

**Before the Appellate Tribunal for Electricity  
Appellate Jurisdiction**

**Appeal Nos. 4, 5, 6, 8, 9, 10, 12, 13, 14 & 23 of 2006**

**Transmission Corporation of AP & Another**

**...Appellant(s)**

**Versus**

**Andhra Pradesh State Electricity Regulatory  
Commission & another**

**...Respondent(s)**

**Under Section 111 (2) of Electricity Act, 2003**

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

**September 28, 2006**

Counsels for Appellant : Mr. A. Subba Rao,

Counsels for Respondent : Mr. K. Gopal Choudary,  
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Mr. Avijit K. Lala  
Mr. P. Sri Raghuram  
Mr. C. Kodandaram  
Ms. Mamta Choudary  
Ms. Bhushan

**Appeal Nos. 4 & 6 of 2006**

1. Transmission Corporation of A.P. Limited  
Vidyut Soudha, Hyderabad
2. A. P. Southern Power Distribution Company Ltd.  
(APSPDCL)  
Tirupati, Andhra Pradesh

**Versus**

1. A.P. State Electricity Regulator Commission  
5<sup>th</sup> floor, Singareni Bhavan,Red Hills, Hyderabad
2. M/s Jocil Ltd.  
dokiparru, Guntur – 522438

**Appeal Nos. 5 & 9 of 2006**

1. Transmission Corporation of A.P. Limited  
Vidyut Soudha, Hyderabad
2. A. P. Eastern Power Distribution Company Ltd.  
(APEPDCL)  
Vishakhapatnam, Andhra Pradesh

Versus

1. A.P. State Electricity Regulator Commission  
5<sup>th</sup> floor, Singareni Bhavan,Red Hills, Hyderabad
2. M/s Vensa Biotech LTd.  
P.B. No. 18, Samalkot, E.G. District.(A.P.)

**Appeal Nos. 8 & 10 of 2006**

1. Transmission Corporation of A.P. Limited  
Vidyut Soudha, Hyderabad
2. A. P. Northern Power Distribution Company Ltd.  
(APNPDCL)  
Warangal, Andhra Pradesh

Versus

1. A.P. State Electricity Regulator Commission  
5<sup>th</sup> floor, Singareni Bhavan,Red Hills, Hyderabad
2. M/s Kakatiya Cement, Sugar & Industries Lt.  
1-10-140/1, Gurukrupa, Ashok Nagar, Hyderabad (A.P.)

**Appeal Nos. 12 & 14 of 2006**

1. Transmission Corporation of A.P. Limited  
Vidyut Soudha, Hyderabad
2. A. P. Southern Power Distribution Company Ltd.  
(APSPDCL)  
Tirupati, Andhra Pradesh

Versus

1. A.P. State Electricity Regulator Commission  
5<sup>th</sup> floor, Singareni Bhavan,Red Hills, Hyderabad
2. M/s Balaji Agro Oils Ltd.  
Davuluru, Kankipadu(M), Krishna Dist., A.P.

**Appeal No. 13 & 23 of 2006**

1. Transmission Corporation of A.P. Limited  
Vidyut Soudha, Hyderabad
2. A. P. Eastern Power Distribution Company Ltd.  
(APEPDCL)  
Vishakhapatnam, Andhra Pradesh

Versus

1. A.P. State Electricity Regulator Commission  
5<sup>th</sup> floor, Singareni Bhavan,Red Hills, Hyderabad
2. M.s Gowthami Solvent Oils Ltd.  
P.B. No. 7, Pydiparru, Tanuku-234211 (A.P.)

## **JUDGEMENT**

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

The above mentioned appeals have been filed against the direction of Andhra Pradesh State Electricity Regulatory Commission (hereafter called "Commission") contained in its letter dated 09.08.2004. All the aforesaid appeals raise identical issues. We have; therefore, decided to take up one of the appeals being appeal No. 4 of 2006 as the lead matter and the decision arrived at on the said appeal shall apply to other appeals being appeal Nos. 5,6,8,9,10,12,13,14 & 23 of 2006.

2. The appellant, Transmission Corporation of Andhra Pradesh (herein after called as 'APTRANSCO') and AP Southern Power Distribution Company Ltd. (herein after called 'APSPDCL') are the instrumentalities of the Govt. of Andhra Pradesh. While APTRANSCO has been assigned the role of state transmission utility owned and operated by Govt. of Andhra Pradesh, APSPDCL is one of the four distribution companies made responsible for distribution of electricity in the state of Andhra Pradesh. The role of distribution of electricity in the entire State, prior to creation of distribution companies was being performed by the APTRANSCO. APSPDCL is the distribution company created to perform the functions of electricity distribution in the Southern Region of the state.

