Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 92 of 2007 and Appeal No. 138 of 2007

Dated: December 19, 2008.

Present: - Hon'ble Mrs. Justice Manju Goel, Judicial Member
Hon'ble Shri H.L. Bajaj, Technical Member

Appeal No. 92 of 2007

Jocil Limited
Dokkiparru
Guntur 522438 ...Appellant

Versus

1. ***Transmission Corporation of Andhra Pradesh Ltd.***
Vidyut Soudha,
Hyderabad

2. ***Southern Power Distribution Company of Andhra Pradesh limited***
19-3-13(M), Upstairs, Renigunta Road
Rirupati- 517501

3. Andhra Pradesh Electricity Regulatory Commission
11-4-660, 4th and 5th floors,
Singareni Bhavan, Red Hills
Lakdikapool, Hyderabad-5400004.....Respondents

(The corrected version as per orders of Hon'ble Court-II dated 18.3.2009 in IA No.103 of 2009 is shown in Italics and bold.)

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No. of corrections

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11-4-660, 4th and 5th floors,
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Lakdikapool, Hyderabad-5400004…….Respondents

Counsel for the appellant: Ms M. Malika Choudhuri
Mr. K. Gopal Choudhary
Ms Mamta Choudhary

Counsel for the respondent: Mr. K.V. Mohan
Mr. K.V. Balakrishna for APERC
Ms Ruchika Rathi for APTRANSCO
Mr. P.Shuiva Rao,
Ms Shikha Ohri
Mr. P. Umapathi
Mr. Sanjay Sen

(The corrected version as per orders of Hon'ble Court-II dated 18.3.2009 in IA No.103 of 2009 is shown in Italics and bold.)

Judgment

Per Hon'ble Mr. H.L. Bajaj, Technical Member.

Appeal No. 92 of 2007 challenges the order of the Andhra Pradesh Electricity Regulatory Commission (APERC or the Commission in short) dated April 21, 2007 passed in O.P. No. 27 of 2004. Appeal No. 138 of 2007 challenges the APERC order dated September 14, 2007 in O.P.No. 6 of 2007.

2. In both the appeals No. 92 and 138 of 2007, similar issues have been agitated by the appellant against the impugned orders of the Commission. In view of the similarity of grounds of appeals and the issues involved we have heard both the appeals together. We have taken appeal No. 92 of 2007 as reference and the decisions in this appeal will apply mutatis mutandis to appeal No. 138 of 2007 also.

3. The facts of the case as brought out by the appellant are given hereinunder in brief:

4. A 6 MW biomass co-generation power plant was established by the appellant in pursuance of the policy of the Government of India for the promotion of non-conventional energy projects and co-generation projects, the National Programme on Biomass Power/Co-Generation and the policy and directions issued by the state Government providing for incentives for the establishment of such projects. Being a cogeneration power plant, it is essential for appellant to produce the necessary quantity of steam at the required pressures for its manufacturing process. This is an inherent priority for operating the plant, and the electricity is generated consequently. A part of the electricity so generated is consumed by the appellant for its manufacturing process and the surplus electricity generated is sold. The quantity of such surplus energy also varies from time to time according to the requirements of steam and the captive consumption of electricity for the appellant's manufacturing process.

5. The appellant entered into a Power Purchase and Wheeling Agreement dated April 12, 2000 with the first

respondent which provided for the wheeling of surplus electricity sold to third parties and for the purchase by the first respondent of the whole or part of the surplus electricity. The said agreement provided, in pursuance of the guidelines of the Government of India and the policy directions of the state Government, for a wheeling charge at 2% in case of third party sale.

6. Upon an application of the appellant the Commission accorded consent to the captive consumption valid up to June 30, 2003 under Section 21 (3) of the Andhra Pradesh Electricity Reform Act, 1988, read with Section 44 of The Electricity (Supply) Act, 1948 by order dated January 24, 2001. The power plant was commissioned on March 26, 2001.

