

Before the Appellate Tribunal for Electricity
Appellate Jurisdiction
New Delhi

Appeal Nos.1, 2, 5, 6, 7, 8, 9, 10, 12, 15, 16, 17, 18, 19, 20, 21, 22, 34, 46, 47, 48, 49, 50, 52,
58, 67 and 80 of 2005

Dated this 2nd day of June 2006

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

Appeal Nos.5, 6, 7, 8, 9, 10, 16, 17, 18, 19, 52, 58 of 2005:

- | | |
|---|------------------------------|
| 1. Small Hydro Power Developers Association | Appellant in A.No.5 of 2005 |
| 2. K.M. Power Pvt. Ltd. | Appellant in A.No.6 of 2005 |
| 3. Manihamsa Power Projects Ltd. | Appellant in A.No.7 of 2005 |
| 4. PMC Power Pvt. Ltd. | Appellant in A.No.8 of 2005 |
| 5. Bhavani Hydro Power Projects Pvt Ltd. | Appellant in A.No.9 of 2005 |
| 6. NCL Energy Ltd. | Appellant in A.No.10 of 2005 |
| 7. Kallam Spinning Mills Ltd. | Appellant in A.No.16 of 2005 |
| 8. Fivess Power Projects Pvt. Ltd. | Appellant in A.No.17 of 2005 |
| 9. Srinivasa Power Projects Pvt. Ltd. | Appellant in A.No.18 of 2005 |
| 10. Janapadu Hydro Power Projects Pvt. Ltd. | Appellant in A.No.19 of 2005 |
| 11. Balaji Energy Pvt. Ltd | Appellant in A.No.52 of 2005 |
| 12. Saraswati Power & Industries Pvt. Ltd. | Appellant in A.No.58 of 2005 |

.....Appellants

Versus

1. Andhra Pradesh Electricity Regulatory Commission
2. Transmission Corporation of Andhra Pradesh Ltd.
3. Central Power Distribution Company of Andhra Pradesh Ltd.
4. Southern Power Distribution Company of Andhra Pradesh Ltd.
5. Northern Power Distribution Company of Andhra Pradesh Ltd.
6. Eastern Power Distribution Company of Andhra Pradesh Ltd.

.....Respondents in all appeals

Appeal No.1 of 2005

Sai Renewable Power Pvt. Ltd
1-10-208, Ashoknagar, Hyderabad

.....Appellant

Versus

- 1 Transmission Corporation of Andhra Pradesh Ltd.
Vidyut Soudha, Hyderabad
- 2 A.P. Eastern Power Distribution Company Ltd.
Visakhapatnam
- 3 Union of India, represented by its Secretary, Ministry of Energy
- 4 Non-conventional Energy Development Corporation
Nampally, Hyderabad (AP)
- 5 Ministry of Non-Conventional Energy Sources
Block No.14, C.G.O. Complex, Lodhi Road, New Delhi
- 6 A.P. Electricity Regulatory Commission
Singareni Bhavan, Red Hills, Hyderabad

.....Respondents

Appeal No.2 of 2005

M/s Biomass Energy Developers Association
E-506, Kirthi Apartments Ameerpet, Hyderabad

.....Appellant

Versus

- 1 A.P. Electricity Regulatory Commission
11-4-660, 4&5th Floor, Singareni Bhavan, Red Hills, Hyderabad
- 2 A.P. Transco rep. by its Chairman & Managing Director
Vidyut Soudha, Somajiguda, Hyderabad
- 3 Rayalaseema High Strength Hypo Ltd.
Kurnool District, Andhra Pradesh

.....Respondents

(R-1 to R-2 are Contesting Respondents & R-3 is Proforma Respondent)

Appeal No.12 of 2005

M/s Active Power Corporation Pvt. Ltd.
B-68, Journalist Colony, Jubilee Hills, Hyderabad

.....Appellant

Versus

- 1 A.P. Electricity Regulatory Commission

11-4-660, 4&5th Floor, Singareni Bhavan, Red Hills, Hyderabad
2 The A.P. Transmission Corporation Ltd.
Vidyut Soudha, Somajiguda, Hyderabad

.....Respondents

Appeal No.15 of 2005

Kakatiya Cement Sugars & Industries Ltd.
1-10-140/1, Ashoknagar, Hyderabad, AP

.....Appellant

Versus

1 The A. P. Electricity Regulatory Commission
11-4-660, 4&5th Floor, Singareni Bhavan, Red Hills, Hyderabad
2 The A.P. Transmission Company Ltd.
Vidyut Soudha, Somajiguda, Hyderabad

.....Respondents

Appeal No. 20 of 2005

M/s The South Indian Sugar Mills Association
At Door No.5-9-22/69, Adarshnagar, Hyderabad

.....Appellant

Versus

1 Andhra Pradesh Electricity Regulatory Commission
11-4-660, 4&5th Floor, Singareni Bhavan, Red Hills, Hyderabad
2 Transmission Corporation of Andhra Pradesh Ltd.
Represented by its Chairman & Managing Director
Vidyut Soudha, Somajiguda, Hyderabad
3 Central Power Distribution Company of Andhra Pradesh Ltd.
Represented by its Managing Director
11-5-423/1/A, First Floor, Singareni Collieries Bhavan, Lakdi-ka-pul
Hyderaad
4 Southern Power Distribution Company of Andhra Pradesh Ltd.
Represented by its Managing Director
Upstairs, Hero Honda Showrom, Renigunta Road, Tirupati
5 Northern Power Distribution Company of Andhra Pradesh Ltd.
Represented by its Managing Director
11-5-423/1/A, First Floor, 1-7-668, Postal Colony, Hanamkonda,
Warangal
6 Eastern Power Distribution Company of Andhra Pradesh Ltd.
Represented by its Managing Director
Sai Shakti, Opp. Saraswati Park, Daba Gardens
Visakhapatnam

....Respondents

Appeal No.21 of 2005

M/s The South Indian Sugar Mills Association
At Door No.5-9-22/69, Adarshnagar, Hyderabad

.....Appellant

Versus

1. Andhra Pradesh Electricity Regulatory Commission
11-4-660, 4&5th Floor, Singareni Bhavan, Red Hills, Hyderabad
2. Transmission Corporation of Andhra Pradesh Ltd.
Represented by its Chairman & Managing Director
Vidyut Soudha, Somajiguda, Hyderabad
3. Central Power Distribution Company of Andhra Pradesh Ltd.
Represented by its Managing Director
11-5-423/1/A, First Floor, Singareni Collieries Bhavan, Lakdi-ka-pul
Hyderabad
4. Southern Power Distribution Company of Andhra Pradesh Ltd.
Represented by its Managing Director
Upstairs, Hero Honda Showrom, Renigunta Road, Tirupati
5. Northern Power Distribution Company of Andhra Pradesh Ltd.
Represented by its Managing Director
11-5-423/1/A, First Floor, 1-7-668, Postal Colony, Hanamkonda,
Warangal
6. Eastern Power Distribution Company of Andhra Pradesh Ltd.
Represented by its Managing Director
Sai Shakti, Opp. Saraswati Park, Daba Gardens
Visakhapatnam

....Respondents

Appeal No.22 of 2005

M/s Vensa Bio-Tek Limited
East Godavari District, Andhra Pradesh

.....Appellant

Versus

1. A.P. Electricity Regulatory Commission
11-4-660, 4&5th Floor, Singareni Bhavan, Red Hills, Hyderabad
2. The A.P. Transmission Company Ltd.
Vidyut Soudha, Somajiguda, Hyderabad
3. Non-conventional Energy Development Corporation
Nampally, Hyderabad (AP)
4. Union of India, represented by its Secretary, Ministry of Energy

.....Respondents

Appeal No. 34 of 2005

Sagar Sugars & Allied Products Limited
Nelavoy Village, Sri Rangarajapuram Mandal
Chittoor District, Andhra Pradesh

.....Petitioner

Versus

1. A.P. Electricity Regulatory Commission
11-4-660, 4&5th Floor, Singareni Bhavan, Red Hills, Hyderabad
2. The A.P. Transmission Company Ltd.
Vidyut Soudha, Somajiguda, Hyderabad

.....Respondents

Appeal No.47 of 2005

M/s Raus Power Ltd.
6-3-347/13, Flat No.201, Tejaswi Apt., Panjagutta, Hyderabad

.....Appellant

Versus

1. A.P. Electricity Regulatory Commission
Red Hills, Hyderabad
2. The A.P. Transmission Company Ltd.
Vidyut Soudha, Somajiguda, Hyderabad
3. Non-Conventional Energy Development Corporation
Nampally, Hyderabad, Andhra Pradesh

.....Respondents

Appeal No. 67 of 2005

M/s Gayatri Sugars Limited
6-3-663/E, Flat No.301, Diamond House
Behind Topaz Building, Punjagutta, Hyderabad

