Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal Nos. 90,91,92,93,108,109,110 & 111 of 2006

Dated: September 28, 2006

Present:

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

Appeal No.90 of 2006

Rithwik Energy Systems Limited,
Lanco House, 141 Avenue 8, Road No. 2,
Banjara Hills, Hyderabad 500 034
Represented by its Director ..... Appellant

V/s

1. Transmission Corporation of Andhra Pradesh Ltd.,
   Represented by its Chairman & Managing Director,
   Vidyut Soudha,
   Hyderabad-500 082.

2. Southern Power Distribution Co. of
   Andhra Pradesh Ltd.
   Represented by its Managing Director
   Upstairs, Hero Honda Showroom,
   Renigunta Road,
   Tirupati-517 501.

3. Andhra Pradesh Electricity Regulatory Commission,
   Singareni Bhavan, Red Hills,
   Hyderabad
   Represented by its Chairman ..... Respondents

Counsel for Appellant : Mr. K. Gopal Choudary &
Miss Mamta Choudary

Counsel for Respondents : Mr. Sanjay Sen & Mr. Vishal
Anand for R-1 & 2

Mr. P. Sri Raghuram for R-3

Appeal No.91 of 2006

Indur Green Power Private Limited,
3-5-821, Ist Floor, 104 Doshi Square,
Hyderguda, Hyderabad-500 029
Represented by its Director ..... Appellant

V/s

1. Transmission Corporation of Andhra Pradesh Ltd.,
   Represented by its Chairman & Managing Director,
   Vidyut Soudha,
   Hyderabad-500 082.

2. Northern Power Distribution Co. of
   Andhra Pradesh Ltd.
   Represented by its Managing Director,
   11-5-423/1/A, First Floor,
   1-7-668, Postal Colony,
   Hanamkonda, Warangal 506 001.

3. Andhra Pradesh Electricity Regulatory Commission,
   Singareni Bhavan, Red Hills,
   Hyderabad
   Represented by its Chairman ..... Respondents

Counsel for Appellant : Mr. K. Gopal Choudary &
Miss Mamta Choudary

Counsel for Respondents : Mr. Sanjay Sen & Mr. Vishal
Anand for R-1 & 2

Mr. P. Sri Raghuram & Mr. Shriram
Murthy for R-3

Appeal No.92 of 2006

Perpetual Energy Systems Limited,
3-5-821, Flat No. 104 Doshi Square,
Hyderguda, Hyderabad-500 029
Represented by its Managing Director ..... Appellant

V/s

1. Transmission Corporation of Andhra Pradesh Ltd.,
   Represented by its Chairman & Managing Director,
   Vidyut Soudha,
   Hyderabad-500 082.

2. Eastern Power Distribution Co. of
   Andhra Pradesh Ltd.
   Represented by its Managing Director,
   Sai Shakti, Opp. Saraswati Park,
   Daba Gardens,
   Visakhapatnam 530 020.

3. Andhra Pradesh Electricity Regulatory Commission,
   Singareni Bhavan, Red Hills,
   Hyderabad
   Represented by its Chairman ..... Respondents

Counsel for Appellant : Mr. K. Gopal Choudary &
Miss Mamta Choudary

Counsel for Respondents : Mr. Sanjay Sen & Mr. Vishal
Anand for R-1 & 2

Mr. P. Sri Raghuram & Mr. Shriram
Murthy for R-3

<u>Appeal No. 93 of 2006</u>

1. M/s. Gowthami Bio Energies Pvt. Ltd.,
   Gopalapuram, P.B. No. 7,
   Pydiparru,
   Tanuku, Pin 534 21,
   Andhra Pradesh

2. Biomass Energy Developers Association,
   E-506, Keerthi apartments,
   Ameerpet, Hyderabad-500 073 ..... Appellants

V/s

1. Transmission Corporation of Andhra Pradesh Ltd.,
   Vidyut Soudha, Khairatabad,
   Hyderabad-500 082.

2. Andhra Pradesh Electricity Regulatory Commission,
   Hyderabad.

3. Central Power Distribution Co. of A.P. Ltd.

4. Southern Power Distribution Co. of A.P. Ltd.

5. Northern Power Distribution Co. of A.P. Ltd.

6. Eastern Power Distribution Co. of A.P. Ltd. ..... Respondents

Counsel for Appellants : Mr. B. Adinaraya Rao,
Mr. G. Ramakrishna Prasad,
Mr.Venkat Subramaniam,
Mr. B. Suyodhan & Mr. Mohd.
Wasai Khan

Counsel for Respondents : Mr. Sanjay Sen & Mr. Vishal
Anand for R-1,3,4,5 & 6

Mr. P. Sri Raghuram & Mr. Shriram
Murthy for R-2

Appeal No. 108 of 2006

M/s. Sagar Sugars and Allied Products Ltd.,
Nelavoy Village, Sri Rangarajapuram Mandal,
Chittoor District.
Represented by its Executive Director ..... Appellant

V/s

1. The Andhra Pradesh Electricity Regulatory Commission,
Red Hills,
Hyderabad
Represented by its Chairman

2. The Andhra Pradesh Transmission Co. Ltd.
Vidyut Soudha, Somajiguda,
Hyderabad
Represented by its Chairman & Managing Director

