Before the Appellate Tribunal for Electricity
Appellate Jurisdiction

Appeal No. 203 of 2005

Dated 7th March, 2007

Present: Hon'ble Mr. Justice Anil Dev Singh, Chairperson
Hon'ble Mr. A. A. Khan, Technical Member

Under Section 111 (2) of Electricity Act, 2003

In the matter of:

1. M/s GMR Industries Ltd.
6-3-866/1/G2
Greenland's Begumpet
Hyderabad – 500016

…Appellant

Versus

1. Andhra Pradesh Electricity Regulatory Commission,
Sngareni Bhavan, Red Hills, Hyderabad
Represented by its Managing Director

2. Transmission Corporation of Andhra Pradesh Ltd.
Vidyut Soudha, Hyderabad,
Represented by its Chairman & Managing Director.

3. The Joint Managing Director (HRD, Commercial & IT)
Transmission Corporation of Andhra Pradesh Ltd.
Vidyut Soudha, Hyderabad,

4. The Chief Engineer (Commercial)
Transmission Corporation of Andhra Pradesh Ltd.
Vidyut Soudha, Hyderabad,

5. Eastern Power Distribution Company of Andhra Pradesh Ltd.
represented by its Managing Director,
Sai Shakti, Opp Shakti, Opp Saraswati Park, Daba Gardens,
Viskhapatnam – 530020

…Respondents

Counsel for the appellant : Mr. C. Kodanda Ram, Mr. Y. Rajagopal Rao
Mr. Y. Ramesh, Mr. Chall Gunaranjan
Mr. G.N. Reddy (for C. Kodanda Ram)

Counsel for the respondents : Mr. A. Subba Rao, Mr. Naik H.K.,
Mr. A.T. Rao, Mr. Sanjay Sen,
Mr. Vishal Anand and MR. P. Sri Raguhuram

JUDGEMENT

Per Hon'ble Mr. A.A. Khan, Technical Member

1. This appeal, preferred by the appellant, M/s G.M.R. Industries Ltd. of Hyderabad (for short 'NCE Co-gen.'), is directed against the order of the first respondent, Andhra Pradesh Electricity Regulatory Commission (hereinafter called as 'The Commission') dated 17.07.2004 in O.P. No. 21 of 2004 and Review Order dated 18.11.2004 in R.P. No. 60 of 2004.

2. The appeal challenges the aforesaid orders of the Commission only to the extent that it rejected the claim of the appellant for the purchase of power by it from the respondent No. 2, Andhra Pradesh Transmission Corporation Ltd. (for

brevity 'APTRANSCO), the latter is entitled to collect the energy charges as per the tariff applicable to the HT-I category of consumers and for which purpose the maximum demand specified in the tariff shall be computed by dividing the quantity of energy supplied by the 'APTRANSCO' by the total hours in the billing month as mandated in the Article 2.5 of the Power Supply and Purchase Agreement (hereinafter called as 'PPA') executed between the appellant and the APTRANSCO with the approval of the Commission.

3. The respondent no. 5, Eastern Power Distribution Company (for short 'EPDC') has also been impleaded as a party respondent since the Transfer Scheme notified by Govt. of Andhra Pradesh has transferred the rights and obligations and contracts relating to procurement and bulk/retail supply of electricity from APTRANSCO to EPDC in the specified distribution area with effect from 09.06.2005.

FACTS, DISCUSSIONS & ANALYSIS

4. The appellant is a company incorporated under the Companies Act, 1956 and is engaged in production of Sugar, Ferro Alloys and other allied products. The appellant company has set up 16 MW Capacity, Non-conventional Energy Co-generation (for brevity 'NCE Co-gen') Plant within the premises of its sugar plant, based on bagasse, and has entered into a PPA with APTRANSCO for a period of 20 years for sale of energy, in excess of its own consumption, to the latter on 14.08.2001, after obtaining permission of the Commission. This 'PPA'

was executed after the Commission banned the third-party sale by its order passed on June 2001 in OP No. 1061 of 2001 filed by the respondent No. 2, APTRANSCO. The 'NCE Cogen' plant of the appellant commenced its commercial operation on 14.08.2001 and has since been supplying the power produced, in excess of its requirement, to 'APTRANSCO' under the terms and conditions of the 'PPA'. The said 'PPA' without specifying any contracted demand, also provided that the appellant company could purchase energy from the grid controlled by the respondent Nos. 2 to 5 at the tariff applicable to HT-I category of consumers.