.....Appellant

Versus

1. Andhra Pradesh Electricity Regulatory Commission
Singareni Bhavan, Red Hills, Hyderabad
2. Transmission Corporation of Andhra Pradesh Ltd.
Vidyut Soudha, Hyderabad
Represented by its Chairman & Managing Director
3. Central Power Distribution Company of Andhra Pradesh Ltd.
11-5-423/1/A, First floor, Singareni Collieries Bhavan
Lakdi-ka-put, Hyderabad
Represented by its Managing Director

4. Southern Power Distribution Company of Andhra Pradesh Ltd.
Upstairs, Hero Honda Showroom, Renigunta Road, Tirupati
Represented by its Managing Director
5. Northern Power Distribution Company of Andhra Pradesh Ltd.
11-5-423/1/A, First Floor, 1-7-668, Postal Colony
Hanamkonda, Warangal
Represented by its Managing Director
6. Eastern Power Distribution Company of Andhra Pradesh Ltd.
Sai Shakti, Opp. Saraswati Park, Daba Gardens
Visakhapatnam
Represented by its Managing Director

....Respondents

Appeal No.80 of 2005

1. Roshini Powertech Ltd.
E-506, Keerthi Apartments, Hyderabad
2. Shree Papers Ltd.
G. Rangampeta, Peddapuram Mandal E.G. District
Andhra Pradesh
3. Agri Gold Projects Ltd.
40-1-21/21, 2nd floor, Catholic Complex
M.G. Road, Vijayawada, A.P.
4. Rithwik Energy Systems Ltd.
Lanco House, 141, Avenue 8, L V Prasad Marg
Road No.2, Banjara Hills, Hyderabad
5. Rithwik Power Projects Ltd.
91/B, Sagar Society, Road No.2, Banjara Hills, Hyderabad
6. Vijaya Agro Products Pvt. Ltd.
Enikepadu 521 108, Vijayawada, A.P.
7. Jocil Ltd.
Box No. 216 Arundalpet, Guntur, A.P.
8. S.L.S. Power Ltd.
N.V. Garden, Ashoknagar, Nellore, A.P.
9. Balaji Agro Oils Ltd.
74.2.19, Old Check Post Centre, Patmata, Vijayawada, A.P.
10. Matrix Power Pvt. Ltd.
8-2-269/3/1, No.257, Road No.2, Banjara Hills No.2, Hyderabad
11. Sri Balaji Biomass Power Pvt. Ltd.
1-8-50/2/4/1, Plot No.32, Krishnanagar Colony
137, PG Road, Secunderabad, A.P.
12. Varam Power Projects Pvt. Ltd.
8-4-120/3, Raja Complex, G.T. Road Srikakulam, A.P.
13. Sri Kalyani Agro Products & Industries Ltd.
Prathipadu – 534146, Pentapadu Mandal, Tadepalligudem, W.G. Distt

14. Jyothi Bio Energies Ltd.
4th Floor, Mayank Towers, Raj Bhavan Road, Somajiguda, Hyderabad
15. Gouthami Bio Energies Ltd.
Gopalapuram Collectorate PO, Khammam 507 002, A.P.
16. Satyakala Power Projects Pvt. Ltd.
Ganguru 521 139, Penamaluru Mandal, Krishna Dist. A.P.
17. Saro Power and Infrastructure Ltd.
19-2-217/2, Mir Alam Tank road, Hyderabad
18. KMS Power Pvt. Ltd.
No.247, 3rd Floor, Dwarakapuri Colony, Punjagutta, Hyderabad
19. Indur Green Power Pvt. Ltd.
3-5-821, 1st Floor, Doshi Square, Hyderguda, Hyderabad
20. Shalivahana Projects Ltd.
No.94, Minerva House, S.D. Road, Secunderabad, A.P.
21. Veeraiah Non-conventional Power Projects Ltd.
Kurumaddali 521 157, Pamarru Mandal, Krishna Dist, A.P.
22. B. Seenaiiah & Co. (Projects) Ltd.
6-2-913/914, 5th Floor, Progressive Towers Khairatabad, Hyderabad
23. Vamshi Industries Ltd.
2-215 Sree Nagar Colony, Anaparthi 533 342 (A.P.)
24. Om Shakti Energies Ltd.
16-11-20/F Post Office Lane, Malakpet, Hyderabad
25. My Home Power Ltd.
V Floor, My Home Jupally, Opp. Hotel Green Park, Ameerpet, Hyderabad
26. Suchand Powergen Pvt. Ltd.
4-93, Ashok Plaza Chandanagar, Hyderabad
27. Clarion Power Corporation Ltd.
“Lanco House”, Avenue No.8, L.V. Prasad Marg, Road No.2,
Hanjara Hills, Hyderabad (AP)
28. Perpetual Energy Systems Ltd.
Flat No.104, Doshi Ford Bldg, Hyderguda, Hyderabad
29. Gowthami Solvent Oil Ltd.
P.B.No.1, Pydiparru, Tanuku 534211, W.G. Dist (AP)
30. Satyamaharshi Power Corpn. Ltd.
3rd Floor, Space Time City Estates, 3-6-612, Himayatnagar
X Road, Hyderabad (AP)

.....Appellants

Versus

1. A.P. Electricity Regulatory Commission
Singareni Bhavan, Red Hills, Hyderabad
2. A.P. Transco Rep. by its Chairman & Managing Director
Vidyut Soudha, Hyderabad

.....Respondents

Appeal Nos. 46, 48, 49, 50 of 2005:

Appeal No.46 of 2005

1. Central Power Distribution Company of Andhra Pradesh. Ltd.
2. Transmission Corporation of Andhra Pradesh Ltd.

.....Appellants

Versus

1. M/s Gayatri Agro Industrial Power Limited
2. M/s Suchand Power Generation Pvt. Limited
3. M/s Saro Poswer & Infrastructure Limited
4. M/s Sree Rayalseema Hi-Strength Hypo Limited
5. M/s NCL Energy Limited
6. M/s Srinivasa Power Projects (P) Limited
7. M/s Janapadu Hydro Power Projects
8. M/s KM Power Limited (located at Velpanur)
9. M/s KM Power Limited (located at Madhavaram)
10. M/s KM Power Limited (located at Madhavaram)
11. M/s Nile Limited
12. M/s BHEL (located at Ramagiri, Anantapur)
13. M/s BHEL (located at Ramagiri, Anantapur)
14. M/s IL & FS Windfarms Limited
15. M/s Veeramani Biscuit Industries Limited
16. M/s NEDCAP
17. M/s Selco International Limited
18. M/s My Home Power Ltd
19. M/s Ganapathi Sugars Limited
20. Andhra Pradesh Electricity Regulatory Commission

.....Respondents

Appeal No.48 of 2005

1. Eastern Power Distribution Company of Andhra Pradesh Ltd.
2. Transmission Corporation of Andhra Pradesh Limited

.....Appellants

Versus

1. M/s Vamshi Industries Limited
2. M/s Varam Power Projects (P) Limited
3. M/s Perpetual Energy Systems Limited
4. M/s Sri Kalyani Agro Products & Industries Limited
5. M/s Shree Papers Limited
6. M/s Gautami Solvent Oils Limited
7. M/s Vensa Biotek Limited

8. M/s Sai Renewable Power (P) Limited
9. M/s Deccan Sugars Limited
10. M/s Etikoppaka Co-operative Agricultural & Industries Society Limited
11. M/s Chodavaram Co-operative Sugars Limited
12. M/s Manihamsa Power Projects Limited
13. M/s GMR Technologies Limited
14. M/s Jeypore Sugar Company Limited
15. Andhra Pradesh Electricity Regulatory Commission

.....Respondents

Appeal No. 49 of 2005

1. Southern Power Distribution Company of Andhra Pradesh Ltd.
2. Transmission Corporation of Andhra Pradesh Limited

.....Appellants

Versus

1. M/s Matrix Power Pvt Ltd
2. M/s SLS Power Ltd.
3. M/s Roshni Power Tech. Ltd.
4. M/s Satyakala Power Projects Pvt. Ltd.
5. M/s KMS Power Ltd.
6. M/s Rithwik Energy System Ltd.
7. M/s Veeraiah Non-Conventional Power Projects Ltd.
8. M/s B. Seenaiiah & Co (Projects) Ltd.
9. M/s Agri Gold Projects Ltd.
10. M/s Sri Balaji Biomass Power (P) Ltd.
11. M/s Sathya Maharshi Power Corporation Ltd.
12. M/s Jyothi Bio Energy Ltd.
13. M/s Om Shakthi Renegies Ltd
14. M/s Jocil Limited
15. M/s Vijay Agro Products Pvt. Ltd
16. M/s Balaji Agro Oils Ltd.
17. M/s Shree Vaani Sugars Ltd.
18. M/s Active Power Corporation Private Ltd.
19. M/s PMC Power Private Ltd.
20. M/s Bhavani Hydro Power Projects (P) Limited
21. M/s NEDCAP
22. M/s Shriram Energies Ltd.
23. M/s Clarion Power Corporation Ltd
24. M/s Sagar Sugars & Allied Products Ltd.
25. Andhra Pradesh Electricity Regulatory Commission