3. Southern Power Distribution Co. of A.P. Ltd. ..... Respondents

Counsel for Appellant : Mr. Dama Seshadri Naidu

Counsel for Respondents : Mr. P. Sri Raghuram & Mr. Shriram
Murthy for R-1

Mr. Sanjay Sen & Mr. Vishal
Anand for R-2 & 3

Appeal No. 109 of 2006

M/s. GMR Industries Ltd.,
Door No. 6-3-866/1/G2, Green Lands,
Begumpet,
Hyderabad-500 016
Represented by its Managing Director ..... Appellant

V/s

1. The Andhra Pradesh Electricity Regulatory Commission,
Red Hills,
Hyderabad
Represented by its Chairman

2. The Andhra Pradesh Transmission Co. Ltd.
Vidyut Soudha, Somajiguda,
Hyderabad
Represented by its Chairman & Managing Director

3. Eastern Power Distribution Co. of A.P. Ltd. ..... Respondents

Counsel for Appellant : Mr. Dama Seshadri Naidu,
Mr. J.N. Bhushan,
Mr. G Arun

Counsel for Respondents : Mr. P. Sri Raghuram & Mr. Shriram Murthy for R-1

Mr. Sanjay Sen & Mr. Vishal Anand for R-2 & 3

Appeal No. 110 of 2006

Kakatiya Cement Sugars & Industries Ltd.,
1-10-140/1, Ashok Nagar,
Hyderabad, A.P.
Represented by its Deputy General Manager
(Accounts) ..... Appellant

V/s

1. The Andhra Pradesh Electricity Regulatory Commission,
Red Hills,
Hyderabad
Represented by its Chairman.

2. The Andhra Pradesh Transmission Co. Ltd.
Vidyut Soudha, Somajiguda,
Hyderabad
Represented by its Chairman & Managing Director

3. Northern Power Distribution Co. of A.P. Ltd. ..... Respondents

Counsel for Appellant : Mr. Dama Seshadri Naidu,
Mr. J.N. Bhushan,
Mr. G Arun

Counsel for Respondents : Mr. P. Sri Raghuram & Mr. Shriram Murthy for R-1

Mr. Sanjay Sen & Mr. Vishal Anand for R-2 & 3

Appeal No. 111 of 2006

Clarion Power Corporation Ltd.,
141 Avenue 8,
Road No.2, Banjara Hills,
Hyderabad-500 034
Represented by its Director ..... Appellant

V/s

1. Transmission Corporation of Andhra Pradesh Ltd.,
Represented by its Chairman & Managing Director,
Vidyut Soudha,
Hyderabad-500 082.

2. Central Power Distribution Co. of
Andhra Pradesh Ltd.
Represented by its Managing Director
Singareni Bhavan,
Red Hills,
Hyderabad.

3. Southern Power Distribution Co. of
Andhra Pradesh Ltd.
Represented by its Managing Director
Upstairs, Hero Honda Showroom,
Renigunta Road,
Tirupati 517 501.

4. Northern Power Distribution Co. of
   Andhra Pradesh Ltd.
   Represented by its Managing Director
   1-7-668, Postal Colony,
   Hanamkonda,
   Warangal 506 001.

5. Eastern Power Distribution Co. of
   Andhra Pradesh Ltd.
   Represented by its Managing Director
   Sai Shakti, Opp. Saraswati Park,
   Daba Gardens,
   Visakhapatnam 530 020

6. Andhra Pradesh Electricity Regulatory Commission,
   Singareni Bhavan,
   Red Hills,
   Hyderabad
   Represented by its Chairman

Counsel for Appellant : Mr. K. Gopal Choudary & Mr. J.N. Bhushan

Counsel for Respondents : Mr. Sanjay Sen & Mr. Vishal Anand for R-1 to 5

Mr. P. Sri Raghuram & Mr. Shriram Murthy for R-6

JUDGMENT

Per Hon'ble Mr. Justice Anil Dev Singh, Chairperson

These appeals are directed against a common order of the Andhra Pradesh Electricity Regulatory Commission (for short 'APERC'/'Commission') dated June 2, 2006 passed in O.P.nos. 12/06,

20/06, 21/06, 22/06, 23/06, 24/06, 25/06 and 26/06, whereby the Commission concluded as follows:-

"(a). *The Commission has got jurisdiction to entertain the petitions to issue directions to modify the terms and conditions of the PPAs entered into between the petitioners and the respondents herein to clarify the actual intent of the various provisions thereof and for their proper implementation and to decide the petitions.*

(b) *The particulars mentioned in Schedule 1 to the PPAs have a bearing on the quantum of electricity generated by the respondent-developers which the petitioners are obliged to purchase, and as discussed in the preceding paragraphs, the petitioners are not liable to purchase electricity generated over and above 100% PLF computed on the basis of half-hourly meter readings, less the auxiliary consumption and the captive consumption, if any. The petitioners shall however make available all relevant data relating to the half-hourly meter readings to the respondents.*

(c) *In the case of PPAs wherein quantum of auxiliary consumption is not mentioned specifically, this quantum shall be taken as 9% on normative basis as decided by the Commission in its Order dated 20.03.2004 in R.P. No. 84 of 2003 in O.P. No. 1075 of 2000. In the case of the power project relevant to O.P. No. 26 of 2006, it would be as reported by NEDCAP in its letter dated 29.11.2003, unless that is disputed by the respondent-developer therein, in which case the matter would be submitted to the Commission for appropriate orders.*

(d) *The present order of the Commission will not cover any period prior to November/December 2003 i.e. the date with*

effect from which the APTRANSCO actually put the system of 30-minute PLF computation into operation.

