts deducted by the Respondents towards levy of disincentive. We, further, find that the State Commission has not committed any error or illegality by concluding that the outage of steam turbine was the reason for not achieving the threshold PLF. The instant Appeal, being Appeal No. 257 of 2014 is worthy of dismissal as having no merits.

O R D E R

12. The present Appeal, being Appeal No. 257 of 2014, is hereby dismissed and the Impugned Order, dated 12.8.2014, passed by the Andhra Pradesh Electricity Regulatory Commission, in O.P. No. 87 of 2012, is hereby upheld. There shall be no order as to costs.

PRONOUNCED IN THE OPEN COURT ON THIS 18TH DAY OF MARCH, 2016.

(T. Munikrishnaiah)	**(Justice Surendra Kumar)**
Technical Member	**Judicial Member**

√ **REPORTABLE/~~NON-REPORTABLE~~**

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