.....Respondents

Appeal No. 50 of 2005

1. Northern Power Distribution Company of Andhra Pradesh Ltd.
2. Transmission Corporation of Andhra Pradesh Limited

.....Appellants

Versus

1. M/s Gowthami Bio-Energies Ltd.
2. M/s Shalivahana Constructions Ltd
3. M/s Rithwik Power Projects Ltd.
4. M/s Indur Green Power Private Ltd
5. M/s NCS Gayatri Sugars Ltd.
6. M/s Saraswathi Power & IND Ltd.
7. M/s Kallam Spinning Mills Ltd.
8. M/s Kakatiya Cement Sugar Mills Ltd.
9. Andhra Pradesh Electricity Regulatory Commission

.....Respondents

Counsel in all the appeals

For the Appellants : Mr. L. Nageswara Rao, Sr. Advocate,
Mr. G. Ramakrishna Prasad, Advocate,
Mr. K. Gopal Choudary, Advocate,
Mr. C. Kodanda Ram, Advocate,
Mr. P. Ramesh Babu, Advocate,
Mr. Abhiram Reddy, Advocate,
Mr. Avijeet Kumar Lala, Advocate
Mr. Guntur Prabhakar, Advocate
Mr. B. Suyodhan, Advocate,
Mr. Md. Wasay Khan, Advocate,
Mr. P.S. Narasimha, Advocate
Mr. Mask D'Souza and
Mr. Y. Rajagopala Rao

For the Respondents : Mr. A. Subba Rao, Advocate,
Mr. P. Sri Raghu Ram, Advocate
Mr. Ananga Bhattacharyya, Advocate,
Miss Saumya Sharma, Advocate,
Mr. V. Hiremani, Advocate and
Mr. A. T. Rao, Advocate

For the Commission : Mr. M.G. Ramachandran, Advocate

COMMON JUDGMENT

Per Hon'ble Mr. Justice E. Padmanabhan, Judicial Member:

1. Batch of Appeals preferred by Hydro Developers

Appeal No.5 of 2005

- (a) This appeal has been preferred by the appellant under Section 111(1) of The Electricity Act 2003 against the order in R.P. No.84/2003 in O.P. No.1075/2000 dated 20th March 2004 as modified by the order dated 7th July 2004 made in Review Petition R.P. No.5/2004 passed by the Andhra Pradesh Electricity Regulatory Commission.

Appeal No.6 of 2005

- (b) This appeal has been preferred under Section 111(1) of The Electricity Act 2003 challenging the order in R.P. No.84/2003 in O.P. No.1075/2000 dated 20th March 2004 as modified by the order dated 7th July 2004 made in Review Petition R.P. No.5/2004 passed by the Andhra Pradesh Electricity Regulatory Commission.

Appeal No. 7 of 2005

- (c) The appellant has preferred this appeal under Section 111(1) of The Electricity Act 2003 against the order in R.P. No.84/2003 in O.P. No.1075/2000 dated 20th March 2004 as modified by the order dated 7th July 2004 made in Review Petition R.P. No.5/2004 passed by the Andhra Pradesh Electricity Regulatory Commission.

Appeal No. 8 of 2005

- (d) This appeal is filed under Section 111(1) of The Electricity Act 2003 against the order in R.P. No.84/2003 in O.P. No.1075/2000 dated 20th March 2004 as modified by the order dated 7th July 2004 made in Review Petition R.P. No.5/2004 passed by the Andhra Pradesh Electricity Regulatory Commission.

Appeal No. 9 of 2005

- (e) This appeal has been preferred under Section 111(1) of The Electricity Act 2003 challenging the order in R.P. No.84/2003 in O.P. No.1075/2000 dated 20th March 2004 as modified by the order dated 7th July 2004 made in Review Petition R.P. No.5/2004 passed by the Andhra Pradesh Electricity Regulatory Commission.

Appeal No. 10 of 2005

- (f) This appeal has been preferred by the appellant under Section 111(1) of The Electricity Act 2003 against the order in R.P. No.84/2003 in O.P. No.1075/2000 dated 20th March 2004 as modified by the order dated 7th July 2004 made in Review Petition R.P. No.5/2004 passed by the Andhra Pradesh Electricity Regulatory Commission.

Appeal No. 16 of 2005

- (g) The appellant has preferred this appeal under Section 111(1) of The Electricity Act 2003 against the order in R.P. No.84/2003 in O.P. No.1075/2000 dated 20th March 2004 as modified by the order dated 7th July 2004 made in Review Petition R.P. No.5/2004 passed by the Andhra Pradesh Electricity Regulatory Commission.

Appeal No. 17 of 2005

- (h) This appeal is filed under Section 111(1) of The Electricity Act 2003 against the order in R.P. No.84/2003 in O.P. No.1075/2000 dated 20th March 2004 as modified by the order dated 7th July 2004 made in Review Petition R.P. No.5/2004 passed by the Andhra Pradesh Electricity Regulatory Commission.

Appeal No. 18 of 2005

- (i) This appeal has been preferred by the appellant under Section 111(1) of The Electricity Act 2003 against the order in R.P. No.84/2003 in O.P.

No.1075/2000 dated 20th March 2004 as modified by the order dated 7th July 2004 in Review Petition R.P. No.5/2004 passed by the Andhra Pradesh Electricity Regulatory Commission.

Appeal No. 19 of 2005

- (j) The present appeal has been preferred under Section 111(1) of The Electricity Act 2003 challenging the order in R.P. No.84/2003 in O.P. No.1075/2000 dated 20th March 2004 as modified by the order dated 7th July 2004 made in Review Petition R.P. No.5/2004 passed by the Andhra Pradesh Electricity Regulatory Commission.

Appeal No. 52 of 2005

- (k) This appeal has been preferred by the appellant under Section 111(1) of The Electricity Act 2003 against the order in R.P. No.84/2003 in O.P. No.1075/2000 dated 20th March 2004 as modified by the order dated 7th July 2004 made in Review Petition R.P. No.5/2004 passed by the Andhra Pradesh Electricity Regulatory Commission.

Appeal No. 58 of 2005

- (l) The present appeal has been preferred under Section 111(1) of The Electricity Act 2003 challenging the order 2004 in R.P. No.84/2003 in O.P. No.1075/2000 dated 20th March 2004 as modified by the order dated 7th July 2004 made in Review Petition R.P. No.5/2004 passed by the Andhra Pradesh Electricity Regulatory Commission.

Appeal by : Renewable Energy Source - Developers

Appeal No. 1 of 2005

- (m) This appeal has been preferred by the appellant under Section 111 of The Electricity Act 2003 challenging the order in R.P. No.84 of 2003 dated the

20th March 2004 and in Review Case No. 7 of 2004 dated the 10th July 2004 passed by the Andhra Pradesh Electricity Regulatory Commission.

Appeal No. 2 of 2005

- (n) The present appeal has been preferred under Section 111 of The Electricity Act 2003 by the above-named appellant challenging the order passed by the first Respondent Andhra Pradesh Electricity Regulatory Commission in R.P. No. 84 of 2003 in O.P. No. 1075 of 2000 dated 20th March 2004 regarding revision of rate for purchasing electrical energy and common order in R.P. No. 3 of 2004 dated 5th July 2004 with respect to drastic reduction in tariff, as being arbitrary, unjust, unreasonable, discriminatory and essentially being violative of principles of natural justice.

Appeal No. 12 of 2005

- (o) This appeal has been preferred by the appellant under Section 111 of The Electricity Act 2003 against the order passed by the Andhra Pradesh Electricity Regulatory Commission in R.P. No.84 of 2003 in O.P.No.10.75 of 2000 dated 20th March 2004 as confirmed in R.P.No.12 of 2004 dated 7th July 2004 effecting downward revision of tariff payable to the appellant, i.e., reduction in tariff from Rs.3.48 paise to Rs.2.34 paise and also limited the said tariff to 35% PLF as against 100% PLF.

Appeal No. 15 of 2005

- (p) The present appeal has been preferred under Section 111 of The Electricity Act 2003 challenging the order passed by the first Respondent Andhra Pradesh Electricity Regulatory Commission in R.P. No. 84 of 2003 in O.P. No. 1075 of 2000 dated 20th March 2004 regarding revision of rate for purchasing electrical energy and common order in R.P. No. 3 of 2004 dated 5th July 2004 with respect to drastic reduction in tariff, as being arbitrary, unjust, unreasonable, discriminatory and essentially being violative of principles of natural justice.

Appeal No. 20 of 2005

- (q) The present appeal has been preferred by the appellant challenging the order dated 20th March 2004 in R.P.No.84 of 2003 in O.P.No.1075 of 2000 passed by the Andhra Pradesh Electricity Regulatory Commission.

Appeal No. 21 of 2005

- (r) This appeal has been preferred by the appellant under Section 111(1) of The Electricity Act 2003 challenging the order dated 10th July 2004 in Review Petition R.P.No.8 of 2004 in R.P.No.84 of 2003 in O.P. No. 1075 of 2000 passed by the Andhra Pradesh Electricity Regulatory Commission.