In the result, the petitions are allowed accordingly".

2. Since these appeals are grounded on same set of facts and raise identical issues, it would be appropriate to refer to the facts arising in Appeal No. 90 of 2006 for proper appreciation of the controversy involved in these appeals.

Facts of Appeal No. 90 of 2006

3. The appellant by its application dated December 28, 1998 sought approval of the Non-conventional Energy Development Corporation of Andhra Pradesh Limited (for short 'NEDCAP') for setting up Biomass based generation plant of 4MW capacity at Kotha Cheruvu Village Srikalahasthi Mandal, Chittoor District. The 'NEDCAP Board Sub-Committee' in its meeting held on Feb., 15, 1999 considered the application of the appellant and accepted its request. Formal sanction to set up the Biomass based power generation plant of 4 MW capacity at Kotha Cheruvu Village was accorded by the NEDCAP on February 18, 1999 in favour of the

appellant. Subsequently, the appellant filed a fresh application for approval before the NEDCAP to set up Biomass power plant of 4.7 MW capacity. This request was also accepted by the NEDCAP. Again the appellant applied to the NEDCAP for approval to set up Biomass power plant of 6 MW capacity. The NEDCAP approved this request of the appellant as well and granted the requisite sanction on March 1, 2000. The appellant also sought permission of the APERC under Section 21(4) of the Andhra Pradesh Electricity Reform Act for selling energy to the first respondent, APTRANSCO, the then bulk supplier licensee. The Commission in its regulatory jurisdiction approved the format of Power Purchase Agreement between APTRANSCO and the appellant. Thereupon, on Feb. 18, 2002, the APTRANSCO and the appellant entered into Power Purchase Agreement (for short 'PPA') by which the APTRANSCO agreed to the purchase of delivered energy from 6 MW Biomass plant of the appellant at inter-connection point as per the terms and conditions specified therein. After the Biomass plant of the appellant commenced its operation on Sept. 18, 2002, the energy generated by it was being

purchased by the first respondent. Subsequently, the obligations under the PPA were transferred to the second respondent, Southern Power Distribution Co. of Andhra Pradesh w.e.f. June 10, 2005 and since then the energy generated by the plant of the appellant is being purchased by the second respondent.

4. In the beginning, for more than one year the first respondent was purchasing the entire power delivered by the appellant at the rate of Rs. 3.48/- per unit. This rate was being paid by the first respondent to the appellant as per clause 2.2 of the PPA. Clause 2.2 of the PPA provides to the effect that the appellant will be paid tariff for the energy delivered for sale to the APTRANSCO at Rs. 2.25/- per unit with escalation at 5% per annum, with 1994-95 as the base year, which is to be revised on the 1st of April every year upto the year 2003-04 subject to certain conditions. Subsequent to the year 2003-04, the purchase price payable by the APTRANSCO is to be fixed by the APERC.

5. Subsequently, by letter dated July 29, 2003, the Chief Engineer, APTRANSCO pointed out to the APERC that some of the Non-conventional Energy Projects were delivering energy for sale to the APTRANSCO at more than 100% PLF. It was also pointed out that because of the technical constraints in evacuating the delivered energy, the APTRANSCO would need to substitute Article 1.4 of the PPA by a new clause restricting the operation of Non-conventional Energy Projects up to 100% PLF only after deducting capacities for auxiliary consumption and captive consumption from the installed capacity of the bio-mass plants.

6. By communication dated November 15, 2003, APERC approved the modification of Article 1.4 of the PPA but not to the extent as proposed by APTRANSCO. The proposal for modification of Article 1.4 by APTRANSCO and the modification approved by the Commission, through its letter of November 15, 2003 need to be juxtaposed to appreciate the

difference between the two:-

APPLICABLE TO NON-CONVENTIONAL ENERGY POWER PROJECTS OTHER THAN MINI HYDEL AND WIND FARM

Proposed Modification by APTRANSCO	Modification Approved by the Commission
Article 1.4 (Delivered Energy) Means, with respect to any Billing Month, the kilo watt hours (kWH) of electrical energy generated by the Project and delivered to the APTRANSCO at the Interconnection point as defined in Article 1.8, as measured by the energy meters at the Interconnection Point during that Billing Month. Explanation 1: For the purpose of clarification, Delivered Energy excludes all energy consumed in the project, by the main plant and equipment, lightening and other loads of the Project from the energy generated and as recorded by energy meter at Interconnection Point. Explanation 2: The energy delivered beyond agreed capacity for sale to APTRANSCO momentarily for short duration due to operational constraints is recognized. However, even during the momentary fluctuations such excess continuous one hour (2 continuous blocks of ½ hour integration or 4 continuous block of ¼ hour integration). Not more	**Article 1.4 (Delivered Energy):** Means, with respect to any Billing Month, the kilo watt hours (kWH) of electrical energy generated by the Project and delivered to the APTRANSCO at the Interconnection point as defined in Article 1.8, as measured by the energy meters at the Interconnection Point during that Billing Month. Explanation 1: For the purpose of clarification, Delivered Energy, excludes all energy consumed in the project, by the main plant and equipment, lighting and other loads of the Project from the energy generated and as recorded by energy meter at Interconnection Point. Explanation 2: 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