5. As per the terms and conditions of the 'PPA' the 'APTRANSCO' has to purchase the surplus electricity generated from the 'NCE Cogen' plant at the tariff rates applicable to Non-conventional Energy Plants and the same is not in dispute.

6. As regards electricity that is to be supplied by the APTRANSCO to the appellant company, the terms and conditions of the 'PPA', in particular Article 2.5, provides that the latter has to pay to the former for such purchases of electricity at the then prevailing tariff applicable to HT-I category of consumers. It also provides that for the aforesaid purpose the term 'maximum demand' specified in the tariff shall be computed by dividing the quantity of energy supplied by the 'APTRANSCO' by the total hours in the billing month. The extract of Article 2.5 of the PPA is reproduced hereunder:

"2.5 Where in any billing month the energy supplied by the APTRANSCO to the Company shall be billed by the APTRANSCO and the Company shall pay the APTRANSCO for such electricity supplies, at the APTRANSCO's then-effective tariff applicable to High Tension Category-I Consumers. For this purpose, the maximum demand specified in such APTRANSCO's Tariff shall be computed by dividing the amount of such energy supplied by the APTRANSCO by the total hours in the Billing Month."

7. Further an extract from the tariff order for the period 2004 – 05 passed by the Commission on 23.03.2004 as it relates to HT-I category of consumers is reproduced below:

"H.T. Category –I

This tariff applicable for supply to all H.T. Industrial Consumers. Industrial purpose shall mean manufacturing, processing and/or preserving goods for sale, but shall not include shops, Business Houses, Offices, Public Buildings, Hospitals, Hotels, Hostels, Choultries, Restaurants, Clubs, Theatres, Cinemas, Railway Stations and other similar premises not withstanding any manufacturing, processing or preserving goods for sale. The Water Works of Municipalities and Corporations and any other Government

organizations come under this category. The information Technology units identified and approved by the Consultative Committee on IT Industry (CCITI) constituted by Govt. of A.P. also fall under this category.

A) INDUSTRY – GENERAL

(i) DEMAND CHARGES
Per KVA of Billing =Rs. 195 per KVA

PLUS

(ii) ENERGY CHARGES
For all units consumed
during the month = 350 paise per unit

IMPORTANT

i) The billing demand shall be the maximum demand recorded during the month or 80% of the contracted demand whichever is higher.

ii) Energy charges will be billed on the basis of actual energy consumption or 50 units per KVA of billing demand

whichever is higher

FSA will be extra

B) FERRO ALLOY UNITS

(i) DEMAND CHARGES = Nil

(ii) ENERGY CHARGES

For all nits consumed during the month = 212 Paise per Unit

CONDITIONS

1. *Guaranteed energy off-take at 85% annual load Factor on Contracted Maximum Demand or Actual Demand which ever is higher. The energy falling short of 85% Load Factor will be billed as deemed consumption.*

2. *The consumer shall draw his entire power requirement from DISCOMS Only.*

3. *Not eligible for HT-1 Load Factor incentive.*

4. *FSA will be extra as applicable.*

Notes :

1) Incentive

(a) The following non-telescopic incentives are applicable for HT-category -1(a) consumers:

Load Factor (LF)	***Discount applicable on the energy rates***
More than 30% up to 50%	*10%*
More than 50% up to 60%	*15%*
More than 60 up to 70%	*20%*
More than 70%	*25%*

> *b) The incentive is applicable for the consumption in excess of the average monthly consumption for the FY 2000-2001. The discount rates will be applied on the entire consumption eligible for incentives i.e. such consumption as is in excess of the average monthly consumption for the FY 2000-01 and is above the threshold LF level of 30% on a non-telescopic basis. This scheme will be effective till 31st March 2005."*