Appeal No. 22 of 2005

- (s) The present appeal has been preferred by the appellant under Section 111 of The Electricity Act 2003 challenging the Order dated 20th March 2004 in R.P. No. 84 of 2003 in O.P. No., 1075 of 2000 as confirmed in R.P. No. 9 of 2004 dated 10th July, 2004, passed by the Andhra Pradesh Electricity Regulatory Commission.

Appeal No. 34 of 2005

- (t) The present appeal has been preferred under Section 111 of The Electricity Act 2003 by the above-named appellant challenging the order passed by the first Respondent Andhra Pradesh Electricity Regulatory Commission in R.P. No. 84 of 2003 in O.P. No. 1075 of 2000 dated 20th March 2004 regarding revision of rate for purchasing electrical energy and common order dated 10.07.2004 in R.P. No.8 of 2004 with respect to drastic reduction in tariff, as being arbitrary, unjust, unreasonable, discriminatory and essentially being violative of principles of natural justice.

Appeal No. 47 of 2005

- (u) This appeal has been preferred by the above named appellant under Section 111 of The Electricity Act 2003 challenging the order dated 20th March, 2004

in R.P. No. 84 of 2003 in O.P. No. 1075 of 2000 as confirmed in Review Petition R. P. No. 13 of 2004 dated 10th July, 2004 of the Andhra Pradesh Electricity Regulatory Commission.

Appeal No. 67 of 2005

- (v) The present appeal has been preferred by the appellant under Section 111 (1) of The Electricity Act against the Order dated 20th March, 2004 in R. P. No. 84 of 2003 in O.P. No. 1075 of 2000 passed by the Andhra Pradesh Electricity Regulatory Commission.

Appeal No. 80 of 2005

- (w) The present appeal has been preferred under Section 111 of The Electricity Act 2003 by the above-named appellant challenging the order passed by the first Respondent Andhra Pradesh Electricity Regulatory Commission in R.P. No. 84 of 2003 in O.P. No. 1075 of 2000 dated 20th March 2004 regarding revision of rate for purchasing electrical energy and common order dated 05th July 2004 in R.P. No.3 of 2004 with respect to drastic reduction in tariff, as being ultra vires, unjust, unreasonable, discriminatory and essentially being violative of principles of natural justice.

2. Batch of Appeals Preferred by the DISCOM and TRANSCO

Appeal No. 46 of 2005

- (A) This appeal has been preferred under Section 111 of The Electricity Act 2003 by the appellants challenging the order in R.P. No.84 of 2003 dated 20th March 2004 and order dated 11.8.2004 in Review Petition No.1 of 2004 passed by the Andhra Pradesh Electricity Regulatory Commission.

Appeal No. 48 of 2005

- (B) The present appeal has been preferred by the appellants under Section 111 of The Electricity Act 2003 challenging the order in RP No.84 of 2003 dated 20th

March 2004 and order dated 11.8.2004 in Review Petition No. 1 of 2004 passed by the Andhra Pradesh Electricity Regulatory Commission.

Appeal No. 49 of 2005

(C) The present appeal has been preferred by the appellants under Section 111 of The Electricity Act 2003 challenging the order in RP No.84 of 2003 dated 20th March 2004 and order dated 11.8.2004 in Review Petition No. 1 of 2004 passed by the Andhra Pradesh Electricity Regulatory Commission.

Appeal No. 50 of 2005

(D) This appeal has been preferred under Section 111 of The Electricity Act 2003 by the appellants challenging the order in R.P. No.84 of 2003 dated 20th March 2004 and order dated 11.8.2004 in Review Petition No.1 of 2004 passed by the Andhra Pradesh Electricity Regulatory Commission.

3. In Appeal Nos. 46, 48, 49 & 50 of 2005, the appellants seek for the following reliefs:
 - i. To direct APERC to re-fix the tariff for non-conventional energy projects considering ROE at 14% for existing and 11% for to be commissioned projects and made the tariff applicable from 1.4.2004.
 - ii. To direct APERC to re-fix the tariff for Bagasse cogeneration projects considering PLF at 62% with retrospective effect from 1.4.2004.
 - iii. To direct APERC to issue necessary regulations for continuation of operation of plants after loan repayment period.
 - iv. To direct APERC to fix the incentive at 10 paise per unity for non-conventional energy projects for generation above threshold PLF.
 - v. To pass such other order or orders as this Hon'ble Tribunal deems fit.

4. As set out above, the first batch of appeals Nos. 1, 2, 5, 6, 7, 8, 9, 10, 12, 15, 16, 17, 18, 19, 20, 21, 22, 34, 52, 58, 67 and 80 of 2005 have been preferred by the generators – Developers, while Appeal Nos. 46, 48, 49, 50 of 2005 have been

preferred by the four Distribution Companies in Andhra Pradesh and The Transmission Corporation of Andhra Pradesh. These are appeals and counter appeals. These appeals were consolidated and grouped at the joint request of either side. Arguments were advanced in each of the appeal by the learned counsel appearing for the appellant as well as the learned counsel appearing for the respondents in the respective appeal. There are certain Common Points, while in some cases individual points were advanced. The appeal No.5 of 2005 has been preferred by Small Hydro Power Developers Association while the remaining appeals except 46, 48, 49, 50 of 2005 have been preferred by the respective non-conventional energy generating companies in the State of Andhra Pradesh. The contesting Respondents are also the same in all the appeals. In the second batch, the appeals as seen from the cause title, the APTRANSCO and DISCOMS are the appellants and Developers are the Respondents. Though the appellants, in most of the appeals, are generators/ Developers, they are also the respondents in Appeals No.46, 48, 49, & 50 of 2005. For convenience, appellants are being referred as “Developers”. The contesting Respondents in all the above appeals, who are also the appellants in appeal Nos.46, 48, 49 & 50 of 2005 are referred as APTRANSCO or DISCOMS.

Factual matrix

5. The facts leading to the present batch of appeals are identical and therefore, it is sufficient to refer to the facts in one of the appeals. The Government of Andhra Pradesh on 18.1.1997 by GO Ms 93, with the object of encouraging generation of electricity from renewable sources of energy allowed uniform charges to all such projects. This GO was followed by GO Ms 112 dated 22.12.98 introducing amendment to GO Ms 93, to remove ambiguities in the uniform implementation of the scheme. The Andhra Pradesh Electricity Reform Act 1998 received the assent of the President of India on 21.10.1998. The said Act was brought into force with effect from 1.2.1999. The Andhra Pradesh Electricity Regulatory Commission was constituted under the said Andhra Pradesh Electricity Reform Act 1998 on 3.4.1999 and the same Commission is also the Commission which continue to function under The Electricity Act 2003 by virtue of Section 185 of The Electricity Act. Under

Section 27-B of The Indian Electricity Act 1910, the Government of Andhra Pradesh notified the Transmission Corporation of Andhra Pradesh to be the State Transmission Utility.

6. The Regulatory Commission issued license not only to the Transmission Corporation but also to four DISCOMS in the State for bulk and retail supply of electricity with effect from 1.4.2001. On 20.6.2001, the Regulatory Commission by order made in OP No.1075 of 2000 directed generators of non-conventional energy to supply power exclusively to APTRANSCO and the non-conventional energy Developers were not permitted to sell the energy generated by them to third parties. The Regulatory Commission also approved the rate which was prevailing earlier for such supply at Rs.2.25 per unit with 5% escalation per annum from 1994-95, being the base year. Such purchase price, it is stated, is based upon the guidelines of the Ministry of Non-Conventional Energy Sources, Government of India as well as the Government of Andhra Pradesh.
7. The Electricity Act 2003 was notified and it came in force on and after 10.6.2003. While so, the Regulatory Commission issued a notice on 23.10.2003 calling for objections on or before 5.11.2003 to the proposals of APTRANSCO / NEDCAP to fix the price to be paid by APTRANSCO for the quantum of electricity purchased from non-conventional energy projects with effect from 1.4.2004. The notice sent by the Regulatory Commission for the year 2003-04 directed the Discoms and the NEDCAP to submit proposals for a review of incentives to take effect from 1.4.2004 as the said Commission had received proposals from the second Respondent APTRANSCO. The said notices were served on the Developers on 30.10.2003. The Developers were granted time initially and time was extended till 13.11.2003. The Developers through their Association as well as individually were required to send their objections on or before 13.11.2003 as a final chance.
8. The Developers Association on 13.11.2003 while submitting objections to the proposals, advanced several preliminary objections arising out of the notice dated

23.10.2003. The Developers also requested for an opportunity of hearing before determination on the preliminary issues. The APTRANSCO after securing extension after extension only on 6.12.2003 submitted its response to the objections raised by the Developers on 6.12.2003. As per notice dated 12.12.2003, the Regulatory Commission intimated the Developers to appear and take part in the proceedings on 22.12.2003. This was followed by a hearing of general public on 19.3.2004.