than 2 such spells of continuous excess delivery of energy for one hour shall be considered for billing in a day. No payment shall be made for excess delivered energy from the project beyond the conditions stipulated above. Also the delivered energy in a Billing month shall be limited to the energy calculated based on the Capacity agreed for export to Grid for sale to APTRANSCO as mentioned in Preamble and Schedule 1 multiplied with number of hours and fraction thereof the project is in operation during that billing month. In case any excess energy is delivered no payment shall be made for the same.	installed capacity, the energy delivered by the project above 100% PLF during such periods will not be accounted for the purpose of payment.

7. Thus, according to the modification approved by the Commission delivered energy was limited to the energy calculated at 100% PLF after deducting capacities for auxiliary consumption and captive consumption from installed capacity of the plant as mentioned in the Preamble & Schedule-I of the PPA and whenever generation exceeds the installed capacity, the energy delivered by the plant above 100% PLF is not be accounted for the purpose of payment. In the letter of the APERC dated Nov. 15, 2003, reference was made to the earlier letter of the APERC dated August 18, 2003 and the letter of the Chief Engineer/IPC dated Oct., 14, 2003.

8. As a sequel to the letter of the APERC dated Nov.15, 2003, the APTRANSCO by its letter dated June 26, 2004 informed the appellant that as per the directive of the APERC, the APTRANSCO cannot purchase excess energy delivered, whenever generation exceeds the installed capacity, i.e. the excess energy delivered over and above 100% PLF during the period of 30 minutes time block by the NCE Projects. The appellant was also informed that the amounts paid for excess energy delivered above 100% PLF during time block of 30 minutes each for the period between December, 2003 and May, 2004 was being deducted from the power purchase bill payable for the billing month of May, 2004.

9. Aggrieved by the aforesaid action of the APERC and APTRANSCO the appellant filed writ petition before the High Court of Andhra Pradesh alleging, *inter alia,* that the appellant had no knowledge of the order of the Andhra Pradesh Electricity Regulatory Commission dated Nov. 15, 2003 or any proceeding relating thereto much less the letter dated August 18, 2003 of the APERC pertaining to the modification of the

PPA in respect of Non-conventional energy power purchase. The appellant not only challenged the action of the APERC but it also called in question the communication of the first respondent dated June 26, 2004 for making consequential deductions pursuant to the letter of the APERC dated November 15, 2003.

10. On July 9, 2004, High Court of Andhra Pradesh granted interim order suspending the proceedings emanating from the letter of the first respondent dated June 26, 2004. It also stayed the operation of the communication of the APERC dated November 15, 2003. The first respondent was also interdicted from making any deductions from the bill payable for purchase of power from the appellant in accordance with letter dated June 26, 2004 for any excess energy delivered beyond 100% PLF during any 30 minutes time block.

11. The first respondent by letter dated August 5, 2004, addressed to the Biomass Energy Developers Association, with copies endorsed to the appellant and other generators, who were petitioners before the High Court, requested the

generators to withdraw the writ petition. It was stated in the letter that the first respondent had decided to calculate PLF on monthly basis to arrive at the purchasable energy limiting to 100% PLF as it was done earlier w.e.f. December, 2003. As a consequence of the aforesaid communication, the appellant withdrew the writ petition and the same was dismissed by the High Court of Andhra Pradesh as withdrawn.

12. Even after the withdrawal of the writ petition by the appellant and other members of the Biomass Energy Developers Association, the first respondent did not refund the amounts deducted from the monthly bills of the appellant and other members. It, however, by its letter dated August 19, 2004 proposed to the APERC to continue the earlier procedure for purchase of energy by duly taking into consideration the net capacity of the plant and number of hours in a billing month upto 100% PLF for billing with retrospective effect from December, 2003 and to refund all amount recovered from the appellant and other members for the period December, 2003 to May, 2004. In response to the aforesaid letter of the first

respondent, the Commission by its letter dated October 6, 2004 required the first respondent to intimate whether the amendment to Clause 1.4 was incorporated in the PPA, as directed in Para 3 of the earlier letter of the Commission dated November 15, 2003.

13. While the matter was under correspondence between the APTRANSCO and APERC, the appellant submitted a fresh representation to the first respondent on December 21, 2004 as the appellants were not given relief as per the assurance of the first respondent contained in its aforesaid letter dated August 5, 2004, on the basis of which the appellant withdraw the writ petition. In this representation, the appellant urged the first respondent to forthwith implement the monthly PLF principle retrospectively from December, 2003 as promised by it and to refund the amount deducted from the monthly bills of the appellant for the aforesaid period. This representation also proved to be of no avail.