8. The appellant has not challenged the rates of 'Demand Charges' and the energy charges for the electricity drawn from the respondents as notified in the above tariff order but has disputed the method employed in computing and billing of the quantum of demand not being in accordance with the Article 2.5 of the PPA. The appellant has submitted that from August 2001 till October 2003, the energy imported by it from the respondent, 'APTRANSCO' was being charged in terms of the Article 2.5 of the PPA, but all of a sudden, the respondent from November 2003 onwards changed the computing methodology for 'demand charges.' In other words from November 2003 onwards, APTRANSCO started raising the bills for 'demand' charges on the basis of recorded 'Maximum Demand' and not on 'average demand' (i.e. energy consumed divided by number of hours in billing months) as stipulated in the PPA. The appellant has submitted that based on the methodology to compute 'recorded demand' the respondents 2 to

5 have made excess deductions from the bills of energy payable by the later for the supply made to it by the former and has requested the refund of the excess deductions with applicable interest as per clause 5.6 of the PPA. In a further additional written submission the appellant has stated that for the import of energy for the period from August 2001 to October 2006 the respondent Nos. 2 to 5 have made an excess deduction of Rs. 155.46 lakhs over and above the entitled tariff and has requested for its refund with the applicable interest as per the PPA.

9. The appellant has submitted that its imports power from the grid only on rare occasions and that too whenever the turbine gets tripped due to grid disturbance or due to shut down of cogeneration plant and such import of power is only and exclusively meant for and used for start-up of the boiler auxiliaries such as TD fans, FD fans, SA Fans, feed water pumps, fuel handling system of the cogeneration plant and no quantity of the imported power is used towards captive consumption for running the Sugar Plant. The appellant is having a standby D.G. Set of 2260 KVA capacity which during the shut-down of the co-gen plant, is used for meeting the power requirement of essential equipment of the Sugar Plant to prevent any damage to them. Thus, the cogeneration plant is the primary source of power to run the Sugar Plant and the standby D.G. Set is used only to meet the power requirement of the essential equipment of the Sugar Plant and not for running the plant itself. The appellant has further submitted that the respondents Nos. 2 to 5 are even now, for import of power by the biomass plants, are charging

'demand charges' on the average demand as stipulated in Article 2.5 of the PPA. The appellant has claimed that their case is exactly the same as that of biomass plants in so far as the import of energy from the respondent is concerned.

10. On receipt of the impugned order passed by the commission on 17.07.2004 in O.P. No. 21 of 2004, the appellant filed a Review Petition, R.P. No. 60 of 2004 which was dismissed by the first respondent commission on the ground of admissibility. The appellant thereafter, approached the High Court by filing a Writ Petition No. 15285 of 2005 on 13.07.2005. The High Court disposed of the Writ Petition by an order dated 14.09.2005 granting liberty to appellant to approach this Tribunal.

11. The Commission in its order dated 17.07.2004 rejected the claim of the appellant for computation of 'demand charges' by average method as provided in the PPA. The grounds of the rejection pointed to letter/proceedings of the first respondent Commission to the respondent No. 2 dated 02.01.2002 by which certain directions relating to the modifications in the 'PPA' were conveyed by the Commission. The appellant has made allegations that the contents of the aforesaid letter were neither notified, at the time of its issue or subsequently, to the developers whose interests are affected nor were they brought into confidence by the first respondent Commission. The appellant has complained that the letter dated 02.01.2002 which is a simplicter letter of correspondence

between first respondent, Commission and the second respondent, cannot be considered as the decision of the first respondent, Commission arising out of germane proceedings protecting the interests of the parties to the PPAs and is in total violation of Principles of natural justice.