7. In order to enable sales of surplus energy to third parties, the appellant had applied to the Commission on January 04, 2001 under Section 16 of the Andhra Pradesh Electricity Reforms Act, 1998 for exemption from the requirement to have a licence. By an order dated May 03, 2001 in O.P. No. 76 of

2001 the Commission granted a temporary exemption effective from April 24, 2001 up to the billing month of June 2001 for the supply of electricity to the consumers specified in the agreement dated April 25, 2001 subject to any further orders of the Commission in other pending proceedings before it.

8. By an order dated June 20, 2001 in O.P. No. 1075 the Commission directed inter alia that the power generated by non-conventional energy developers is not permitted for sale to third parties and that the developers of non-conventional energy shall supply power generated to the first respondent and/or the distribution licensees. In terms of the said order dated June 20, 2001, the first respondent was obliged to pay for all the surplus energy fed into the grid by the ***appellant*** at the rate of Rs. 2.25 per unit with 5% escalation per annum with 1994-95 as the base year. Accordingly, the price payable for the energy during 2003-04 was Rs. 3.48 per unit.

9. In view of the order of the Commission dated June 20, 2001, the appellant entered into a Power Purchase Agreement

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dated July 06, 2002 valid up to June 30, 2003 with the first respondent.

10. In pursuance of the Power Purchase Agreement dated July 06, 2002, all the surplus electricity of the appellant was duly exported to the first respondent's grid and the same was duly purchased and paid for by the first respondent during the entire period from July, 2002 up to April, 2003.

11. In response to the first respondent's letters seeking Commission's consent for the draft standard Power Purchase Agreement in respect of non-conventional power projects based on bio-mass and bio-mass co-generation the Commission convened a meeting on December 05, 2002 with the first respondent and the Bio-mass Power Project Developers Association. Thereafter, the Commission issued directions dated January 06, 2003 inter alia, directing the first respondent to make provision for reduced captive consumption with a corresponding increase in the quantum of power export to the grid and to amend the existing agreements

or enter into new Power Purchase Agreements as per the draft approved and the directions given.

12. By order dated February 05, 2003 in proceedings No. APERC/Dir(Engg)/CPP/jocil/OP No. 101/03/10 the Commission granted renewal of consent for captive consumption up to June 30, 2004 and also allowed reduction in the capacity intended for captive use by the appellant to 2 MW.

13. By letter dated February 18, 2003 the appellant informed the first respondent that the Commission had granted renewal of permission for reduced captive consumption by proceedings dated February 05, 2003 and enclosing a copy of the said proceedings and requesting the first respondent to extend/renew the Power Purchase Agreement for a period of one year with effect from July 01, 2003. By letter dated May 10,2003 the appellant requested that a Power Purchase Agreement be entered into for a period of 20 years as it was understood from biomass co-generation power suppliers that

Power Purchase Agreements were entered into with them for a period of 20 years irrespective of the permission given by the Commission for captive power consumption.

14. The Electricity Act, 2003 came into effect from June 10, 2003 and thereafter no consent of the Commission was required for captive use of any part of the energy generated from the appellant's plant.

15. By letter dated June 26, 2003 the first respondent indicated inter alia, that the first respondent will purchase power from the appellant's project for a limited period of three months with effect from July 01, 2003 to September 30, 2003 and that the utilization of power for captive use was 2 MW as approved by the Commission and that the auxiliary consumption was limited to 0.6 MW as sanctioned by Non-conventional Energy Development Corporation of Andhra Pradesh (NEDCAP) and that the purchase of power from the appellant's project is limited to 2.4 MW only and that the first respondent was not willing to purchase additional capacity.

16. By letter dated June 26, 2003 the appellant brought to the notice of the first respondent that the Commission had reduced the captive consumption from 3.6 MW to 2.6 MW (including auxiliary consumption). The appellant also drew attention to the appellant's letters dated February 18, 2003 and May 10, 2003 for renewal of the Power Purchase Agreement and the first respondent was requested to take the increase in the exportable surplus power on record and renew the agreement.