3. The 2<sup>nd</sup> respondent is a private electricity generating company and produces electricity based on Non-Conventional Energy (NCE) sources of 6 MW co-generation plant established on bagasse and biomass fuel and had entered into power purchase and wheeling agreement (PPA for short) for third party sale with APTRANSCO on 12.04.2000. The plant was aimed to meet the captive electricity requirements of the 2<sup>nd</sup> respondent and to sell surplus to third parties/ APTRANSCO. Before the project was commissioned on 26.03.2001, the Commission, on 24.01.2001, granted approval to the 2<sup>nd</sup> respondent for captive consumption and it entered into a Power Purchase Agreement (PPA) with APTRANSCO. The validity of the aforesaid PPA was extended up to 31.03.2004 by the Commission. The Commission by its order dated 20.06.2001 in O.P. 1075/2000 withdrew the third party sale of power generated by NCE – Developers and directed that the power surplus to captive use shall be supplied to APTRANSCO/ Discoms only. A PPA dated 06.07.2002 was, accordingly, entered into, between APTRANSCO and the 2<sup>nd</sup> respondent with validity up to 30.06.2003 matching the validity of the consent for captive consumption given by the Commission. The PPA envisaged 3.6 MW (inclusive of auxiliary consumption) as captive use and the energy surplus to the captive requirement for exporting to grid. The Commission issued an order dated 05.02.2003 granting renewal of consent up to 30.06.2004.
4. Subsequently the 2<sup>nd</sup> respondent made representation to the Commission seeking permission for reduction of their captive consumption and sale of resulting surplus power to APTRANSCO.

5. The Commission forwarded the representation made by the 2<sup>nd</sup> respondent on 07.10.2003 to APTRANSCO for their comments. It appears that the Commission had issued directions on 06.01.2003 to APTRANSCO to incorporate a provision in the PPA that *“The proposed captive consumption can be reduced by the company and additional surplus power can be sold to APTRANSCO in case of exigencies or otherwise.”*
  
6. The first appellant requested the Commission not to consider the prayer of the 2<sup>nd</sup> respondent requiring the appellant to purchase additional surplus power from the 2<sup>nd</sup> respondent and requested the Commission for endorsement of this request. The 1<sup>st</sup> appellant reiterated its plea that the purchase of power from the 2<sup>nd</sup> respondent be limited to 2.4 MW only. The 1<sup>st</sup> appellant, from the bill of May 2003 started deducting the payment for energy units purported to have been supplied in excess of the capacity indicated in PPA. On 09.08.2004, the Commission issued a direction to APTRANSCO that the power purchased from the 2<sup>nd</sup> respondent on account of reduction in captive consumption shall be regulated as per the directions of the Commission issued from time to time in that regard. Aggrieved by the said direction the first appellant filed a review petition RP (SR No. 52 of 2004). The 1st respondent Commission dismissed the review petition by order dated 17.11.2004 at the admission stage itself. Aggrieved by the direction conveyed by the letter dated 09.08.2004 the 1st appellant filed Writ Petition No. 12 of 2004 in the High Court of Andhra Pradesh under article 226 of the Constitution of India praying the High Court to quash the direction. High Court awarded interim stay of further

proceedings in pursuance of the impugned order and the High Court by an order dated 14.11.2005 disposed of the writ petition directing the first appellant to approach this Tribunal within eight weeks while at the same time directed that the interim stay shall continue for that period. The appeal is thus before the Tribunal.

7. The appellant (s) have raised the following grounds in their appeal:-

(a) *It is submitted that the power purchase agreement is in the nature of a contract between the parties. It operates only in the sphere set out in the agreement. It provides only for the purchase of the quantity of power as mentioned therein. Subsequent to the execution of this agreement, the matter engaged the attention of the A.P. Electricity Regulatory Commission, which made some suggestions regarding amendment to the power purchase agreement format. The suggestions of the Regulatory Commission were not implemented by amending the power purchase agreement. No fresh power purchase agreement in the revised format was entered into. This is yet another reason for rejecting the request of the 2<sup>nd</sup> respondent.*

(b) *It is submitted that the 2<sup>nd</sup> respondent is a captive generation plant. It was set up primarily to supply power to its own industrial venture. At the relevant time, as also now, it had no license to generate power for general purposes. Even today, they have no license to trade in electricity, which is mandatory. In this connection, please*

*see Section 14 of the Electricity Reform Act and Section 12 of Electricity Act, 2003, it is against this background that the relative obligations of parties have to be adjudicated. It is respectfully submitted that the original contractual term should be deemed to have been modified as per the new format and the rights of parties adjudicated accordingly.*