12. It will be appropriate to refer to paras 14,15 & 16 of the impugned order dated 17.07.2004, which are reproduced as hereunder :

> "*14. On 02.01.2002, the Commission issued a letter in regard to bagasse-based co-generation energy developers as well as other non-conventional energy (NCE) Developers who have captive generation about charges payable for the energy imported by them. The Commission in this respect has also recognized two categories for such import of energy from APTRANSCO for the use of such NCE developers. These are :-*
>
> *(a) NCE developers having captive consumption and wishing to avail grid power only for start-up purpose but not for their process plant during the import period.*
>
> *(b) NCE developers having captive consumption and wishing to avail grid supply both for start-up purpose and for their process plants during the import period.*

The minimum charges payable in either case are based on the recorded demand, and that is exactly what has been charged by the APTRANSCO for the energy-imported by the petitioner in this case.

15. The order of the Commission issued on 02.01.2002, is binding on both the parties of the PPA i.e. the petitioner and APTRANSCO by virtue of Article 7 of the PPA. In this regard, it is relevant to mention that the only agreement to which the Commission has given its consent is the standard format approved on 02.01.2002 and as amended from time to time. The petitioner cannot enforce any other agreement as the same would be void under section 21(4) and (5) of A.P. Electricity Reform Act 1998. The alleged non-communication of the Commission's order dated 02.01.22002 by APTRANSCO to the petitioner is not relevant. In this context it is necessary to direct the APTRANSCO and the petitioner to execute a fresh PPA in the format approved by the Commission on 02.01.2002 with subsequent approved modifications and APTRANSCO should submit the same to the Commission for record.

16. Consequently, the deduction of amounts made by the APTRANSCO from the bills from November 2003 to April 2004 towards energy imported by the petitioner cannot be said to be illegal or unauthorized. Therefore, the petitioner is not entitled to be charged only for the energy actually imported by it as claimed by it.

Similarly, the deductions if any made by the APTRANSCO in respect of low power factor surcharge are not illegal because these are covered by Article 4.16 of the approved standard format dated 02.01.2002."

13. The respondents Nos.. 2 to 5 in their counter affidavit have submitted that the Commission had approved the revised standard format of PPA with subsequent modifications. They have further stated that Article 2.5 of the unmodified PPA is being relied upon by the appellant whereas the aforesaid article has been amended in the revised subsequent format of PPA as indicated below:

"Where in any billing month, the gross energy and demand supplied by the APTRANSCO to the Company as a bilateral arrangements to maintain the auxiliaries in the power plant in situations of non-generation of power, shall be billed by APTRANSCO as per the explanations given, and the Company shall pay the APTRANSCO for such energy and demand supplies. Further, since the Company's power house is running in parallel with APTRANSCO grid, the company has to pay Grid Support Charges as decided by APERC for gird support given to the process unit in the premises.

<u>Explanation 1</u> : The Generating plants viz. Bagasse based cogeneration projects, Biomass based power projects and power

projects based on waste to Energy (projects based on any waste of renewable nature from urban and industrial sector) use the power generated for their captive purpose in the same premises and export surplus power to grid.

Explanation 2*: If the Company is not willing to avail power from APTRANSCO for their processing unit in the same premises during outages of their power plant by providing suitable interlocking arrangements between power plant and processing unit, and desires to draw power from Grid for starting and maintenance purpose of the generating station through the dedicated line intended for export of power, the following conditions will apply:*

> *(i) The Company has to declare the load requirements for starting and maintenance purposes of the power plant and agreed to by APTRANSCO/DISCOM.*
>
> *(ii) The Company will not have a separate H.T. service connection number, H.T. Agreement and contracted maximum demand. The gross energy and the recorded maximum demand shall be billed as per APTRANSCO's the then tariff rates applicable to H.T-1 consumers.*
>
> *(iii) In the even of exceeding the declared load, penal charges will apply as per Tariff conditions.*

(iv) In case the developer wants the power from grid for their processing plant during planned outage, a separate requisition for sanction of Temporary supply for the purpose shall be made utilizing the existing infrastructure for the project.

Explanation 3: If the Company is willing to avail power from APTRANSCO for their processing unit in the same premise during outages of their power plant, and desires to draw power from Grid for starting and maintenance purposes of the export of power, the following conditions will apply:

(i) The company will have a separate H.T Agreement and contracted Maximum Demand with APTRANSCO.