17. Meanwhile for the billing month of May 2003 the appellant was paid for only 1728000 units as against the actual export of 1756500 units and the appellant was given to understand that the balance 28500 units were considered by the first respondent as exported in excess of capacity indicated in the agreement.

18. By letter dated July 01, 2003 the appellant made a representation to the Commission requesting the Commission

to direct the first respondent to accept purchase of the entire surplus power as per the approval of the Commission for captive consumption and to enter into the Power Purchase Agreement and to pay for the balance units of the billing month of May, 2003.

19. By letter dated August 30, 2003 the Commission was requested by the appellant to direct the first respondent to renew the agreement for the purchase of surplus power of 3.4 MW and to direct the first respondent to arrange payment for the unpaid energy that was exported during the billing months of May 2003 and July, 2003.

20. By letter dated September 26, 2003 addressed to the appellant, the first respondent stated inter alia that it is agreeable to purchase 2.4 MW power from the appellant's project up to March 31, 2004 but is not willing to purchase additional capacity; auxiliary consumption is limited to 0.6 MW and that the purchase price as approved by the Commission is Rs. 3.48 unit for 2003-04 and that the limited

purchase does not confer any rights to the appellant for further sale or otherwise and that the appellant's request for release of amounts towards excess energy over and above 2.4 MW cannot be considered.

21. On being called upon by the Commission by letter dated October 07, 2003 to furnish comments on the representation of the appellant, the first respondent submitted its objections by letter dated November 11, 2003 and prayed that the representation of the appellant may not be accepted.

22. By letter dated November 29, 2003 the appellant requested the Commission to direct the first respondent to release the balance for unpaid units for the months of May to October , 2003 and to renew the agreement for purchase of surplus power.

23. After receiving the first respondent's reply dated November 07, 2003 and upon taking into consideration the submission made therein by the first respondent, the Commission issued directions which were communicated by a

letter APERC/Secy/Dir(Engg)/DD-Tr/F.PPA/D.No. 2821/2003 dated December 05, 2003 stating that:

> *"APTRANSCO has to amend the PPA entered into with the above developers and purchase additional/surplus power on account of reduction in captive consumption as per the standard PPA approved by the Commission vide letter dated April 03, 2003 which provides 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."*

24. The appellant made a further representation dated January 05, 2004 to the Commission but the first respondent sent letter dated December 29, 2003 to the Commission requesting not to consider the request of the appellant for sale of additional power to the first respondent. The Commission's reiteration of directions were communicated by letter APERC/Secy/Dir(Engg)/DD.Tr/F.PPA/Comp/D No. 147/2004 dated January 28, 2004 of the Secretary of the Commission to the Chairman and Managing Director of the first respondent

APTRANSCO that the Commission had directed by letter dated December 05,2003 as below:

> *"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 Limited and make the payments"*

25. Again in response to the first respondent's letter dated December 29, 2003 to the Commission, the Commission reiterated the earlier directions and communicated the same by letter ALPERC/Secy/Dir(Engg)/DD-Tr/F.PPA/D No. 158/2004 dated January 01, 2004 as under:

> *" The APTRANSCO has to purchase additional/surplus delivered energy on account of reduction in captive consumption as per Commission's directions already given".*

26. By appellant's letter dated February 09, 2004 to the first respondent it was requested to renew the Power Purchase Agreement to purchase the entire surplus power from the

appellant as per the directions of the Commission. Another reminder dated March 30, 2004 was sent by the appellant to the first respondent for the renewal of the Power Purchase Agreement to purchase the entire surplus power as per the directions of the Commission. By letter dated February 27, 2004 the appellant sought release of payments held up for the months from May 2003 to November 2003.