14. Aggrieved by the directive of the APERC contained in its letter dated November, 15, 2003 and the letter of the first

respondent dated June 26, 2004, the in-action of the first respondent in carrying out its promise contained in its letter dated August 5, 2004, the appellant filed a fresh Writ Petition before the Andhra Pradesh High Court. Several similar Writ Petitions were also filed by other petitioners, generating energy from bio-mass. On January 23, 2005, the Writ Petitions were allowed by the High Court of A.P. by its order dated January 23, 2005 holding that modification of clause 1.4 of the PPAs, approved by the second respondent APERC, is arbitrary and illegal and not binding on the appellants herein in as much as the modification was effected without issuing any notice to them which was in contravention of the scheme of the Electricity Act, 2003 as well as the fundamental principles of natural justice. It was also observed that:

"a. the modification approved by the second respondent, as can be seen from Annexure II to the letter dated November 15, 2003 of the APERC does not indicate that 30 minutes time block shall be taken as the basis for determining excess energy.

b. *The modifications said to have been approved by the second respondent in its order dated the November 15, 2003 has not been incorporated in the Power Purchase Agreements. Thus, the amendments, which do not form part of the agreements, under no circumstances, can be held to be binding on the petitioners".*

15. The High Court directed the APERC to consider the objections raised by the appellant herein with regard to amendment to article 1.4 proposed by the first respondent in respect of the PPAs in favour of the appellants herein and to pass appropriate orders afresh in accordance with law after hearing the parties.

16. Pursuant to the order of the High Court, the appellant filed petition before APERC to the proposal of the APTRANSCO seeking amendment of article 1.4 of the PPA, wherein it was, *inter alia,* stated that the APERC does not have the jurisdiction or power to consider any proposal for amendment of a concluded PPA between the parties and the proposal to limit the purchase of energy to 100% PLF on continuous one hour

basis or two continuous blocks of ½ hour integration or 4 continuous block of ¼ hour integration or any other such time blocks. Besides, it was asserted that the proposed amendment is unreasonable and arbitrary and contrary to the terms of the agreement. It was also submitted that PPA provided for the purchase of <u>all</u> the energy delivered to the first respondent from the project at the specified inter connection point. That apart, it was averred that <u>all the energy</u> actually delivered to the licensee (first respondent) is sold to the consumers for which the first respondent has realized valuable consideration. Consequently, it was pointed out that the non payment for any part of energy actually delivered to the licensee would result in unjust enrichment of the licensee. While the matter was pending before the APERC, the first respondent by its letter dated February 18, 2006 informed the appellant that the accounts would be settled after the issue is decided finally by the APERC.

17. It needs to be pointed out that APTRANSCO contrary to its assurance to the appellant that it shall implement the

monthly PLF principle retrospectively from December, 2003, moved a petition, being O.P. No. 12 of 2006, purportedly under section 62 and 86 (1)(f) of the Electricity Act, 2003 read with Regulations 8 and 9 of APERC Conduct of Business Regulations, 1999 before the APERC. In the petitions the APTRANSCO sought the following reliefs :

"a. To allow and take the petition on record.

b. To declare that the Petitioner is obliged to purchase delivered energy from the Respondent at any point of time only upto the capacity agreed in the PPA, i.e. installed capacity less the auxiliary Consumption.

c. To declare the action taken by the Petitioner in restricting the delivered energy from the Respondent during any 30 minutes time block is justifiable and correct as also in line with the directions of the Hon'ble Commission.

d. To declare that even in the absence of Hon'ble commission directions dated November 15, 2003, the petitioner has no obligation to purchase excess delivered energy from the Respondent at any point of time in terms of the provisions of PPA.

e. To amend the Agreement by including the condition mentioned above".

18. Thus, it is clear from the reliefs sought by the first respondent that its representation/promise to the appellant contained in its letter dated August 5, 2004 was a hollow one and it had no intention to abide by the same. The appellant filed a counter to the petition of the first respondent and objections to the proposed amendment of Article 1.4 of the PPA. After hearing the parties, the APERC on June 2, 2006 passed the impugned order in which it raised and determined the following issues:-

"*Issue No. 1*: *Whether the Commission has jurisdiction to entertain the petitions.*

Issue No. 2 : *Whether the capacity mentioned in Schedule-1 to the PPAs has any bearing on the quantum of electricity which the petitioners are obliged to purchase.*

Issue No. 3: *What would be the quantum of auxiliary consumption to be taken into consideration for computation of electricity energy to be purchased by the petitioners with regard to the PPAs wherein this quantum is not mentioned specifically.*

Issue No. 4 : *Whether the petitioners are justified to settle the claims of the respondent-developers for electricity*

supplied by them on the basis of PLF computed on the basis of meter readings for 30 minute time blocks".

19. In so far as Issue No 1 is concerned, the Commission held that the PPA is not outside the regulatory jurisdiction of the Commission. The Commission was also of the view that it can issue directions to the parties concerned to modify the PPA, if found necessary.

20. As regards Issue No 2, the commission opined that the obligation of the first respondent to purchase electricity generated by the biomass based generation plants is limited to the capacity indicated in Schedule-1 to the PPA.