(ii) The Gross energy and the Demand will be billed by APTRANSCO as per the then tariff applicable to H.T.-I consumers."

14. From the aforesaid, the following emerge:

(a) The Commission had accorded approval to a standard format PPA-document and directed the respondent No. 2 to convert all pre-existing PPAs into the standard format.

(b) The Commission either *suo moto* or on the proposals from the respondent approved several modifications to the standard format PPA.

One such modification was issued by the Commission's letter dated 02.01.2002 to respondent, APRANSCO. On pointing out by the appellant that the orders of the Commission were not communicated to it, the Commission in para 15 of the impugned order responded that "*the alleged non-communication of the Commission's order dated 02.01.2002 by APTRANSCO to the petitioner is not relevant*".

15. It may be pertinent to mention that in a counter affidavit on behalf of respondents Nos. 2 to 5 filed before this Tribunal on 25.09.2006, it is affirmed that the appellant is to be charged as per the applicable HT-Category-I tariff because during the non-operation/shut down periods of the power plant, the processing plant (Sugar plant) draws energy from the grid. The relevant paras of the counter affidavit, conveying the aforesaid understanding, are reproduced below:

> *"(ii) The PPA with GMR Industries Ltd., was entered in the then approved format where there is no captive consumption in the premises.*
>
> *(iii) During the non-operation/shut down periods of the power plant, the processing plant draws energy from the grid. The processing plant (sugar mill) is an industries activity. Hence, the energy which is drawn by the Company for their industrial*

requirements is to be charged as per the applicable HT Category-I tariff.

(iv) xxxxxxx

(v) It is not fair on the part of the appellant to disagree for payment of demand charges and PF surcharge on account of non mentioning in the Agreement as they are utilizing the energy for their sugar plant which is running on commercial basis."

The above assertion of the respondents Nos. 2 to 5 is diametrically opposite to the submission of the appellant brought out in para 9 above, according to which the energy imported from the grid by the appellant is exclusively meant to power the start-up of the boiler auxiliaries, fuel system, ID fans etc. of the 'co-gen plant' in the event of that not being available due to failure/shut down, and not as captive consumption for running the sugar plant. The appellant has submitted that a DG Set of 2260 KVA has been installed in the premises to provide power support to the essential equipment of the sugar plant and no power is used from the grid for the purpose. These assertions of the appellant have not been disputed by the respondents. The claims of the appellant appear to be *prima facie* correct as PPA signed between the parties indicate that during the 'season' when the sugar factory is running at its full capacity, only 5.9 MW out of the installed capacity of 16 MW of the co-generation plant is exported to the grid, thus indicating that power consumption in the sugar plant is nearly 10 MW. Whereas, the import from the

grid in the event of failure/shut down of the co-gen plant is merely of the order of 1000-2000 units in a month, which is much lower than the load requirement of the sugar plant.

16. The Commission also in para 14, 15 & 16 of its impugned order dated 17.7.2004, the extract of which is placed on pages 11 to 13, confirms that the appellant belongs to the category of NCE developers having captive consumption and wishing to avail grid power only for start-up purposes of the co-gen plant but not for their processing plant (sugar plant) during the import period. The aforesaid make it distinctly clear that the respondent's belief that, in the event of failure/shut down of the 'co-gen plant', it will supply energy to the appellant to provide power support for running the entire sugar plant and not merely the essential equipments. If that was so, the purchase of energy from the respondent would have been manifold higher than shown to be actually purchased. While the Commission had rightly comprehended the usage of energy purchased by the appellant it did not appreciate that the application of methodology to compute demand as per the tariff for HT-I category of consumers would result in appellant paying over 66% of the tariff charges only on account of demand charges. Higher purchase of energy by the appellant would have diluted the impact of demand charges in the overall cost of purchase of per unit of energy.