27. Meanwhile, by order dated March 20, 2004 in R.P.No. 84/03 in O.P.No. 1075/2000, the Commission determined the revised tariff for non-conventional projects applicable from April 01, 2004 on a two-part tariff basis. That order was subsequently revised by the Commission by order dated July 05, 2004 in R.P. Nos. 3 and 4 of 2004 in R.P. No. 84/03 in O.P. 1075/2000 upon a review petition filed on behalf of the biomass developers. The Appellate Tribunal set aside the aforesaid tariff order by judgment dated June 02, 2006 and directed that the same rate at which the power generated by NCE Developers supplied before passing of the tariff order be paid. The further appeals filed by the respondents before the

Hon'ble Supreme Court are pending. Pending disposal of the appeal before the Hon'ble Supreme Court, the biomass energy developers including the appellant were and are continuing to be paid by the second respondent as per the interim orders subsisting during the proceedings before the High Court and the Appellate Tribunal.

28. The first respondent sent letter dated May 13, 2004 to the appellant stating that it is agreeable for renewal of the Power Purchase Agreement for a period of 20 years from the commercial operation date of the project with power purchases limited to 2.4 MW only as per the conditions communicated by the first respondent in its letter dated September 26, 2003.

29. By letter dated May 15, 2004 the appellant objected to the limiting of the power purchases as stated by the first respondent in its letter dated May 13, 2004 and requested the first respondent to renew the Power Purchase Agreement to purchase the surplus power as per the approval of the

Commission in its proceedings dated February 05, 2003, April 03, 2003, December 05, 2003 and January 30, 2004.

30. The first respondent sent a letter dated June 09, 2004 to the Commission stating that it had decided to purchase the surplus energy due to reduction in captive use by all non-conventional energy projects. The second respondent proposed to pay only the variable cost as determined in the order dated March 20, 2004 in R.P. 84/2003 in O.P. 1075/2000 which is effective from 2004-05 onwards. The appellant had no notice of the said letter dated June 09, 2004 of the first respondent to the Commission and was not aware of the same nor of any proceedings before the Commission.

31. In response to the appellant's request dated May 30, 2004 for a copy of the approved standard draft agreement, the Commission advised the appellant by letter dated June 11, 2004 to approach the first respondent for the standard Power Purchase Agreement approved by the Commission as well as for the directions for amendment in the Power Purchase

Agreement issued by the Commission from time to time. Accordingly, the request was made to the first respondent by the appellant's letter dated June 17, 2004.

32. In the above background the appellant received the first respondent's letter dated July 08, 2004 stating therein that the issue of purchase of surplus energy due to reduction in captive consumption by non-conventional energy projects at variable cost fixed for respective projects by the Commission is under examination by the Commission. Appellant addressed a letter dated July 17, 2004 to the first respondent setting out all the facts and the objections and contentions of the appellant in detail.

33. The appellant filed O.P. No. 27 of 2004 before the Commission praying that the Commission may enforce compliance with its directions to the first respondent to:

(a) make payment of the aggregate amount of the Rs. 81,62,688/-which was deducted by the first respondent

from the amount due and payable to the appellant for the energy exported by the appellant to the first respondent for the months of May 2003 to August, 2003, October 2003 to January, 2004 and April 2004 and

(b) enter into a Power Purchase Agreement with the appellant to purchase the entire surplus energy exported by the appellant to the first respondent after meeting the actual auxiliary consumption of the appellant's power plant and the appellant's captive consumption without any limitations on the basis of any notional capacity or otherwise and without insisting upon any unfair, unreasonable exceptionable or unauthorized terms and conditions.

34. Appellant prayed that the Commission may take appropriate action according to law under sections 142 and/or 146 of The Electricity Act, 2003 and also take such other action as the Commission considers appropriate, fit or necessary in the facts and circumstances of the case.