- (c) *It is submitted that even otherwise APTRANSCO/APSDCL cannot be purchased power of any particular quantity. It is a public body, an instrumentality of the State, and owes a duty to the consumers of electricity in the State of supply power at the lowest possible rates. This implies a corresponding obligation to buy power at reasonable rates. It cannot be compelled to buy power, if it does not desire to do so. The Commission's power to regulate the tariff does not extend to compelling APTRANSCO/APSPDCL to purchase power beyond the quantity it desires to purchase. In this context it is to be recalled that in its order dated 23.04.2002 in OP No. 70-A (LVS) 2001 dated 2304.2002 the Commission recorded the limits of its powers by observing "if APTRANSCO does not wish to enter into PPA with LVS there is no way the Commission can compel APTRANSCO to do the same." This dicta is equally applicable to modification of PPA. This limitation on the power of the Commission has escaped its attention. The Commission's order in so far as*



*it directs the APTRANSCO to purchase all the surplus power generated by the 2<sup>nd</sup> respondent is without jurisdiction.*

*(d) It is submitted that the directions given by the Commission travels beyond the scope of powers of the Commission. The directions sought for by the 2<sup>nd</sup> respondent do not fall within the ambit of the matters, which can legitimately form the subject matter of enquiry before and decision by the Commission. The Commission has failed to keep in mind the limitations on its jurisdiction.*

*(e) It is submitted that captive power generation was allowed merely because the appellant was not able to generate sufficient power. Its name implies that the generating unit was expected to manufacture power required for the purposes of the generating company itself. It has no license to trade in electricity. It has no legal right to generate more power than required for its purposes and insist on the purchase of the same by the APTRANSCO/APSDCL or on supply to others. All power purchase agreements are mere contracts, which are by virtue of Section 174 of Electricity Act 2003 subordinated to the statutory provisions. Any provision in the said power purchase agreement, which authorizes an activity not sanctioned by statute, is void and is not legally enforceable.*

(f) *It is submitted that the Commission has no jurisdiction to compel APTRANSCO/APSDCL to purchase any power. The power under Section 86 of the Electricity Act 2003 is in two parts-(a) to fix tariff; and (b) to regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies etc. The power to regulate cannot comprehend a power to compel APTRANSCO/APSPDCL to purchase.*

(g) *It is submitted that the Commission, assuming without conceding that APTRANSCO is bound by the clause suggested in Annexure-II of letter dated 02.01.2002 relating to circumstances in which surplus power is available for sale to APTRANSCO, failed to note that the facts proved do not bring the present situation within the scope of that clause”.*

**FACTS OF THE CASE:**

8. The 2<sup>nd</sup> respondent in pursuance of the policy of Government of India for promotion of Non-conventional energy projects and co-generation projects and state Government policy for providing incentives to such projects, established the 6 MW biomass co-generation project as approved by Non-conventional Energy Development Corporation of Andhra Pradesh (NEDCAP) for the respondent's captive consumption and to sell the surplus power to

third parties and /or the 1<sup>st</sup> appellant. A Power Purchase and Wheeling Agreement between the developer and APTRANSCO was entered into on 12.4.2000. The said agreement provided for wheeling of surplus electricity sold to third parties and for purchase by the 1<sup>st</sup> appellant of the whole or part of the surplus electricity. The 2<sup>nd</sup> respondent in compliance to Section 21(3) of the AP Electricity Reform Act 1998 read with Section 44 of Electricity (Supply) Act 1948 secured consent from the Commission for captive consumption of 3.6 MW (including auxiliary consumption of 0.6 MW) by its order dated 24.01.2001 with validity up to 30.06.2003.

9. After the commissioning of the project on 26.3.2001 the Commission had undertaken the review of the existing PPAs and approved on 02.01.2002, a standard draft PPA applicable to bagasse/biomass co-generation project, biomass and waste-to-energy projects with captive consumption in project premises and export of surplus power to grid for sale. Standard PPA format provided the following significant articles viz. Article 2.2 and Article 10 which are as under:-

*(a) (Article 2.2) Rs. 2.25 pise per unit with escalation at 5% per annum with 1994-95 as base year and to be revised on 1<sup>st</sup> April, every year up to the year 2003-04. Beyond the year 2003-04, the purchase price by APTRANSCO will be decided by Andhra Pradesh Electricity Regulatory Commission.*

*(b) (Article 10) If as a result of any act, restraint or regulation by the A.P. Electricity Regulatory Commission, State of Central Government Authority, Department, Ministry, whether part of legislative, executive or judicial branch, the Company's*

*ability to use the energy for captive consumption can be materially abridged or abrogated, at the request of the Company, APTRANSCO agrees to negotiate in good faith with the Company for an arrangement mutually agreed to by both the parties, whereby, the Company would sell and the APTRANSCO would purchase the energy produced by the Project.*

10. In order to enable sale of surplus energy to third parties the 2<sup>nd</sup> respondent approached the Commission on 04.01.2001 under Section 16 of AP Electricity Reform Act -1998, to obtain exemption from the requirement to have a license. The Commission by an order dated 03.05.2001 granted a temporary exemption with effect from 25.04.2001 up to June 2001. It is noted that the Commission in its said order records that the 1<sup>st</sup> appellant had objected to the sale of power to third parties on the ground, amongst others, that the sales to third parties are highly detrimental to the financial interests of the 1<sup>st</sup> appellant and also that the 1<sup>st</sup> appellant had expressed its willingness to purchase power from the developers at the rates determined by the Commission.
  