17. The appellants have also challenged that the PPA being in the nature of the contract between the parties and the terms of the PPA being specific, the conditions of the PPA regulating the rates would prevail as may be notified by the Regulatory Commission and in view of the articles 9.2, 9.6 of the PPA, the terms of the PPA would be binding between the parties for a period of 20 years and no variation would be affected unless mutually agreed by both the parties in writing and approved by the Regulatory Commission. The extract of the aforesaid articles of the PPA are reproduced as under:-

> "*Article 7: This agreement shall be effective upon its execution and delivery thereof between parties hereto and shall continue in force from the Commercial Operation Date (COD) and until the twentieth (20th) anniversary that is for a period of twenty years from the Commercial Operation Date (COD). This agreement may be renewed for such further period of time and on such terms and conditions as may be mutually agreed upon by the parties, 90 days prior to the expiry of the said period of twenty years, subject to the consent of the APERC. Any and all incentives/conditions envisaged in the Articles of this Agreement are subject to modification from time to time as per the directions of APERC, Government of Andhra Pradesh and APTRANSCO.*"
>
> "Article 9:

9.1 xxxxxx

9.2 No oral or written modification of this Agreement either before or after its execution shall be of any force or effect unless such modification is in writing and signed by the duly authorized representatives of the Company and the APTRANSCO, subject to the condition that any further modification of the Agreement shall be done only with the prior approval of Andhra Pradesh Electricity Regulatory Commission. However, the amendments to the Agreement as per the respective orders of APERC from time to time shall be carried out. All the conditions mentioned in the Agreement are with the consent of APERC.

9.3 xxxxxxx

9.4 xxxxxx

9.5 xxxxxx

9.6 xxxxx

9.7 This Agreement, including Schedule 1, 2 & 3 attached hereto, constitute the entire agreement between the parties with respect to the subject matter hereof, and there are no oral or written understandings, representations or commitments of any kind, express or implied, not set forth herein."

18. It is to be acknowledged that Bagasse-based co-generation plant is recognized to be a member of the family of non-conventional sources of energy such as biomass, wind etc. and the State Commissions are mandated by the Section 86 (e) of the Electricity Act 2003 (for short 'EA-2003') to promote its development. For the aforesaid reason, the commission in pursuance of Sec. 86(a), has determined a separate tariff for NCE-generators including that of appellant's plant and has been uniformly regulating the procurement price of such energy by the distribution licensees in accordance with Sec. 86 (b) of EA-2003. The sale and purchase of energy between the NCE-Developers is governed by the identical provision of PPAs signed between the licensees and the developers which are approved by the Commission. There is no dispute between the parties in so far as the procurement of energy by the respondent Nos. 2 to 5 from the appellant is concerned and the generation plant of the appellant is considered on the same footing as the generation plants of the other NCE- developers.

19. The distinction is sought to be made between the generation plant of the appellant from the plants of the other NCE-developers when the energy is supplied by the respondent Nos. 2 to 5 to the former and the latter respectively, even though the conditions of PPAs regulating such supplies are identically the same and the appellant belongs to the same class of NCE- developers. Since, the Commission has been treating the NCE- sources of plants as an exclusive category of generators while determining their generation tariff for supply of electricity to

distribution licensee in terms of the various provisions of the Act particularly Sec. 86 (1)(e), Sec. 61 (h) and Sec. 62 (3), in our considered opinion, differentiating the co-generation plant of the appellant from the other NCE- developers in so far as the sale of energy to them is concerned appear to be arbitrary being violative of Sec. 45 (4) of the Act.

20. The appellant has furnished the following monthly data of energy supplied by the respondent to it along with the amount billed and deducted.

Month	Units	Bill Amount (Rs.)	Rs. per Unit
February 2002	1,000	6,22,995	612.00
July 2003	2,000	2,80.470	140.24
November, 2003	2,000	3,28,043	164.02
April,2004	1,000	4,69,527	469.53
December,2004	1,000	3,35,135	335.14

21. From the above data, we observe the following:

(a) The appellant is importing the power from the grid only occasionally i.e. in the period of nearly three years (35 months) it has used power from the grid only for 5 months equivalent to 14% of the time-period.

(b) During a month even if the appellant taps the grid only once for a short while, regardless of the duration, the maximum demand recorded by the meter is used for computing the demand charges. In other words if the maximum demand is capped and the appellant draws power from the grid continuously each day of the month, it will be liable to pay the same

'demand charges' as it would pay for tapping the power once, for a short duration. The tariff design is disproportionately biased in favour of large continuous load HT consumers.