21. While considering Issue No. 3, the commission held that the first respondent was justified in taking 9% as the auxiliary consumption for the projects, for which the PPA contains no specific mention. However, in the case of power projects relevant to OP No. 26 of 2006, the auxiliary consumption as reported by NEDCAP in its letter dated November, 29, 2003 was to prevail, unless disputed by the developers in which

case the liberty was granted to agitate the matter before the Commission.

22. In so far as Issue No. 4 is concerned, it was held that the commission found nothing wrong in the action of the first respondent in settling the power supply claim of the appellant with respect to a billing month on the basis of PLF as computed from meter readings for 30 minute time blocks for which the metering facility is available.

23. Aggrieved by the order passed by the commission, the appellant and other developers have filed the aforesaid appeals before us.

24. We have heard the learned counsel for the parties.

25. The learned counsel for the appellants submitted that the first respondent was bound to buy entire energy generated by the appellants from bio mass and there cannot be any limitation on the quantity of energy that may be delivered to the first respondent from their projects. This submission of the learned counsel for the appellants is misconceived and has

no substance as is clear from the PPAs and the approvals granted by the NEDCAP to the developers for setting up the power plants. Since all the PPAs and sanctions accorded by the NEDCAP to the developers are identical in nature, except for minor details depending upon the capacity of the plants and various other small mattes, we will take up the case of the appellant in Appeal No. 90/2006 to test the submission of the learned counsel for the appellants. The appellant had set up a non conventional energy project of 6 MW capacity based on bio mass. As already noted the appellant by its application dated December 28, 1998 sought approval of NEDCAP for setting up a bio mass generation plant of 4 MW capacity. Subsequently, it applied to the NEDCAP for setting up a bio mass power plant of 4.7 MW. Thereafter, the appellants applied to the NEDCAP for setting up a bio mass power plant of 6 MW capacity. The NEDCAP approved the request of the appellant and granted the requisite sanction on March 1, 2000 for setting up 6 MW capacity Biomass power plant. After obtaining the sanction for 6 MW capacity bio mass power plant, the appellant is not justified in contending that the

energy delivered in excess of the declared capacity of the plant on monthly basis is required to be accepted by the first respondent.

26. We agree with the learned counsel for the first respondent that the capacity of the power plant was crucial to the agreement of sale and purchase of energy between the appellant and the first respondent. In case the capacity factor was irrelevant, there would not have been reason enough for the appellant to seek approval of the NEDCAP for enhancement of capacity of the plant. Generally speaking in a contract of sale and purchase, quantities are fixed so that parties know their obligations. An element of uncertainty has to be avoided as otherwise the parties cannot be said to be ad-idem or having same understanding of the terms of the contract. A party cannot be saddled with a liability which was not even in its contemplation, when it entered into an agreement with the other party. The agreement speaks of definite capacity of the plant. In Schedule 1 to the PPA, capacity of the generator and the station has been indicated as

6 MW. Delivered energy clause in the agreement has nexus with the generating capacity of the plant and cannot be read in isolation. It was argued by the learned counsel for the appellants that the generating plant has an inbuilt ability to produce approximately 20% more energy than the declared capacity. This argument has not been supported by the learned counsel for the appellants by providing any scientific data. Accordingly, the submission of the learned counsel for the appellants that all delivered energy beyond 100% PLF on monthly basis is required to be computed for payment, cannot be accepted.

27. We must point out that the learned counsel for the appellants realizing the hollowness of the argument that the first respondent is bound to pay for delivered energy beyond 100% PLF on monthly basis gave up the plea ultimately.

28. The learned counsel for the appellants next contended that the first respondent and the Commission cannot apply 30 minutes time block principle for the purpose of measuring the delivered energy. It was contended by the learned counsel

that as per the PPA dated Feb. 18, 2002, delivered energy with respect to any billing month was required to be measured by the energy meters at the interconnection point during a particular billing month and not during 30 minutes time block. They invited our attention to various Articles of the agreement especially Articles 1.2, 1.4, 4.10 and 5.3. They also pointed out that the letter of the first respondent dated June 26, 2004, which was a sequel to the directions of the APERC dated November 15, 2003, was in fact not inconformity with such directions. The Commission had not approved the proposed amendment of Article 1.4 in toto. According to the learned counsel, 30 minutes time block principle was not approved by the Commission and what was approved was to the effect that the delivered energy was to be limited to the energy calculated monthly at 100% PLF with net exportable capacity for sale to the APTRANSCO after deducting capacities for auxiliary consumption and captive consumption from installed capacity and as mentioned in Preamble & Schedule 1 of the Agreement and in case of any excess energy

delivered beyond 100% PLF no payment was to be made for the same.