11. The Commission by its order dated 20.06.2001, inter-alia, directed that the power generated by Non-conventional Energy Projects, and the quantum in surplus to their own captive use is not permitted for sale to third parties and is to be supplied to the 1<sup>st</sup> appellant only. Thus the option of sale of Power to third parties by the 2<sup>nd</sup> respondent provided in the PPA stood withdrawn. The 2<sup>nd</sup> respondent, therefore, was compelled to sell all surplus power to 1<sup>st</sup> appellant only and the 1<sup>st</sup> appellant was obliged to purchase the

entire Electricity generated or power surplus to their own captive use of all NCE Projects including that of the 2<sup>nd</sup> respondent.

12. Complying with the Commission's order dated 20.06.2001, the 2<sup>nd</sup> respondent entered into a PPA with APTRANSCO on 6.7.2002 (superceding the PPA entered into on 12.04.2000 and amended on 25.04.2001) indicating the capacity of 6 MW biomass based co-generation plant, with 0.6 MW capacity for auxiliary consumption, 3 MW capacity for captive consumption and balance 2.4 MW for sale to APTRANSCO. This Power Purchase Agreement (PPA) was valid up to 30.06.2003 as the Commission's order for captive use was up to that date.
  
- 13 It appears that the Commission had held meetings with the Principal Secretary (Energy), Govt. of Andhra Pradesh, CMD, APTRANSCO and Vice Chairman and MD, NEDCAP on 3.9.2002 wherein it was decided to modify the standard draft PPA earlier approved by the Commission to have provisions of regulations for running a plant. It was in this context that the Commission, on 6.1.2003 directed incorporation of a provision in the PPA that "the proposed captive consumption can be reduced by the Company and additional surplus power can be sold to APTRANSCO in case of exigencies or otherwise". On the request made by the 2<sup>nd</sup> respondent the APTRANSCO on 26.9.2003 consented for purchase of 2.4 MW power up to 31.3.2004.
  
14. It is observed that during the period from July 2002 to April, 2003 the 1<sup>st</sup> appellant purchased the entire surplus electricity exported by the

- 2<sup>nd</sup> respondent and made payments without demur. This conduct exhibits the understanding of the parties, that the entire electricity or power surplus to the captive use of the developers was necessarily to be purchased by the 1<sup>st</sup> appellant.
15. The 2<sup>nd</sup> respondent approached the Commission seeking permission for reduction in captive consumption and supply of resulting additional surplus power to APTRANSCO. Based on the existing provision that surplus power can be sold to APTRANSCO the representation of the 2<sup>nd</sup> respondent was forwarded to APTRANSCO for their comments on 7.10.2003. APTRANSCO on 7.11.2003 conveyed to the commission that the request of the 2<sup>nd</sup> respondent may not be considered stating that the power purchase from the said project is being made as per the capacity provided in the PPA and the purchase will be limited to as specified in the PPA. Further, on 15.11.2003, the Commission approved the modification to the PPA format that *“the delivered energy shall be limited to the energy calculated at 100% PLF with Net Exportable Capacity i.e. after deducting capacities for auxiliary consumption and captive consumption from installed capacity and as mentioned in Preamble & Schedule 1 of Agreement for sale to APTRANSCO. Whenever generation exceeds the installed capacity, the energy delivered by the project above 100% PLF during such periods will not be accounted for the purpose of the payment”*. (Emphasis supplied)
16. The Commission by its order 05.02.2003, granted renewal of consent to 2<sup>nd</sup> respondent for captive consumption up to 30.06.2004 and accepted reduction of captive consumption from 3 MW to 2 MW. The 2<sup>nd</sup> respondent requested the 1<sup>st</sup> appellant by its letter dated

10.05.2003 that the PPA be entered into for a period of 20 years as it was with other Non-conventional Energy Developers.