(c) The combined rate of energy tapped from the grid during a month including the 'demand charges' is ranging from Rs. 140.24 per unit to Rs. 612 per unit showing the dependency upon the number of units consumed, demand charges etc. For the given 'demand charges' as per the impugned tariff order, higher the number of units consumed lower is the combined rate of charge per unit. For the month of November 2003, the combined rate of availing the energy say at Rs. 4 per unit is possible only if the appellant draws over 8,000 units in that month as against actual consumption of 2,000 units. For a given cost of 1000-2000 units of energy consumption, the only possibility of restricting the combined rate of energy and demand charges to a reasonable level is in the reduction of 'demand'.

(d) Out of combined charge of energy and demand charges of Rs, 3,28,043.00 for the month of November 2003, the share of only demand charges is Rs. 2,16,450.00 constituting nearly 66% of the combined cost. The ratio appears unreasonably loaded against the consumers importing low quantum of energy every month and merit consideration to link 'demand' to the monthly drawl of energy or alternatively to provide a single part tariff as applicable for Ferro Alloy Units, the extracts of which is

on page 7 above. The formulation in Article 2.5 of the PPA for computing the 'demand' also addresses the issue adequately.

22. The PPA was approved by the Commission under Section 21 (4) of Andhra Pradesh Electricity Reform Act- 1998. All pre-existing Electricity Acts including the AP Electricity Reform Act- 1998 were repealed by the Electricity Act- 2003. But, by the virtue of Sections 185 (2)(a) and 185 (3) of EA-2003, the agreements entered into, prior to coming into force of the Act, are saved, in so far as it is not inconsistent with the provisions of the Act.

23. Article 2.5 or for that matter any clause of the PPA were not declared inconsistent with EA-2003 by the Commission. Article 2.5 provides that the respondent shall supply the energy to the appellant who in turn shall be liable to be charged at the then prevailing tariff applicable to HT-I category of consumers. It, inter alia, specifies that the 'maximum demand' specified in the tariff shall be computed by dividing the quantity of energy supplied by the total number of hours in the billing month. The appellant does not dispute the rates of 'energy charge' and 'demand charges'. It only disputes the manner in which the 'maximum demand' is derived to determine the 'demand charges' as the PPA does not quantify the contracted maximum demand or even the connected load. It is also pertinent to note that right from August, 2001 till October, 2003, the 'maximum demand' was computed and billed by the respondent in terms of Article 2.5 of the

PPA. This conduct clearly reflects the understanding of the parties about the manner in which the 'maximum demand' is required to be computed.

24. We observe that from November, 2003 onwards, the respondent raised the bills on the basis of recorded 'Maximum Demand' and not on 'average demand' as stipulated in the PPA. As an example, for supplying 2000 units of energy to the appellant during November, 2003 the respondent deducted an amount of Rs.3,29,663.00. As per the details admitted by the parties, the respondents levied charges for 'demand' of 1110 KVA as against 4.01 KVA of actual demand for which charges works out to be Rs. 9,872.00 only.

25. As per the tariff order for HT category I, which is made applicable to the instant case, the billing demand shall be the maximum demand recorded during the month or 80% of the contracted demand whichever is higher. We observe that in the absence of the quantification of contracted demand in the instant case, if opening of the PPA for carrying out the amendment is allowed, there is no option but to compute demand charges for billing on the basis of the maximum recorded demand placing the 'co-generation plant' in a disadvantaged situation.

26. In a Full- Bench decision of this Tribunal dated 02.06.2006 passed in Appeal Nos. 1, 2, 5, etc. of 2005 between Small Hydro Power Developers Associations & Ors –Vs- Andhra Pradesh Electricity Regulatory Commission &

Ors., it has been held that the Commission has no jurisdiction to re-open the PPAs, once they were approved by it. This decision was rendered in a case where PPAs were re-opened by the Commission and modified to the detriment of the NCE generators.