35. The first respondent filed writ petitions before the High Court challenging the Commission's letter dated August 09, 2004 and November 17, 2004 whereby the payments for the delivered energy on account of reduction of captive consumption were to be regulated as per the approvals given by the Commission and at the rates as applicable. The High Court had passed an interim order suspending further proceedings in pursuance of the order dated August 09, 2004. Subsequently, after the Appellate Tribunal for Electricity commenced functioning, the writ petitions were disposed of with liberty to approach the Appellate Tribunal. The first and second respondents filed appeal No. 4 and 6 of 2006 before the Appellate Tribunal for Electricity against the Commission's letter dated August 09, 2004 and order dated November17,2004.

36. By an order dated September 28, 2006 the Appellate Tribunal dismissed the Appeals 4 and No. 6 directing that the

Commission hold proceedings in O.P. No. 27 of 2004 and decide the same in accordance with law.

37. Pursuant to the aforesaid order of the Appellate Tribunal the Commission took up hearing of the O.P. No. 27 of 2004. The second respondent herein was impleaded as a party in view of the notification by the state Government of the Third Transfer Scheme in G.O. Ms No. 58 Energy (Power-III) dated June 07, 2005 whereby all the obligations of the first respondent with respect of purchase of electricity from the appellant's power plant stood transferred and vested in the second respondent.

38. By the Impugned Order dated April 21, 2007 the Commission held that the appellant had failed to make out a case for punitive action against the first and second respondents u/s 142 or 146 and that direction cannot be given to the respondents to enter into PPA with the appellant as the said respondents have not come forward to enter into PPA with the appellant herein and that the appellant is

entitled to payment for the surplus energy received by the first and second respondents to the extent of variable cost.

39. Aggrieved by the Commission's order dated April 21, 2007 passed in O.P. No. 27 of 2004 the appellant has filed this appeal before this Tribunal.

The appellant has sought the following reliefs:

(a) To allow the appeal and set aside the order of the Commission dated April 21, 2007 in O.P. 27 of 2004 and

(b) To declare that the first and second respondents are bound to comply with the directions dated December 05, 2003, January 28, 2004 and January 30, 2004 given by the Commission and consequently declare that the said respondents are bound to purchase the additional surplus energy arising out of reduction of captive consumption and pay for the same at the same rate as the rest of the surplus energy purchased and paid for by the respondents and

(c) To direct the first and/or second respondents to make payment of the aggregate amount of Rs. 81, 62, 688/- which was deducted by the first respondent from the amount due and payable to the appellant for the energy exported by the appellant to the respondent for the months of May, 2003, July, 2003 to August, 2003, October, 2003 to January, 2004 and April, 2004 together with interest at 15% per annum and

(d) To direct the second respondent to enter into a power purchase agreement with the appellant to purchase the entire surplus energy generated by the appellant from the 6 MW co-generation biomass power plant and exported by the appellant to the second respondents after meeting the actual auxiliary consumption of the appellant's power plant and the appellant's captive consumption, without insisting upon any unreasonable, unfair exceptionable or unauthorized terms and conditions; and

(e) To hold that the first respondent has willfully defied and disobeyed the directions dated December 05,2003, January 28, 2004 and January 31, 2004 of the

Commission and consequently to take such appropriate action according to law under Sections 142 and/or 146 of the Act as the Tribunal considers appropriate, fit or necessary in the facts and circumstances or the case and

(f) To award costs of the appellant throughout and in this appeal

(g) And/or pass such other order as this Tribunal may deem fit and proper so that justice may be done.

40. In appeal No. 138 of 2007 the appellant has challenged order dated September 14, 2007 of the Commission in O.P. No. 6 of 2007. The appellant had, in O.P. No. 6, as petitioner sought for enforcement of directions under Section 86(1) (b), 86(1)(e), 86(1) (f), 142 and 146 of The Electricity Act, 2003 praying the Commission to enforce its directions dated December 05, 2003, January 28,2004 and January 30, 2004 and the order dated June 20,2001 in O.P. No. 1075 of 2000(ii) direct the respondents according to their respective liabilities to make payment of Rs. 1,47,86,334/- remaining unpaid in respect of the energy supplied during the months of May 2004

to March 2006 together with interest at 15% per annum (iii) to take such penal or other action according to law for non-compliance with directions and order of the Commission and (iv) pass such further or other order that the Commission deems fit and expedient in the facts and circumstances of the case.