17. The Commission by a letter dated 5.12.2003, directed the APTRANSCO that the PPA with the developers has to be amended to enable purchase of surplus power from developers on account of reduction in captive consumption as per the Commissions approved format. The order of the Commission read thus :

*“APTRANSCO has to amend the PPA entered into with the above developers and purchased additional/surplus power on account of reduction in captive consumption as per the standard PPA approved by the Commission vide letter dated 03.04.2003 which provides “the proposed captive consumption can be reduced by the company and additional/surplus power can be sold to APTRANSCO in case of exigencies or otherwise”.*

The APTRANSCO with reference to the said directions responded, on 29.12.2003, to Commission requesting it not to consider the request of the developers for sale of additional surplus power. The APTRANSCO also confirmed that as per Commission’s approval of the amendment to the PPA, on 15.11.2003, the APTRANSCO need not purchase energy delivered above 100% net of exportable capacity. The Commission insisted upon the APTRANSCO to purchase surplus power on account of reduction in captive consumption from 2<sup>nd</sup> respondent and make payments. The Commission by letter dated 28.01.2004 addressed to CMD,

APTRANSCO, reiterated its direction issued through letter dated 05.12.2003 stating that:

*“already directed APTRANSCO to purchase surplus/additional power on account of reduction in captive consumption and that APTRANSCO is therefore, directed to purchase the surplus power delivered by M/s Jocil Ltd. and make the payments”*

It appears that despite repeated directions/orders by the Commission, APTRANSCO resisted their implementation with the result that the standard PPA was neither finalized and approved by the Commission nor implemented.

18. In the meanwhile the APTRANSCO got the 2<sup>nd</sup> respondent's plant inspected by the Superintending Engineer and Vigilance Officer to assess generation capacity and reasons for reduction in captive consumption. The 2<sup>nd</sup> respondent has resented to the stated inspection as APTRANSCO did not have authority for such inspection.
19. The 1<sup>st</sup> appellant by its letter dated 26.06.2003 conveyed that it is agreeable to purchase power from the 2<sup>nd</sup> respondent subject to the following conditions:
  - (a) Purchase of power will be for a limited period of 3 months i.e. from 01.07.2003 to 30.09.2003.
  - (b) Maximum quantum of power to be purchased is limited to 2.4 MW.



- (c) No additional power shall be purchased.
  - (d) Purchased price of Rs. 3.48 per unit as approved by the Commission for the Financial Year 2003-04.
20. For the first time after signing the PPA dated 06.07.2002, 1<sup>st</sup> appellant unilaterally deducted from the billing month of May 2003, the payment for 28,500 units from the 2<sup>nd</sup> respondent's billing of the actual export to grid. It is pointed out by the 2<sup>nd</sup> respondent that the similar deductions continued in July, 2003 to August, 2003, October 2003 to January, 2004; and April, 2004. The 2<sup>nd</sup> respondent was given to understand that units not paid for by the 1<sup>st</sup> appellant was considered to have been supplied in excess of capacity indicated in the agreement. The 2<sup>nd</sup> respondent through its letter dated 01.07.2003, made representation to the Commission requesting it to direct the 1<sup>st</sup> appellant to accept purchase of the entire surplus power as approved by the Commission for captive consumption and to enter into PPA and to pay for balance units not paid for. The 2<sup>nd</sup> respondent made representations through letters dated 30.08.2003, 26.09.2003 and 29.11.2003 to the Commission requesting it to have its order / decisions implemented by the 1<sup>st</sup> appellant.
21. The 2<sup>nd</sup> respondent has submitted that the Commission approved certain modifications which adversely affected the non-conventional energy developers and were decided by the Commission without any notice or opportunity given to the developers. It averred that the Commission's letter dated 15.11.2003 conveying direction to incorporate modification in the standard draft PPA was responded to by the 1<sup>st</sup> appellant intimating the developers by its letter dated

- 26.06.2004 that the 1<sup>st</sup> appellant cannot purchase excess energy delivered whenever the generation exceeds the installed capacity i.e.. the excess energy delivered over and above 100% PLF during the periods (i.e. 30 minutes time block) by the NCE Projects. It was further stated that in view of the same, amount for the quantum of excess energy delivered above 100% PLF during each 30 minutes time block for the months from December, 2003 to May 2004 is deducted from the power purchase bill payable for the billing month of May, 2004.
22. The 1<sup>st</sup> appellant's letter dated 26.06.2004 and the Commission's letter 15.11.2003 were challenged by the 2<sup>nd</sup> respondent in Writ Petition 12578 of 2004 pending before the AP High Court. The High Court by its order dated 21.07.2004 in WPMP 16009 of 2004 in WP 12578 of 2004 granted interim suspension of the operation of the 1<sup>st</sup> respondent's orders/directives in letter dated 15.11.2003. Due to the aforesaid interim order, 1<sup>st</sup> appellant was not to make any deductions as per letter dated 26.06.2004 for any excess energy delivered above 100 PLF for 30 minutes time block from the 2<sup>nd</sup> respondent. It is submitted by the 2<sup>nd</sup> respondent that the 1<sup>st</sup> appellant has not complied with the said order of the Hon'ble High Court.
23. The Commission announced a revised tariff for non-conventional energy projects effective from 1.4.2004. The said tariff was in two tiers viz. fixed cost and variable cost. On 9.6.2004 APTRANSCO through a letter to the Commission intimated its decision to purchase surplus energy due to reduction in captive use by all non-conventional energy (NCE) projects. APTRANSCO, however,