9. On 20.3.2004, the Regulatory Commission reduced the price payable by the APTRANSCO to the NCE Developers towards supply of electricity. The Developers moved the Andhra Pradesh High Court in WP No.7222 of 2004. The Hon'ble High Court by order dated 15.4.2004, passed interim orders directing the APTRANSCO to continue to pay to the members of Association and NCE Developers for the power that may be supplied by the respective appellant. The APTRANSCO was directed to pay the members of the Association as per the rates that prevailed on 1.4.2004.
10. By order dated 27.4.2004 the High Court disposed of a batch of writ petitions with a direction to the Developers to approach the said Regulatory Commission and seek for review. The Commission was directed to take up the review petition if the reviews are moved within a period of ten days and it was further directed to dispose of the review petition within eight weeks thereafter, while directing that the interim orders passed by the High Court on 15.4.2004 to be in force till final orders are passed by the Regulatory Commission. Accordingly, each of the Developer moved a review petition on 7.5.2004.
11. For organizational reasons, the Government of Andhra Pradesh ordered that APTRANSCO shall cease to engage in trading related functions while further directing that the Power Purchase Agreements entered with the Developers shall vest in the Discoms with effect from 10.6.2004 in terms of Section 39 read with Section 172(b) of The Electricity Act 2003.

12. After following the procedure, The State Regulatory Commission dismissed the review petition RP No.5 of 2004 moved by the Small Hydro Power Developers Association while modifying its earlier order dated 20.3.2004 to re-determine the capital cost and modify the tariff on that premise. The review petitions filed by other Developers came to be dismissed on 5.7.2004 and 10.7.2004. The review petition filed by the APTRANSCO also came to be dismissed on 11.8.2004. The said Small Hydro Power Developers Association along with nine others moved the High Court of Andhra Pradesh in WP No.16621 of 2004.
13. By an interim order dated 16.9.2004, the Hon'ble High Court while making it clear that it is open to TRANSCO to implement the revised tariff, however directed that the Developers shall be paid 50% of the differential amount between the old and revised tariff towards actual power supplied by them with effect from 16.9.2004 pending the Writ Petition.
14. By GO Ms 58.Energy(Power-III) dated 7.6.2005, a transfer scheme under The Andhra Pradesh Reform Act 1998 came to be introduced to transfer and distribute the assets and contracts of bulk supply and trading business of APTRANSCO to the DISCOMS.
15. Ultimately, the Hon'ble High Court by order dated 15.6.2005 or sooner thereof disposed of WP No.16621 of 2004 and connected Writ Petitions, with a direction that the Developers shall approach this Appellate Tribunal. Thereafter, in terms of said directions, the first batch of appeals were preferred by Developers while the second batch of appeals were preferred by the Discoms. The Hon'ble High Court also directed that the interim order passed by it shall continue and remain in force for a period of eight weeks from 15.6.2005 or till the Appellate Tribunal passes orders on the interim application, whichever is earlier. Identical interim direction also came to be continued by orders of Appellate Tribunal pending the present batch of appeals after hearing both sides.

16. Now Let us take up and consider the legal provisions and position of statutory power conferred on the commission. The legal position regarding tariff fixation has undergone a change under The Electricity Act 2003 and the changes, introduced by the legislative enactment confer wide powers on this Appellate Tribunal, to examine, the tariff determination by the Commission on merits. Before the commencement of The Electricity Act 2003, the Supreme Court in Kerala State Electricity Board Vs. Govinda Prabhu and Bros., (1986) 4 SCC 198 laid down that tariff fixation is not the function of the Court and it is not within the court's province to examine the price structure in minute detail, if it is satisfied with revision of tariff as not arbitrary and it is not the result of application of wrong principle.
17. Later, in Association of Industrial Electricity Users Vs. State of A.P. (2002) 3 SCC 711, the same view was reiterated. In Assn. of Industrial Electricity Users Vs. State of A.P. the Supreme Court held that judicial review in a matter with regard to fixation of tariff has not to be as that of Appellate Authority in exercise of its jurisdiction under Article 226 of The Constitution. Fixing tariff, it was held is essentially a matter of policy and normally a Court would refrain from interfering with such policy decision unless it is demonstrated that it is an arbitrary exercise or ex facie bad.
18. After coming into force of The Electricity Regulatory Commissions Act, 1988, the position has changed. Power of appeal was conferred on the Appellate authority, namely, the High Court with respect to such tariff fixation. The Electricity Regulatory Commissions Act, 1998 has since been repealed by The Electricity Act, 2003. The regulator has to determine the tariff in terms of Part-VII of the Act. In tariff fixation the regulator shall specify the terms and conditions for determination of tariff and in doing so, the regulator shall be guided by Section 61. Section 62 mandates that tariff shall be determined in accordance of provisions of the Act:
- (i) for supply of electricity by the generating company to distribution licensee;
 - (ii) for transmission of electricity;
 - (iii) for wheeling of electricity and

(iv) for retail sale of electricity

19. Elaborate procedure has been prescribed in this respect for determination of tariff or variation thereof by regulations framed under the Act as well as Section 64 of the Act. In BSES Ltd. Vs. Tata Power Co. Ltd. 2004 I SCC 195, the Supreme Court held that the Regulatory Commission has been conferred with power to determine the tariff in terms of the provisions of the Act and no tariff can be implemented unless the tariff has been approved by the Regulatory Commission.
20. In terms of Part-XI, this Appellate Tribunal for Electricity has been constituted. Section 111 provides for an appeal by aggrieved party to the Appellate Tribunal for Electricity as against tariff determination. In terms of Sub Section (3) of Section-111 the Appellate Tribunal after affording opportunity of being heard is empowered, pass such orders on the appeal as it deems fit, confirming, modifying or setting aside the order appealed against. There is no doubt that Section 111(3) confers wider jurisdiction and powers on the Appellate Tribunal to examine and interfere with the order appealed against on merits, be it a determination of tariff or be it an order of adjudication passed under the Act. This Appellate Tribunal exercise powers of Appellate authority. In other words, what original authority could do with respect to tariff determination or could have done, the appellate authority could do or it may set aside the order appealed against and remand the same for denovo consideration or could consider the entire matter in terms of provisions of the Act. Therefore, it follows that the jurisdiction and powers of this Appellate Tribunal is wider and there is no restriction to its appellate power nor the appellate power has been circumscribed by any of the provisions in the Act. In the light of the said provisions, we are to examine the tariff order appealed against in these appeals.

BRIEF RESUME DIRECTIONS ISSUED BY CENTRAL GOVERNMENT IN FIXING THE PRICE OF POWER DEVELOPED BY NCE DEVELOPERS AND PROCEEDINGS OF THE REGULATORS COMMISSION:

21. By G.O. Ms No.93 Energy (RES) Department dated 18.11.1997, the Government of Andhra Pradesh fixed tariff and extended the same uniformly to all Developers of Power Projects using wind, biomas, cogeneration, municipal waste and mini hydel to promote of and to encourage generation of electricity from renewable source of energy. To remove certain ambiguities, in the implementation of uniform rate and to ensure channellisation of incentive for promotion and development of non-conventional energy sources, following amendments, were introduced by G.O. Ms No.112 Energy (Res) Dept. dated 22.12.98:-

- (i) Incentives shall be available only to those power projects where fuel used is from non-conventional energy sources, which are in the nature of renewable sources of energy.
- (ii) Operation of the scheme shall be watched for three years from 18.11.97 and Andhra Pradesh State Electricity Board shall come up with suitable proposal for review for further continuance of incentives.
- (iii) The developers shall be deemed to be Licensees for the purpose of Sec. 3 of Electricity Duty Act read with Sec. 28 of Indian Electricity Act, 1910.

22. The price to be paid and elements of incentives as found in G.O. M. S.no.93 Energy (RES) Department dated 18.11.1997 reads thus:

“The government after careful examination of the recommendations and with a view to encourage generation of electricity from renewable sources of energy hereby allow the following uniform incentives to all the projects based on renewable sources of energy, viz., Wind, Biomass, Co-generation, Municipal Waste and Mini Hydel:

<i>Sl. No.</i>	<i>DESCRIPTION</i>	
1.	<i>Power Purchase price</i>	<i>Rs.2.25/-</i>
2.	<i>Escalation</i>	<i>5% per annum with 1997-98 as base year and to be revised on 1st April of every year up to the year 2000 A.D.</i>
3	<i>Wheeling Charges</i>	<i>2%</i>
4.	<i>Third party sales</i>	<i>Allowed at a tariff not lower than H.T. tariff of A.P.S.E. Board.</i>
5.	<i>Banking</i>	<i>Allowed up to 12 months.</i>
	<i>(a)Captive consumption</i>	<i>Allowed throughout the year on 2% banking charges.</i>
	<i>(b) Third party sale</i>	<i>Allowed on 2% banking charges from August to March.”</i>