The Commission in its order dated September 14, 2007 had concluded that there is no force in the arguments of the petitioner as there is no subsisting and valid PPA between the parties and directed the respondents to pay an amount of Rs. 28,81,573/- only to the petitioner as variable cost as decided by the Commission in O.P. No. 27 of 2004.

41. In Appeal No. 138 of 2007 the appellant has sought the following reliefs:

(a) To allow the appeal and set aside the order of the Commission dated September 14, 2007 in O.P. 6 of 2007. To direct the Ist and/or 2nd respondents, according to their respective liabilities to make payment of the amount of Rs. 1,47,86,334/- remaining unpaid in respect of the

energy supplied during the months of May, 2004 to March, 2006 subject to adjustment depending on the final outcome of the appeals arising from the Commission's order dated March 20, 2004 in R.P. 84/2003 in O.P. 1075/2000 which are pending before the Hon'ble Supreme Court and/or any other proceedings consequent thereto with respect to the rate together with interest at 15% per annum.

(b) To take such penal or other action according to law as the Commission ought to have taken against the respondents for non compliance with the directions and orders of the Commission.

(c) To award costs of the appellant throughout and in this appeal

42. The appellant in its Memorandum of Appeal has raised many issues and contentions. However, during the hearings the appellant has mainly pressed as follows.

43. Mr. Choudhary, learned counsel appearing for the appellant stated that as per the order dated June 20, 2001 of the Commission in O.P. No. 1075/2000 all surplus energy could be sold to the APTRANSCO/Discoms of A.P. Only the third party sales, previously allowed, was prohibited. In view of this APTRANSCO was obliged to purchase all the surplus power of the appellant and to contract for such purchase in terms of the Commission's order. Learned counsel asserted that capacity for 2.4 MW for sale to APTRANSCO in the PPA and the period of PPA up to June 30, 2003 was only to accord approval in terms of consent under Section 44 of The Electricity (Supply) Act, 1948 for captive consumption. He claimed that the intention was to vary the same according to renewal/revised consent of APTRANSCO for subsequent period. The obligation of APTRANSCO to continue to purchase all surplus energy in term of Commission's order dated June 20, 2001 was not curtailed. He contended that A.P. Transco was under obligation to purchase surplus power from the appellant by amending and extending the PPA mutatis mutandis.

44. Learned counsel contended that the directions of the Commission dated January 6, 2003 issued with reference to APTRANSCO's letter, draft standard PPAs and after holding a meeting with the Biomass Developers Association and the APTRANSCO are binding upon APRRANSCO. These directions provided for corresponding increase in quantum of export to grid due to reduced captive consumption and for amending the existing PPAs. Accordingly, standard PPA approved by the Commission vide letter dated April 03, 2003 provides for reduction in captive consumption and purchase of additional power by APTRANSCO in case of exigency or otherwise and the same has been reiterated in the Commission's letter of December 05, 2003 and subsequent letter. He emphasized that these directions were communicated by the Secretary of the Commission and these are all rooted upon Commission's order dated June 20, 2001, and the same were not challenged by the APTRANSCO and therefore are binding upon it.

45. Learned counsel contended that in similar circumstances, in the case of GMR, the Commission directed payment for increased supply on reduction of captive consumption which was even upheld by the Tribunal in Appeals No. 7 and 11 of 2006.

46. Learned counsel contended that the Commission should have allowed the payment of energy charges including both fixed and variable cost of generation and that mere variable cost payment would be grossly unreasonable and unjust.