- indicated that surplus energy due to reduction in captive consumption by all NCE projects will be paid only at variable cost as per the tariff order issued on 2.3.2004.
24. The Commission by its letter dated 09.08.2004 persisted in its direction to APTRANSCO that the power purchased from the 2<sup>nd</sup> respondent on account of reduction in captive consumption shall be regulated as per the direction of the Commission issued from time to time in this regard. APTRANSCO filed a review petition (RP SR 52 of 2004) with the Commission on its direction dated 9.8.2004. The Commission conducted hearing on admission of the review petition filed by the APTRANSCO and the 2<sup>nd</sup> respondent filed a petition being O.P. No. 27 of 2004 under Section 142 and 146 of the electricity Act-2003, to the Commission for non-compliance of the direction of the Commission contained in its letter dated 05.12.2003 by the appellant(s). The Commission dismissed the review petition of the APTRANSCO (RP SR 52 of 2004) on 17.11.2004. The APTRANSCO filed its objection in O.P. No. 27 of 2004 filed by the 2<sup>nd</sup> respondent.
  25. The APTRANSCO filed a WP. No. 12 of 2005 in Andhra Pradesh High Court challenging the direction of the Commission in its letter dated 9.8.2004. Andhra Pradesh High Court issued interim stay on further proceedings in pursuance of the order impugned in the writ petition on 30.12.2004 and disposed of the writ petition directing the APTRANSCO to approach the Appellate Tribunal within 8 weeks.
  26. The appellant(s) filed a memorandum of appeal dated 09.01.2006 for appeal No. 4 of 2006 against the directions of the Commission by

letter dated 09.08.2004. At the request made by the senior counsel of the appellant(s) we have allowed impleadment of Andhra Pradesh Southern Power Distribution Company Ltd. (APSPDCL for brevity). As the appellant(s) have filed one material paper book in appeal No. 4 of 2006 we have allowed their prayer to dispense with the filing of the material paper-books in the connected appeals. We have also ordered the continuance of the interim stay of further proceedings before the Commission in pursuance of the order impugned in the Appeal. The 2<sup>nd</sup> respondent filed a counter affidavit along with material papers on 28.02.2006. The learned Sr. counsel of the appellant(s) and respondent(s) argued before us on the various aspects of the appeal for three days.

27. It may be pointed out that recognizing the fact that over a period of time, the performance of State Electricity Boards [created under Electricity (Supply) Act-1948] having deteriorated, measures conducive to sectoral development; promoting competition; protecting consumer's interest, etc. were taken by the legislatures which entailed structural reorganization of the sector. The policy of encouraging investment from private sector became one of the main objects. Andhra Pradesh Power Sector Reform Act-1998; Central Legislations of Electricity Regulatory Commission's Act-1998 and Electricity Act-2003 were enacted in quick succession. The following points are also required to be kept in mind, while deciding the issue:

(a) "Statement of Objects and Reasons" of the Electricity Act 2003 at paragraph 3 records thus:

*“with the policy of encouraging private sector participation in generation, transmission and distribution and the objective of dispensing the regulatory responsibilities from the Government to the Regulatory Commission the need for harmonizing and rationalizing the provisions in the Indian Electricity Act 1910, the Electricity (Supply) Act 1948 and the Electricity Regulatory Commission’s Act 1997, in a new self-contained comprehensive legislation arose”*

Electricity Act 2003 in its preamble provides that one of the main ‘aims’ of the Act is to ensure promotion of efficient and environmentally benign policies

- (b) Further, as per part II para 3 of Electricity Act 2003 *“the Central Government shall, from time to time, prepare the National Electricity Plan (NEP) and Tariff Policy, ----- based on optimal utilization of resources such as coal, ----- and renewable sources of energy”*. Also as per Section 61(h) of the Electricity Act 2003 the Appropriate Commission is obliged to frame tariff regulation specifying the terms and conditions taking *“the promotion of co-generation and generation of electricity from renewable source of energy”* as one of the guiding factors.
- (c) NEP has also recognized that the technologies of the renewable sources of energy being in a nascent state of development, the projects based on them are required to be

incentivized and encouraged and for that even differential tariff may be permitted

- (d) Ministry of Non-Conventional Energy Sources (MNES), Government of India issued policy guidelines to all State Governments conveying the various incentives to encourage investment in the sector of Non-conventional/Renewable Sources of Energy.
- (e) In pursuance of the Government of India's policy guidelines, government of Andhra Pradesh also through notifications GOM's No. 19 dated 16.03.1996; GOMs No. 93 dated 18.11.1997 and GOMs No. 112 dated 22.12.1998 provided incentives to Non-conventional / Renewable Sources of Energy.
- (f) At the behest of Ministry of Power Government of India, the Committee constituted by the Central Electricity Authority carried out a study on 13 projects located in several states and brought out a report in September 2005 named "Operations norms for biomass projects" recommending the technical / financial parameters for such projects. We have, by our judgement dated 7<sup>th</sup> September in appeal No. 20 of 2006 between Biomass Developers Association Vs. Chhattisgarh Regulatory Commission, ruled that CEA's recommended operation-norms to be taken as basic parameters for a specified aggregate capacity of NCE Projects and allow them to operate for five years to stabilize and the data so collected be used to refine the basic parameters for adoption in future.