23. The Government of Andhra Pradesh on 30.1.1999 notified the transmission Corporation of Andhra Pradesh as the State Transmission utility under Sec. 27-B of Indian Electricity Act, 1910.
24. In the meanwhile on 01.02.1999, the Andhra Pradesh Electricity Reforms Act, 1998 (Act 30 of 1998) which received the assent of President on 21.10.1998), came into force providing for the constitution of Regulatory Commission, restructuring of the Electricity Industry, Rationalisation of Generation, Transmission, Distribution and supply of Electricity, avenues for Participation of private sector in the Electricity Sector. The Andhra Pradesh Electricity Regulatory Commission came to be constituted on 03.04.99. The said Commission issued Transmission and Bulk Supply License as well as Distribution & Retail Supply license to APTRANSCO. Subsequently the Distribution & Retail came to be transferred and vested on 01.04.2001 on DISCOMS for the respective areas.
25. Various Developers who proposed to set up generating plants in the State, as approved by NEDCAP, from non-conventional energy sources and Electricity Transmission Corporation of Andhra Pradesh entered into “Power Purchase Agreements” (PPA) on various dates and commenced power supply. But subsequent PPAs were subject to consent being accorded by Andhra Pradesh Electricity Regulatory Commission in terms of Sec. 21 of Andhra Pradesh Electricity Reform

Act, 1998. All the said PPAs among other terms provided for payment of energy at Rs.2.25 paise per unit with escalation at 5% P.A., with 1994-95 as base year and to be revised on 1st April of every year upto 2003-2004 and beyond 2003-2004, the rate of purchase to be decided by Regulatory Commission. The projects were executed, completed on different dates by all Developers and their Plant was connected to APTRANSCO Grid for evacuation of Power. PPA, so entered is to be in force and valid for twenty years from the Commercial Operation Date (COD) but subject to further renewal to be agreed between the Parties.

- 26 The Projects were sanctioned by Non-conventional Energy Department Corporation of Andhra Pradesh, a State Government Nominee. A standard sanction by NEDCAP for NCE Projects promoted by Appellants reads thus:

“The NEDCAP Board in its meeting held on 30.12.2000 has considered the application and accorded sanction to M/s MPR Power Pvt. Ltd., to set up 3.0 MW capacity Industrial waste based power project in Kamavarapukota, West Godavari district.

The sanction is accorded subject to the following conditions:

1. *The Developer shall enter into an agreement with NEDCAP and submit an irrevocable Bank guarantee of Rs.25,000/- per megawatt valid for a period of 12 months shall be furnished at the time of agreement. This amount will be adjusted against penalties imposed, if any, due to delay in execution of the project (The proforma for submission of Bank Guarantee is enclosed).*
2. *The Developer shall abide by the regulations of the Andhra Pradesh Electricity Regulatory Commissioner (APERC). The proceedings issued by APERC shall be followed. The developer shall enter into power purchase agreement (PPA) or power purchase and wheeling agreement (in case of captive consumption) with APTRANSCO. The developer shall approach APERC for obtaining license/ exemption from obtaining license for supply/ use of power.*
3. *The Developer shall follow the guidelines issued by MNES/ State Govt. NEDCAP from time to time.*
4. *The developer shall submit monthly progress reports to NEDCAP on status of the project.”*

27. The NEDCAP by virtue of delegation of power by Andhra Pradesh State Government accorded permission to set up Power plant based on Industrial Waste/ Biomass/ Wind/ Municipal Waste, etc., which are renewable source of energy. The APER Commission, in exercise of its Statutory Power under Sec. 21(4) of APERC act, 1998 granted consent to the PPA so entered between APTRANSCO and all the Developers before us on various dates.
28. It is essential to take note of Sec. 12 of APER Reforms Act, 1998, which provides that the State Government shall have power to issue policy directions consistent with the objects of the Act and it shall not interfere with the functions and Powers of Commission.
29. In 2000-2001, the APER Commission passed an Order in OP 1075/2000, on a proposal submitted by APTRANSCO for continuance of cost per unit for Non-conventional Energy Projects beyond 17.11.2000, while stating that out of 221 projects sanctioned for a capacity of 827 MW, only fifty one projects with 176 MW capacity came into operation. While holding that sale of power by NCE Projects to third parties will not be in public interest, the Commission directed all NCE Projects Developers in the State to supply power to APTRANSCO.
30. The material portion of the Order of the Commission which is relevant for the present purpose runs thus:

“29. The existing incentives under G.O. Ms. No.93, dated 180-11-1997, which are continued under the orders of the Commission from time to time till 24-06-2001 under our letter No.2473, Dated: 24.04.2001 are extended for the time being till 24-07-2001. (The temporary extension has been given to enable the developers to finalized agreements/ arrangements relating to supply of power to APTRANSCO prior to 24-07-2001). With effect from the billing month of August 2001, all generators of non-conventional energy shall supply power to APTRANSCO only as per the following terms:

- (i) *Power generated by non-conventional energy developers is not permitted for sale to third parties;*
- (ii) *Developers of non-conventional energy shall supply power generated to APTRANSCI/ DSICOMS of A.P. only;*
- (iii) *Price applicable for the purchase by the supply licensee should be Rs.2.25 per unit with 5% escalation per annum with 1994-95 as the base year.*

30. A suo motu review of the incentives to take effect from 1st April, 2004 will be undertaken by the Commission after discussions with all the concerned parties. There will also be a review of the purchase price with specific reference to each. There will also be a review of the purchase price with specific reference to each developer on completion of 10 years from the date of the commissioning of the project (by which time the loans from financial institutions would have been repaid) when the purchase price will be reworked on the basis on return on equity, O&M expenses and the variable cost.”

31. It is relevant to take note of the following stand taken by NEDCAP and IREDA before the Commission in the said *suo moto* proceeding initiated by Commission. In the very words of The Regulatory Commission, the objections read thus:

(a) NEDCAP

“18. The Managing Director of NEDCAP stated that there would be an adverse impact on promotion of non-conventional energy based power projects if the incentives are modified or withdrawn. The loss of revenue to APTRANSCO caused by allowing the project developers to sell to third parties can be made-up by increasing wheeling charges as has allegedly been done by the Karnataka Government. Measures have to be taken to ensure regular payment by APTRANSCO who financial health is poor.”

(b) or IREDA

“19. The Director (Technical), IREDA in his letter dated:19-10-2000 requested the Commission to consider the guidelines as recommended by the Government of Indian for development of non-conventional and renewable energy projects to enable the project developers to pay off the loans extended by IREDA and other Banks within 10 years including the moratorium period of 2 or 3 years.”

32. Curiously the Commission took the view that as a Regulator, it has plenary power over the entire subject, and directed that no third party sale by NCE developers is permitted and all the power generated has to be evacuated and sold only to APTRANSCO. This direction is being one of the challenges and as pointed out by the counsel for appellants, it is patently illegal and without jurisdiction.
33. Long after the said Order of APERC, dated 20.06.2001 the Electricity Act, 2003 (Central Act 36 of 2003) came to be notified on 10.06.2003 and came into force on 10.06.2003. Sec. 185(3) of the said Central Act saved the Andhra Pradesh Electricity Reforms Act, 1998, in so far as the provisions of the State Act is not inconsistent with the Central Act. The State Commission constituted under The Electricity Regulatory Commissions Act, 1998 or under The A.P. Electricity Reform Act, 1998, which is specified in the Schedule, shall be the State Commission for the purposes of 2003 Act in terms of proviso to Sec 82 of the 2003 Act.
34. APERC issued a notice on 23.10.2003 inviting objections by 05.11.2003 to the proposal submitted by APTRANSCO to fix the price to be paid for the power purchased from NCE developers. The said notice also directed NEDCAP and APTRANSCO to submit proposals with respect to review of incentives to be effective from 01.04.2004. The proposals of the said two were forwarded to Developers. The objections were submitted by Developers besides raising jurisdictional and legal objections. Small Hydro Developers also raised identical objections. The APTRANSCO responded to the objections on 06.12.2003.
35. The APERC after hearing NCE Developers on 12.12.2003 and public on 19.03.2004, on 20.03.2004 passed the impugned order, in RP No.84/2003 in OP No.1075/2004, slashing the price payable by APTRANSCO to NCE Developers including small Hydel Generators as if it is exercising Powers of review. All the aggrieved parties initially moved the Hon'ble High Court of Andhra Pradesh by invoking writ jurisdiction. The High Court directed the parties to go before the Commission by way of review, while directing the Commission to pass orders in accordance with law

within eight weeks, besides directing the interim orders passed by the High Court shall continue. The appellants – NCE developers as well as small Hydro generators moved review petitions.