47. Learned counsel appearing for the respondents have drawn our attention to Article 10 of the PPA which reads as under:-

> *"If as a result of any act, restraint of regulations by the APERC, state or central Government authority, department, Ministry, whether part of legislative, or judicial branch, the Company's ability to use the energy for captive consumption can be materially abridged or abrogated, at the request of Company, the A.P. Transco agrees to negotiate in good faith with the Company for an*

arrangement mutually agreed by both parties, whereby, the Company would sell and the A.P. Transco would purchase the energy produced by the project."

48. Learned counsel contended that as per the PPA the additional surplus energy available and the payment would not be dealt with on the same terms as the rest of the energy being purchased and it would be on different terms and conditions mutually agreed by both the parties. The first respondent had intimated on June 26, 2003 that it would purchase the agreed capacity of 2.4 MW for additional limited period of September 30, 2003 and thereafter finally it was extended to March 31, 2004 only. After this date, the counsel emphasized that there is no binding contract between the parties and there is no obligation for respondent 1 and 2 to purchase any energy from the appellant.

49. Learned counsel appearing for respondent 1 and 2 contended that on December 05, 2003 APERC issued letter directing APTRANSCO to amend the PPA with 3 developers viz.

M/s Balaji Agro Oil Ltd., (2) M/s Gowthami Solvent Oil Ltd and (3) M/s Jocil Ltd. to purchase additional surplus on account of reduction in captive consumption. He averred that before issuing the aforesaid direction the Commission did not consider or hear the first respondent and therefore the mere directions given without hearing the respondent cannot be considered as a decision of the Commission. Learned counsel stated that the first respondent had conveyed vide its letter dated June 09, 2004 expressing his willingness to purchase the surplus energy from the appellant and others at variable cost only and accordingly amended draft PPA was sent to the appellant on July 08, 2004. Subsequently the Commission intimated the first respondent that payments for energy delivered by the appellant on account of reduction of captive consumption are to be regulated as per the approval given by the Commission, from time to time on this at the rate applicable. Learned counsel emphasized that this was the first time that the Commission expressed its views about the price for the surplus energy delivered. At this stage respondent 1 filed Review Petition to reconsider the issue of

price on the ground that the earlier directions were issued without hearing the respondents.

50. Learned counsel for the respondents contended that there is no similarity in the case of M/s GMR Technologies (Appeal No. 7 and 11 of 2006 before the Tribunal). In these appeals, the appellant had challenged the APERC order to the extent it directed the appellant to purchase all the surplus power delivered by GMR Technologies but there was an existing PPA in their case. In the case of the appellant in this appeal there is no agreement between the parties after March 31, 2004 and therefore the GMRT(Supra) is not applicable to the facts of the instant case.

51. Learned counsel for the respondents contended that there is no subsisting PPA between the parties and there is no obligation originating from the directions of January 28, 2004 by the Commission as these directions were given without even hearing the respondents. He contended that the directions issued by the Commission are in the nature of

advisory and supervisory and are not enforceable directions or orders issued by the Commission. He cited this Tribunal's observation in appeal No. 220 of 2006 and asserted that only directions issued exercising the quasi judicial functions and quasi legislative functions shall fall into the category of enforceable directions. As far as other directions are concerned the same are not issued as per prescribed procedure requiring a hearing and after considering the views of the party concerned and therefore the same cannot be held to be the enforceable directions to be followed by the parties. Moreover, he contended that after June 10, 2003 when the Act came into force the appellant is given liberty to go for third party sales but the appellant insisted on the respondents to purchase additional energy also.

52. Learned counsel for the respondents stated that the fixation of tariff for the co-generation projects can be determined in two parts as per guidelines of Government of India Notification dated November 06, 1996. The Commission has computed tariff applicable to co-generation plants in two

parts viz. fixed costs and variable costs vide its order dated March 20, 2004 in R.P. No. 84 of 2003 and in O.P. No. 1075 of 2000. He contended that the variable costs computed by the Commission in its order and the payment of the same to the appellant is legitimate as it has been determined only after hearing to the rival parties.