28. Power Purchase Agreement is in the nature of a contract between the parties and in the normal course Regulatory Commission will have no jurisdiction to modify it unless mutually agreed to by the involved parties. However, in our judgment cited above in the case between Biomass Developers Association Vs. Chhattisgarh Regulatory Commission we have ruled that *“Where the Power Purchase Agreements (PPAs) between the distribution licensees and generating companies utilizing renewable sources of energy are in conformity with MNES guidelines or various policy guidelines as detailed above, the agreements are not required to be tinkered with but where the agreements are one sided and are not in consonance with the MNES guidelines or aforesaid policy guidelines and the terms thereof do not promote generation of electricity from renewable sources of energy, it is the bounden duty of the appropriate Commission to invoke the provisions of Section 86(1)(e) to issue appropriate directions with a view to promote generation of electricity from renewable sources of energy. This call for re-opening of the power purchase and wheeling agreements by the Commission for suitable amendments in keeping with the provisions of Section 86 (1) (e) of Electricity Act-2003.”* Thus, if approached by the signatories of the PPA the Commission could, if they feel convinced, may allow re-opening of the PPA for required amendments provided that it is in conformity with Sections 86(1)(e) and 61(h) of Electricity Act 2003.
29. Therefore, the PPA executed between the NCE Developers and APTRANSCO / Discoms could be re-opened for incorporating amendments approved by the Commission, provided the Commission is convinced that the amendments would help sustain

the operational stability of such projects and are in conformity with Section 86(1)(e) and 61(h) of Electricity Act -2003. APTRANSCO/Discoms being wholly owned entities of Govt. of Andhra Pradesh, have special obligations towards ensuring the promotions of efficient and environmentally benign policies of the state government and particularly the promotion of co-generation and generation of Electricity from the Non-Conventional / Renewable Sources of Energy.

30. In this background we may again notice the salient features of the case even at the cost of repetition as the view which we take depends upon them. Going through the facts of the case and submissions made by the learned Sr. counsel (s) the following emerge:

- (a) In pursuance of Govt. of India's policy for promotion of NCE projects and co-generation projects and Govt. of Andhra Pradesh (GOAP) policy [GOM No. 19 dated 16.03.1996 and GoM No. 93 dated 18.11.1997] for providing incentives to such projects the 6 MW Biomass based projects was established and commissioned on 26.03.2001 by the 2<sup>nd</sup> respondent. GOAP, however, by GoMs No. 112 dated 22.12.1998 issued certain clarifications in respect of GoMs No. 93 dated 18.11.1997.
- (b) The power from the project was for the captive use by the 2<sup>nd</sup> respondent and for sale of surplus power to third parties and / or the APTRANSCO.



- (c) A Power Purchase and Wheeling Agreement (PPA) was entered into on 12.04.2000 between the 2<sup>nd</sup> respondent and the 1<sup>st</sup> appellant. The Agreement provided wheeling of electricity to third – parties and purchase of whole or part of the surplus electricity by the APTRANSCO. As per the PPA the 6 MW installed capacity of the project was to supply 3.6 MW (including auxiliary consumption of 0.6 MW) for captive consumption and 2.4 MW capacity for sale to APTRANSCO.
- (d) The Commission after review of the existing PPAs for NCE projects approved a standard draft PPA format in consultation with APTRANSCO and NCE Developers. The standard draft PPA at article 10 included the following

Whenever generation exceeds the installed capacity, the energy delivered by the project above 100% PLF during such periods will not be accounted for the purpose of the payment

- (e) The Commission in its order 03.05.2001 records that APTRANSCO has objected to the sale of power by the NCE Projects to third-party stating that it will be highly detrimental to its financial interests. The order further records that the APTRANSCO had expressed its willingness to purchase power from the NCE Projects at the tariff rates determined by the Commission.
- (f) The Commission by its order dated 20.06.2001 directed that the extra power of NCE Power Projects for general purpose and surplus power of captive power plants shall be sold to APTRANSCO only. This called for entering into a fresh PPA

between APTRANSCO and the 2<sup>nd</sup> respondent which was executed on 06.07.2002. The captive consumption capacity was to be at 3.6 MW level (inclusive of 0.6 MW capacity of auxiliary Consumption) and balance 2.4 MW for sale to APTRANSCO. The arrangement functioned normally during June, 2002 to April, 2003 without any controversy and the 2<sup>nd</sup> respondent received its all due payments from the APTRANSCO. APTRANSCO, however, unilaterally deducted the payment for 28,500 units from the billing for the month of May 2003 and similar deductions continued for the following billing months. These deductions were apparently made due to supply of excess energy at PLF higher than 100%