36. On 28.05.2004, State Government by a notification ordered that APTRANSCO shall cease to engage in trading and directed that the PPAs already entered by it shall vest with the concerned area Discoms w.e.f. 10.06.2004 in terms of Sec. 39 read with Sec.172(b) of The Electricity Act, 2003. On 09.06.2004, the Central Government authorized the State Transmission utilities to engage in bulk purchase and sale to DISCOMS for a period of one year from 10.06.2004.
37. The review petitions were rejected by Commission either on 05.07.2004 or 10.07.2004 or on 07.07.2004 except making a minor modification, and re-determined the capital cost and consequent modification of tariff on that basis. Review moved by APTRANSCO also came to be rejected on 11.08.2004. Being aggrieved, the developers filed writ petitions, on the file of the Hon'ble Andhra Pradesh High Court. Pending writ petitions, uniform interim directions were issued in all the writ petitions. The Hon'ble High Court allowed the tariff to be implemented, while directing APTRANSCO to pay 50% of differential between old and revised tariff for the actual power supplied and such payments shall be subject to ultimate orders.
38. The Hon'ble High Court by various orders passed on different dates disposed of the writ petitions with a direction to the respective writ petitioner to approach this Appellate Tribunal, constituted under Sec. 111 of The Electricity Act, 2003. Accordingly, the aggrieved parties moved the above batch of appeals. The concerned Discoms with APTRANSCO, who are also the respondents in the appeals preferred by Developers, moved Appeal No.46, 48, 49 and 50 of 2005. All those appeals were consolidated and heard together by us.

39. On behalf of the developers, Mr. Rajendra Chowdry, Sr. Advocate, Mr. P. Ramesh Babu, Mr. K. Gopal Chowdry, Mr. G. Ramakrishna Prasad, Mr.C. Kodanda Ram, Mr. Abhiram Reddy, Advocates and Mr. L. Nageswar Rao, Senior Advocate made their submissions exhaustively on behalf of respective appellant in the appeals in respect of various points, while Mr. A. Subba Rao, advocate appeared in all the appeals for the DISCOMS and APTRANSCO and Mr. P. Sri Raghu Ram appeared for the Regulatory Commission. Mr. A. Subba Rao appeared in Appeals No.46; 48; 49 and 50 of 2005 for appellants. Arguments were addressed for several days and various contentions were canvassed for the appellant/ Developers in the respective appeal. We shall first take up the common contention relating to jurisdiction and authority of Commission. The jurisdictional objections raised and advanced, to begin with, we shall decide and deal with individual contentions/ points/ issues raised on tariff fixation as well on each category of appeal, depending on our conclusions.
40. The following are the common points framed relating the jurisdiction and authority of Regulatory Commission that arise in these batch appeals preferred by Developers as well as the TRANSCO/ DISCOM:-
- A. Whether the Regulatory Commission has the Power, authority and jurisdiction either under The Electricity Act, 2003 or under the A.P. Electricity Reform Act, 1998 to compel the Developers to sell the power generated by them to the State Transmission Utility or Distribution Company?
- B. Whether the A.P. Regulatory Commission having approved and regulated the purchase price of power in terms of arrangement and PPA entered between APTRANSCO and Developers in terms of Sec 21(4)(b) and 11(1)(e) of A.P. Reform Act read with Sec 86(1)(b) of 2003 Act could re-fix the regulatory purchase price by resorting to tariff fixation under Sec. 62; 64 read with Sec 86(1)(a) of 2003 Act?

- C. Whether the A.P. Regulatory Commission has the power or authority to alter the policy directions issued by the State Government with respect to NCE Developers? Whether the Commission could claim executive power with respect to NCE Developers and fixation of price for power generated by NCE Developers and sold to APTRANSCO/ DISCOM?
- D. Whether the plea of estoppel advanced by Developers is sustainable on facts and law?
- E. Whether the plea of legitimate expectation advanced by Developers is sustainable?
- F. Whether the A.P. Electricity Regulatory Commission is possessed of Executive Powers to issue policy and executive directions in respect of NCE Developers in the State?
- G. Is not the Commission bound by directions already issued by the State in respect of NCE Developers as well as incentives directed to be given to encourage them?
- H. Whether Regulatory Commission could alter or change the PPAs entered between the NCE Developers and Electricity Board/ APTRANSCO?
- I. Whether the procurement arrangement/ PPA entered is a statutory contract and if so, whether it could be interfered by the Commission?
- J. Whether the Commission is just a regulator to approve the PPA entered or whether it could determine tariff with respect to NCE Developers?

K. Having approved PPA by exercise of Regulatory Power, is it open to Commission to undertake determination of tariff in respect of private generation by NCE Developers?

L. To what relief, if any?

All these points could be considered together conveniently as they are interrelated and interconnected. It may be necessary to consider the legality of Tariff fixation in respect of each NCE Developer and the validity of formula/ parameters adopted by Commission, depending on our answer to Points A to K.

41. All the above points, which are common in all the appeals, could be considered together conveniently. Before taking up the points for consideration, certain important dates, having a bearing are required to be set out:

30.05.1992	AP Govt. issued GO MS No. 150 Energy (F&E) – guidelines for Non-conventional Energy generation.
7/13.09.1993	Guide lines for MNES issued by Central Government.
26.11.1993	AP Govt., first GO inviting NCE Developers to put up projects and minimum Purchase Price for Power – announced.
30.09.1994	AP Govt. GO MS No.202, directing modification of the first GO dated 26.11.1993 in fixing price.
1994 – 95	Contract entered with NEDCAP and Board for execution of Projects.
18.08.1995	AP Govt. GO MS No.202, Provided for Purchase of Power at Rs.2.25/unit as basic price with escalation.
1995-96	PPAs entered with APE Board by NCE Developers.
15.11.1995	GO MS No.148 provided for Bagasse Cogeneration Projects, including third party sale and purchase of power by SEB at the weighted average price of the power purchased from Central/ State Electricity generators/ enterprises.

- 18.11.1997 GO MS No.93, A.P. Govt. issued uniform guidelines for all NCE Projects including wheeling, banking at Rs.2.25 per unit with 1997-98 as base year with 5% increase every year.
- 25.04.1998 The Electricity Regulatory Commission Ordinance, 1998 was promulgated.
- 25.04.1998 The Electricity Regulatory Commissions Act, 1998 came into force (with retrospective effect)
- 22.12.1998 AP Govt. in GO MS No.112 issued amendment to Guide Lines and it was directed in respect of third party sales, NCE developers shall be deemed Licensees under Section 28 of Indian Electricity Act and A.P. Electricity Duty Act.
- 01.02.1999 A.P. Electricity Reform Act, 1998 came into force (after it was reserved for the assent of President on 19.05.1998) with respect to existing provisions of The Electricity Act, 1910 and The Electricity Supply Act, 1948, the AP Electricity Reform Act has the overriding effect as provided in Sec. 56.
- 03.04.1999 The Andhra Electricity Regulatory Commission was constituted under A.P. Electricity Reform Act, 1998.
- 31.01.2000 APERC issued License to APTRANSCO for Transmission & Bulk Supply.
- 02.02.2001 PPA entered between APTRANSCO and (MRP Power) NCE Developer.
- 20.06.2001 In OP 1075/2000 APERC affirmed the earlier PPA Price but indicated the said rate would be reviewed on 31.03.04.
- 10.06.2003 The Electricity Act, 2003 came into force. The provisions of Andhra Pradesh Electricity Reform Act, 1998 is saved and the provision of A.P. Electricity Reform Act shall apply to Andhra Pradesh in so far as it is not inconsistent with Electricity Act 2003.
- 13.01.2004 PPA amended and approved by APERC for purchase of power from NCE Projects by APTRANSCO under Reform Act.

20.03.2004 In review – Tariff fixed in R.P. No.84/2003 in OP No.1075/2000 – present appeals are preferred against Tariff fixation by Commission.

42. As per MNES guidelines of Government of India dated 13th September, 1993 the Government of Andhra Pradesh fixed the purchase price of power generated by the projects based on renewable sources of energy. It is misnomer to call the said purchase rate as entirely incentive. As there is nothing to show that for the power generated by the Developers, a higher or fancy price was being paid. The State Government issued amendments to guide lines and which would enable a review for the continuance of the purchase price as well as incurred in the present form or in a suitable modified manner. It is to be pointed that such a policy direction has been issued by the Government of Andhra Pradesh which is binding on the Electricity Board and all its successors.
43. On a misconception and as if the Regulatory Commission is the authority in the place of State Government to issue policy direction, after the coming into force of A.P. Electricity Reform Act, 1998, Regulatory Commission assumed as if it is for the Commission to undertake the review of price. The said proposal was objected to and challenged as one without jurisdiction.
44. However, Commission after hearing NEDCAP, IREDA and APTRANSCO, passed an order affirming the Purchase Price and *inter alia* directed as under :
- a) *The existing incentives under G.O.Ms. No. 93, dated 18-11-1997, which are continued under the orders of the Commission from time to time till 24-06-2001 under Commission's letter No. 2473, Dated: 24.04.2001 are extended for the time being till 24-07-2001. (The temporary extension has been given to enable the developers to finalise agreements/arrangements relating to supply of power to APTRANSCO prior to 24-07-2001).*