29. The learned counsel for the appellants further contended that the APERC even though had not approved the proposed amendment of Article 1.4 *in-toto* in the impugned order, it did not find any thing wrong in the action of the first respondent in settling power supply claims of the appellants with respect to a billing month on the basis of PLF, as computed on the basis of the meter reading for 30 minute time block for which the metering facility is available with the first respondent. The learned counsel for the appellants canvassed that the order of the Commission runs counter to the modification of the Article 1.4 approved by the commission. It was also the contention of the learned counsel for the appellants that the first respondent having made a categorical representation through its letter dated August 5, 2004 to the effect that APTRANSCO will calculate PLF on a monthly basis to arrive at purchasable energy limiting up to 100% PLF as it was done earlier, cannot be allowed to go back on its commitment. It was stressed that

the appellants acting on the representation of the first respondent that it will calculate PLF on monthly basis, withdrew the writ petitions which were filed before the High Court of Andhra Pradesh against the directions of the APERC dated November 15, 2003 and the letter of the first respondent dated June 26, 2004. On the other hand, the learned counsel for the first respondent submitted that according to Article 7 of the PPA, all incentives and conditions envisaged in the PPA are subject to modifications, which may be carried out from time to time as per the directions of APERC, Govt. of A.P. and APTRANSCO. He also referred to Article 9.2 of the PPA to canvass that further modification of the PPA was agreed to by the parties with the approval of the APERC. It was also submitted that the meters installed at the interconnection are capable of reading delivered energy from the plants of the generators for smaller time blocks, including a 30 minute time block. Excess energy delivered over and above 100% PLF during the 30 minute time block by the NCE projects is not payable under any article of the PPA. It was also submitted that none of the articles in the PPA suggest that excess energy

delivered over and above 100% PLF during 30 minutes time block is to be paid for by the first respondent. It was also submitted that the meter readings of 30 minute time block are the basis of billing for each month.

30. We have considered the submissions of the learned counsel for the parties. Before dealing with their submissions, it would be appropriate to refer to the relevant Articles of the PPA:

"1.1 Billing Date: means the fifth (5th) day after the Metering Date".

"1.2 Billing Month: means the period commencing from 25th of the calendar month and ending on the 24th of the next calendar month".

"1.4. Delivered Energy: means, with respect to any Billing Month, the kilo watt hours (KWH) of electrical energy generated by the Project and delivered to the APTRANSCO at the Interconnection Point as defined in Article 1.8, as measured by the energy meters at the Interconnection Point during that Billing Month".

Explanation: For the purpose of clarification, Delivered Energy, excludes all energy consumed in the Project by the main plant and equipment, lighting and other loads of the Project from the energy generated and as recorded by energy meter at interconnection point"

"1.7 Interconnection Facilities: means all the equipment and facilities including, but not limited to, all metering facilities, switch gear, substation facilities, transmission lines and related infrastructure, to be installed by the APTRANSCO by laying independent line to the designated Substation of APTRANSCO at the voltage specified in Article 1.14 at the company's expense from time to time through out the term of this Agreement necessary to enable the APTRANSCO to economically, reliably and safely receive Delivered Energy from the Project in accordance with the terms of this Agreement.

Explanation 1: For Wind Farms the development charges shall be paid by the company at Rs 10 lakhs per MW as per existing government orders and APTRANSCO will provide evacuation facilities.

Explanation 2: The company based on Non-Conventional Energy Projects viz., Biomass, Mini Hydel and Municipal/

Industrial Waste etc. have to bear the entire expenditure of interconnection facilities for power evacuation as per the sanctioned estimate by the respective field officers".

"1.8 Interconnection Point: means the point or points where the Project and the APTRANSCO's grid system are interconnected at designated APTRANSCO substation. The metering for the Project will be provided at the interconnection point as per Article 4.1.

Explanation: In case of Biomass based Power Projects, Power Projects based on Waste to Energy and independent Mini Hydel/ Wind Power Projects the Interconnection Point will be designated APTRANSCO substation".

"1.9 Metering Date: Means mid-day (i.e. noon) of the 24th (twenty fourth) day of each calendar month, at the Interconnection Point".

"2.1 All the delivered energy at the interconnection point for sale to APTRANSCO will be purchased at the tariff provided for in Article 2.2 from and after the date of commercial operation of the project. Title to Delivered Energy purchased shall pass from the Company to the APTRANSCO at the Interconnection point".

"2.2 The company shall be paid the tariff for the energy delivered at the Interconnection point for sale to APTRANSCO at Rs. 2.25 paise per unit with escalation at 5% per annum with 1994-95 as base year and to be revised on 1st April of every year up to the year 2003-2004 subject to the condition that the purchase price so arrived does not exceed 90% of the prevailing H.T. Tariff of APTRANSCO. Beyond the year 2003-04, the purchase price by APTRANSCO will be decided by Andhra Pradesh Electricity Regulatory Commission. There will be further review of purchase price on completion of ten years from the date of commissioning of the project, when the purchase price will be reworked on the basis of Return on Equity, O&M expenses and the Variable cost".

"4.3 The meter readings from the main meters will form the basis of billing. If any of the meters required to be installed pursuant to Article 4.1 above are found to be registering inaccurately the affected meter will immediately be replaced".

"4.10.On the Metering Date each month meter readings shall be taken (and an acknowledgement thereof signed) by the authorized representatives of both parties".