27. This Tribunal in a decision passed on 28.09.2006 in Appeal Nos. 90, 91, 92… etc. of 2006 between NCE Developers – Vs – Transmission Corporation of Andhra Pradesh Ltd. has also held as under:

> *"34. A distinction, however, must be drawn in respect of a case, where the contract is re-opened for the purposes of encouraging and promoting renewable sources of energy projects pursuant to the mandate of Section 86 (1)(e) of the Act, which requires the State Commission to promote cogeneration and generation of electricity from renewable sources of energy.*
>
> *35. The preamble of the Act also recognizes the importance of promotion of efficient and environmentally benign policies. It is not in dispute that non-conventional sources of energy are environmentally benign and do not cause environmental*

degradation. Even the tariff regulations u/s 61 are to be framed in such a manner that generation of electricity from renewable sources of energy receives a boost. Para 5.12 of the National Electricity Policy pertaining to non-conventional sources of energy provides that adequate promotional measures will have to be taken for development of technologies and a sustained growth of the sources. Therefore, it is the bounden duty of the Commission to incentivise the generation of energy through renewable sources of energy. PPAs can be re-opened only for the purpose of giving thrust to non-conventional energy projects and not for curtailing the incentives. The Commission, therefore, was not right in approving the principle of 30 minutes time block for measuring energy as that was not permitted under original clause 1.4 of the PPA and other relevant clauses. The action of the APERC does not promote generation through non-renewable sources of energy but affects the same adversely. In case the practice of reopening the PPAs continues for curtailing the incentives or altering the conditions to the detriment of the developers of the plants based on non-conventional sources of energy, it will kill the initiative of the developers to set up such plants. The policy to

incentivise generation of electricity through renewal sources of energy will be defeated."

28. According to Article 9.2 of the PPA, any modification to the PPA can be only given effect to if the modification is mutually agreed and incorporated in the agreement and approved by the Commission. In the instant case, it appears to us that the Commission, after consultation, may have approved the proposal of the respondent on the standard format of the PPA but consented to subsequent modifications proposed and/or discussed with the respondent without following the due process of consultations with the affected parties. The principles of natural justice and transparency are compromised by the Commission seeking to discharge its quasi-judicial function, admittedly using administrative powers not vested in it, through exchange of correspondence with the respondent on 02.01.2002, whereby it has chosen to convey certain directions affecting the developers of co-generation and Non-conventional Sources of Energy without their participation or providing them opportunity to be heard. A serious flaw has occurred in the process that has been followed by the Commission wherein instead of presenting a mutually acceptable agreement between the parties before the Commission for approval, the proposal submitted by one of the parties is approved by the Commission in contravention to Article 9.2 of the PPA, making it *fait accompli* for the other party to sign on the dotted line.

29. The terms of a contract cannot be changed unilaterally by a party but could only be altered or varied by the agreement of both the parties as provided under Sec. 62 of the Contract Act. The same has also been held in (2004) 1 Sec. 12 in the case of Citi Bank N.A Vs Standard Chartered Bank. This Tribunal also in a decision dated 07.07.2006 in appeal No. 163 of 2005 in TNEB Vs M/s Kothari Sugar & Chemicals Ltd has held as under:

> *"33. xxxxxxx. Any contract which is not based on free volition of the parties and has been induced by force or coercion is void. To constitute an agreement the contracting minds of both the parties must be ad-idem. They must be free to execute or not to execute the agreement."*

30. In view of the aforesaid discussion and our observations on the various issues, the appeal is allowed and the order of the Andhra Pradesh Electricity Regulatory Commission dated 17.07.2004 in O.P. No. 21 of 2004 is set aside. The matter is remanded to the Commission with the direction that within eight weeks of the receipt of this judgement, it will re-determine the 'demand' of the appellant in accordance with the PPA and

authorize adjustment of the amount refundable, if any, against the dues in future.

31. With above directions the appeal is disposed of but with no order as to cost.

(A. A. Khan)
Member Technical

Dated: 7th March, 2007.

(Justice Anil Dev Singh)
Chairperson