The following issues emerge for our consideration:-

A. Whether the Commission's directions dated December 05, 2003, January 28, 2004 and January 30, 2004 etc. requiring the respondents to i) purchase *additional surplus energy* due to reduction of captive consumption ii) to enter into Power Purchase Agreement to purchase the entire surplus energy generated by the appellant. and iii) to pay for the same as for the surplus energy purchased and paid were of binding nature and their non-adherence could lead to action under Section 142/ 146 of the Act?

B. Whether the Commission was justified in allowing the appellant only variable costs for the surplus energy sold to the respondent?

Issue A.

53. Admittedly the PPA was initially valid only till ***June*** 30, 2003 for a specific capacity of 2.4 MW which was subsequently extended in stages finally up to March 31, 2004. The PPA did contain a clause whereby the respondents could agree to initiate with the appellant for any arrangement mutually agreed to by both the parties. There is no legally binding contract between the parties after March 31, 2004. The existing agreement for purchase between the two parties can be changed only by mutual consent of the parties.

54. There is nothing on record to prove that the directions have been issued after hearing the parties as per procedure laid down and due consideration by the Commission as is the case in other valid orders of the Commission. The directions given in the letter signed by the Secretary are in the nature of correspondence and cannot be termed as directions of the Commission as understood under the Act or Regulations.

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55. The first and second respondents are both commercial entities and they have to take their decisions with regard to purchase of power depending upon their requirements and availability of power at competitive rates. As brought out above the Power Purchase Agreement between the two parties cannot be influenced by the third party as the consequences of the agreement have to be borne by the parties to the agreement. In our view, unless the appellant and the respondents agree to enter into PPA the Commission cannot influence or enforce the signing of the agreement between the two parties.

56. The directions issued by the Commission are at best in nature of suggestions or advisory and are, therefore, not enforceable. Therefore, no action under Section 142 and 146 could have been taken by the Commission to enforce its directions.

57. The Commission's letter requiring the respondent No. 2 to enter into a PPA to purchase additional surplus energy were

not directions of the Commission which could be enforced by use of provisions of Sections 142/146 of the Act.

Issue B:

58. Whether the Commission was justified in allowing The Appellant only variable costs for the surplus energy sold to the respondent?

59. As far as the energy which has already been fed into grid of the respondents No. 1 and 2, considering that the respondents have enjoyed benefit of a non-gratuitous act, it is relevant to extract Section 70 of the Indian Contract Act, 1872 below:-

> *" 70 Obligation of person enjoying of non-gratuitous act.- Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered".*

60. Concedingly electricity has been fed into grid of the Respondent No. 1 and 2, by the very nature of electricity the

same has been simultaneously consumed by the respondents. In view of this the respondents are bound to make compensation to the appellant even in the absence of any explicit consent granted by them to the appellant to feed the amount of energy over and above the contracted quantity corresponding to 2.4 MW. So as to determine the amount of compensation it is necessary to understand that generation tariff comprises of a fixed cost and a variable cost. Fixed cost covers return on equity, depreciation, interest on loan, interest on working capital, O&M expenses and Income Tax. The variable component is the cost which has to be expended by the generator on fuel.

61. Accordingly, the amount of compensation payable by the respondents to the appellant is only the variable cost. This has been allowed by the Commission. Fixed cost being the sunk lost would anyway have been borne by the appellant irrespective of the energy actually generated.

62. Therefore, in this view of the matter we decide that the Commission's order need not be interfered with.

63. The appeal under reference fails on all counts and is, therefore, dismissed.

64. As observed by us at para 2 (supra), due to similarity of grounds, Appeal No. 138 of 2007 also fails and is dismissed.

No order as to costs.

(H.L.Bajaj)
Technical Member

(Mrs. Justice Manju Goel)
Judicial Member

GB
No. of corrections