"4.19.The company shall control and operate the Project. The APTRANSCO shall only be entitled to request the Company to reduce electric power and energy deliveries from the Project during a System Emergency, and then only to the extent that in the APTRANSCO's reasonable judgement such a reduction will alleviate the emergency. The APTRANSCO shall give the company as much advance notice of such a reduction as is practicable under the circumstances and shall use all reasonable efforts to remedy the circumstance causing the reduction as soon as possible. Any reduction required of the company hereunder shall be implemented in a manner consistent with safe operating procedures".

"5.1. For delivered Energy purchased, the company shall furnish a bill to the APRANSCO calculated at the rate provided for in Article 2.2, in such form as may be mutually agreed between the APTRANSCO and the Company, for the billing month on or before the 5th working day following the metering date".

"5.3. The APTRANSCO shall pay the bill on monthly basis as per Article 5.1by opening a revolving Letter of Credit for a minimum period of one year in favour of the Company".

31. The aforesaid Articles of the PPA, which were referred to by the learned counsel for the parties, do not recite that the delivered energy shall be determined by applying 30 minutes time block principle. In fact when the PPAs were entered into by and between the appellants and the first respondent, there was no provision to measure the delivered energy during the periods of 30 minutes time block. Obviously the parties did not bargain on the footing that delivered energy shall be calculated on the basis of 30 minutes time block. The parties bargained on the basis that billing will be based on the energy delivered to the first respondent during the period of one month and not during the periods of 30 minutes time block. According to original Article 1.4, extracted above, delivered energy with reference to any billing month meant, the kilo watt hours of electrical energy generated by the Project and delivered to the first respondent at the Interconnection point, as measured by the energy meters at the Interconnection point during the billing month. The metering date as per Article 1.9 is specified as mid-day of the 24th day of each calendar month, at the interconnection point. This also indicates that the

metering date is same for each calendar month and that date cannot be altered. In other words, the energy is not to be measured in time blocks of less than a month much less during the period of 30 minute time blocks. Even Article 4.3, on which much stress was laid by the learned counsel for the first respondent, does not help in arriving at the conclusion that delivered energy is to be measured during the period of 30 minute time blocks. Article 4.3 states that the meter readings from the main meters will form the basis of billing. Operation of Article 4.3 is controlled by Article 4.10 which postulates that on the metering date each month, meter readings shall be taken by both the parties. Therefore, the reading is required to be taken on the metering date i.e. 24th day of each calendar month and not earlier thereto. According to Article 5.3 of the PPA, the first respondent is required to pay the bill on monthly basis. The agreement, as per Article-7, is effective for a period of 20 years from the date of the Commercial Operation of the plant.

32. The learned counsel for the first respondent submitted that as per last 3 lines of Article-7 of the PPA, the incentives/conditions envisaged in the Articles of the agreement are subject to modification from time to time as per the directions of APERC, Government of Andhra Pradesh and APTRANSCO. He also submitted that APERC was competent to modify the terms of the agreement in consonance with Article-7 of the PPA and in exercise of its powers under Section 86(1)(a) of the Act.

33. The submissions advanced on behalf of the first respondent are untenable. A cursory look at the modification approved by the Commission would show that APERC did not accept 30 minutes time block principle. The first respondent had proposed the principle of 30 minutes time block for approval of the APERC but APERC approved the proposal partially. Both the proposals and the modification approved by the Commission of Article 1.4 have been earlier juxtaposed to understand the extent of the approval of the proposal by the Commission. Thus, the Commission merely approved the

principle 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 the PPA. Clause 1.4 as approved by the Commission also states that 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 payment. The words 'such periods' occurring in Article 1.4, approved by the Commission, have reference to the billing month and not to a time block of 30 minutes duration. The APERC did not incorporate the principle of 30 minutes time block in Explanation 2 to Article 1.4. Though the principle of 30 minutes time block was not incorporated in the modification approved by the Commission, it brought the concept in the impugned order and permitted the first respondent to apply the same for calculating the delivered energy. We fail to see how the Commission could apply the concept even without incorporating it in the modified Article 1.4 approved by it. PPA is for a period of 20 years and

in the circumstances it should not be modified for curtailing the incentives to the NCE generators. In a Full Bench decision dated June 2, 2006 rendered in Appeal Nos. 1,2,5 etc. of 2005 – Small Hydro Power Developers Associations & Ors. etc. Vs. Andhra Pradesh Electricity Regulatory Commission & Ors. etc., 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.

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. We are told that when delivered energy is calculated on the basis of 30 minutes time block principle, it is disadvantageous to the appellants as compared to the method of computing the delivered energy by measuring it on the due date viz. 24th of each month.

36. According to Article 9.2 of the PPA, modification of any clause of the PPA cannot be given effect to unless it is incorporated in the agreement. It is not in dispute that clause 1.4, as modified by the APERC has not been incorporated in the PPA. Therefore, clause 1.4 approved by the APERC, by its letter dated November 15, 2003 cannot be acted upon.

37. In view of the aforesaid discussion, the appeals are allowed. The order of the Andhra Pradesh Electricity Regulatory Commission dated June 2, 2006 is set aside and the first respondent is directed to calculate PLF on monthly basis to arrive at the purchasable energy limiting to 100% PLF after deducting auxiliary and captive consumption.

The Appeals are disposed of.

(Justice Anil Dev Singh)
Chairperson

(A.A. Khan)
Technical Member