31. From the aforesaid, it is clear that the APTRANSCO agreed to purchase the entire surplus electricity exported by the 2<sup>nd</sup> respondent and acted upon it and made payments without demur till April, 2003. The Commission's decision to prevent the developers from third-party sale, however, created a piquant situation for the 2<sup>nd</sup> respondent in that whereas earlier it was in position to sell additional surplus, because of reduction in captive consumption to third-party, it was possible now only if the APTRANSCO agreed to accept the purchase of the proportionate increase from the 2.4 MW capacity specified in the PPA. In the earlier arrangement, even when the generation of power was more than 100% PLF the 2<sup>nd</sup> respondent had the flexibility of supplying excess power to third-party. This was denied due to withdrawal of the facility for third-party sale.
32. The 2<sup>nd</sup> respondent's application to the Commission for reduction in captive consumption and supply of the resulting additional surplus to

APTRANSCO was not favored by the APTRANSCO on the ground that it was liable to purchase power limited to as specified in the PPA. This issue escalated the dispute. The Commission, on 06.01.2003 directed incorporation of a provision in the PPA that *“the proposed captive consumption can be reduced by the Company and additional surplus power can be sold to APTRANSCO in case of exigencies or otherwise”* Further, on 15.11.2003 the Commission approved yet another modification to the PPA format that *“the delivered energy shall be limited to the energy calculated at 100% PLF with Net Exportable Capacity i.e. after deducting capacities for auxiliary consumption and Captive consumption from Installed Capacity and as mentioned in Preamble & Schedule 1 of Agreement for sale to APTRANSCO. Whenever generation exceeds the installed capacity, the energy delivered by the project above 100% PLF during such periods will not be accounted for the purpose of the payment”*. This provision restricted the operation of the plant to 100% PLF as the sale of additional energy above 100% PLF is not to be considered for payment. The Commission, on 05.02.2003 accepted the 2<sup>nd</sup> respondent's request for reduction of captive consumption from 3 MW to 2 MW i.e. reduction of captive consumption inclusive of auxiliary consumption from 3.6 MW to 2.6 MW. The balance capacity of 3.4 MW was authorized to be sold to APTRANSCO.

33. Despite repeated directions / orders by the Commission the APTRANSCO willfully ignored them, with the result that neither the standard PPA was finalized and approved by the Commission nor implemented. The commission revised the tariff for NCE projects from 01.04.2004. The tariff was in 2 parts i.e. fixed cost and variable costs. APTRANSCO through a letter to the Commission intimated

that it was ready to purchase surplus energy due to reduction in captive consumption from all NCE Projects provided it pays at variable cost as per the tariff order effective from 01.04.2004

34. While on the one hand, the Commission's order dated 06.01.2003 directed that the 2<sup>nd</sup> respondent's proposed captive consumption can be reduced [from 3.6 MW to 2.6 MW inclusive of auxiliary consumption] and the resulting additional surplus [i.e. 1 MW] could be sold along with the existing surplus of 2.4 MW as specified in the PPA, the Commission, on the other hand, by its order dated 15.11.2003 restricted the sale of power to 100% PLF clarifying that the energy delivered beyond 100% PLF will not be accounted for the payment. APTRANSCO was responsible to cause prevention of third-party sale by the NCE Projects and offered to purchase all power from such projects, thus making the 2<sup>nd</sup> respondent surrendering the flexibility of supplying excess power (even at PLF higher than 100%) to third-party. Despite repeated willful defiance of the Commission's orders / directions by the APTRANSCO the Commission appeared powerless in ensuring the enforcement of its decisions. Under Electricity Act 2003, the Commission has power to pass orders and to enforce decisions. Sections 142 and 146 of Electricity Act 2003 empower the Commission to impose fine or punishment for non-compliance of its directions. In view of these powers vested in the Commission, being a statutory body created under a statute with the thrust on the private sector participation in the power sector, it cannot be a mute spectator when its own licensee refuses to comply with the directions given by it in exercise of its statutory power.

35. In view of the above, we dismiss the appeal No. 4 of 2006 and direct the Commission to hold proceedings in O.P. 27 of 2004 and decide the same in accordance with law.

The above judgement shall also apply to Appeals Nos. 5,6,8,9,10,12,13,14,and 23 of 2006.

**( A.A. Khan)**  
**Member (Technical)**

**(Justice Anil Dev Singh)**  
**Chairperson**