- b) *With effect from the billing month of August 2001, all generators of non-conventional energy shall supply power to APTRANSCO only as per the following terms:*
- i) *Power generated by non-conventional energy developers is not permitted for sale to third parties;*
 - ii) *Developers of non-conventional energy shall supply power generated to APTRANSCO/DISCOMs of A.P. only.*
 - iii) *Price applicable for the purchase by the supply licensee should be Rs.2.25 per unit with 5% escalation per annum with 1994-95 as the base year.*
- c) *APTRANSCO shall arrange payment for the supply of power purchased from developers of non-conventional energy by opening a Letter of Credit in favour of the suppliers of power.*
- d) *A suo motu review of the incentives to take effect from 1st April, 2004, will be undertaken by the Commission after discussions with all the concerned parties.*
- e) *There will also be a review of the purchase price with specific reference to each developer on completion of 10 years from the date of the commissioning of the project (by which time the loans from financial institutions would have been repaid) when the purchase price will be reworked on the basis of return on equity, O & M expenses and the variable cost.*
- f) *It was further stated that wheeling and banking charges would continue to be regulated by GO.Ms No. 93 of 18-11-1997 till further orders of the Commission.”*

45. The said order of the Commission which is, dated 20th June 2001, was challenged by the developers before the High Court. However, out of compulsion some of the developers entered into power purchase agreements with APTRANSCO accepting the terms and conditions set out in the Order dated 20th June, 2001. In respect of those who executed the PPA, the Regulatory Commission initiated *suo motu* proceedings for determination of tariff which is the subject matter of challenge in various proceedings and ultimately before this Appellate Tribunal. The Commission had undertaken a tariff fixation exercise in respect of each generating plant of various

categories of non conventional energy. In the tariff fixation the Commission framed six points for consideration and answered all of them as seen in the Tariff order. Being aggrieved the first batch of appeals have been preferred by the Generator/Developers. While examining the challenge we have to consider the various Questions that arise for consideration in these appeals.

46. As already pointed out, the original fixation of price of energy generated by NCE Developers is in terms of policy direction issued by State Government. It is not within the jurisdiction or scope of powers conferred under the Andhra Pradesh Reform Act, 1998 on the Regulatory Commission to review or examine the policy direction issued by the State Government. Absolutely Commission has no executive power to lay down the policy and the Commission is bound to exercise its powers only in terms of The Andhra Pradesh Electricity Reform Act, 1998 or the Electricity Act 2003. The assumption of authority by the Commission is not only illegal but also a total misconception. The objection raised in this respect has been ignored by the Commission as it was bogged down by its fanciful ideas and over enthusiastic arrogation of power on itself, and acted as if it has executive power to set at naught the Policy directions in force. The Regulator has neither executive nor administrative power nor could lay down a policy of its own as the Statutory Provisions of all the enactments in force do not confer such powers. A perusal of Andhra Pradesh Electricity Reform Act, as already pointed out, would show that policy direction, if any, could be laid down by the State Government as seen from Section 12 of The Act as well as Section 108 of The Electricity Act, 2003. Sub Section (2) of 108 provides that the decision of the State Government with respect to matters of policy involving public interest shall be final. The Commission had claimed and asserted PLENAR POWER, without even finding as to what plenary power means. The word “plenary” according to P. Ramanatha Aiyar’s Law Lexicon means “Not subject to limitation or exceptions, not incomplete (as) plenary powers”. The word “Plenary Power” means “Power that is broadly construed especially a Court’s power to dispose of any matter properly before it”. Being a statutory Commission, it has no plenary power.

47. When the Regulatory Commission has no executive power or the power to lay down the policy, the assumption of the Commission that it has the power to review the price already fixed by State by virtue of policy direction, as already pointed out is a total misconception. That apart the Commission also directed that the NCE developers will be paid at the same rate at which they were being paid. Out of compulsion and threat of the DISCOMs most of the developers have executed the PPAs and some of them went before the High Court challenging the direction of the Regulatory Commission.
48. One of the directions by the Regulatory Commission being that the generator shall supply entire power generated by it to APTRANSCO exclusively. This is obviously without jurisdiction and authority as there is no enabling provision in terms of Andhra Pradesh Electricity Reform Act, 1998. Section 10 of the 2003 Act specifies the duties of a generating company and it has been spelt out by the Legislature in clear words.
49. Under Section 11 of the 2003 Act only the appropriate Government may specify that a generating company shall in an extra ordinary circumstance operate and maintain generating station in accordance with the direction of State Government. Explanation to Sub Section (1) of Section 11 itself indicates as to what is the extra ordinary circumstance. There is no parallel provision in the A.P. Reform Act which enabled the Regulatory Commission to compel the developers to sell the entire energy generated to APTRANSCO and DISCOMS. The 2003 Electricity Act prevails over 1998 AP Reform Act as provided in Sec. 185 (3) of 2003 Act.
50. At the same breath we will be well justified in sustaining the contention that the Regulatory Commission has no power to direct or compel the sale by the appellants only to AP TRANSCO or DISCOM as the provisions of the Andhra Pradesh Electricity Reform Act 1998 do not confer such a power on the Regulator, nor was it the object of the said legislation. We do not agree with the view of the Commission that it has plenary powers or that Section 11 (1) (e) of the said Act confers such a power on it to issue a blanket direction to generators to supply power to licensees or

that it falls within the regulatory functions of Commission to compel so. The interpretation placed by the Commission on Section 11 (1) (e) is not sustainable and the learned counsel for the appellants are fortified by the Division Bench pronouncement of Andhra Pradesh High Court in Writ Petition No. 4770 and 4771 of 2002 and CMA No. 1931 and 1025 of 2003 etc. dated 18.04.2003, since reported in 2003 (3) A.L.D. 762 (DB). This point deserves to be answered in favour of Developers and we hold that the direction issued by the Regulatory Commission to all Developers to sell Power generated only to APTRANSCO/ DISCOM is without authority and jurisdiction. Hence we hold that the A.P. Regulatory Commission has neither the authority nor jurisdiction to issue such an extraordinary direction to NCE Developers in any view of the matter.

51. The first notice issued by Regulatory Commission proceed on the premise that it has power to review the rate/ incentives given to developers or it has power to issue executive directions. Such a proposal is itself without jurisdiction as the Commission in terms of Andhra Pradesh Reform Act could approve a PPA entered between developers and APTRANSCO. The proceeding so initiated is based upon a misconception of the entire provisions of the A.P. Electricity Reform Act. Apart from earlier PPAs entered by Electricity Board, be it out of compulsion or coercion or voluntary, PPAs came to be entered between the APTRANSCO and developers. The PPAs so entered were approved by the Commission in exercise of its statutory powers. At the instance of the Regulatory Commission the APTRANSCO called upon the generator to come and sign a Standard Power Purchase Agreement approved by the Regulatory Commission for giving consent/ approval.

52. Various stipulations, as entered between the transmission corporation and the developer in the PPA, were altered by orders of the Commission. By virtue of amendments so ordered by the Commission, the Commission has fastened its reins as if it has the power to revise the price for the supply of energy from time to time apart from review of purchase price on completion of 10 years from date of commissioning of each NCE project. Duration of the PPA is for 20 years from the commercial

operation date, and there could be a renewal on the expiry of 20 years but subject to the consent of APERC. The PPA itself contains unilateral conditions introduced and imposed by the Regulatory Commission as against the PPA terms and stipulations concluded between the two parties. This action of the Regulatory Commission also is per-se illegal, without authority, not called for and not in conformity with provisions of the Andhra Pradesh Electricity Reform Act, 1998. While entering PPA, the price that has been agreed upon, between parties, is in terms of policy direction issued by the State, and such rate was being paid at which developers being paid for a considerable period.

53. In this background, even assuming that the PPA is final and binding, the price revision stipulated in the PPA and the direction that could be issued with respect to the prices to be paid could be by way of regulatory power which will fall under Section 21 (4) of the A.P. Electricity Reform Act. Once the price has been fixed as a regulatory measure in terms of Section 21(4) or under section 86 (1) (b) of the 2003 Act, as a regulator assuming that it has got the authority or the power, the price has to be determined by way of regulatory action under Section 86 (1) (b) and it cannot be done by resorting to tariff fixation. Once the Commission approve a price on the basis of PPA agreed between the parties or issued direction to enter into PPA as amended by it, it is not open to the Commission to undertake or seek to fix tariff with respect to the NCE developers under Section 62, 63, etc. of 2003 Act. Such an action is without jurisdiction and it interferes with statutory contract, which is binding on the parties, and such interference is not permissible in law.
54. Having approved the PPA even in terms of its direction, which is nothing but a regulation of price falling under the second option either under Section 21 (4) of Andhra Pradesh Reform Act or under Section 86 (1) (b) of 2003 Act, the entire exercise has been undertaken by Commission as if it has the power to fix tariff with respect to private generators by resorting to exercise power under Section 62, 64, read with Section 86(1) of the 2003 Act. Such a view is not sustainable as when once the Commission regulates the purchase price by giving consent to agreement /

arrangement entered, it is not open to Commission to go back and invoke the power of tariff fixation in respect of NCE Developers whose generation simpliciter is not subject to tariff fixation. If such generator enters into arrangement with transmission Licensee, then only the provision enables the Commission to regulate such purchase/procurement by licensee and it has no power to determine tariff of a generator simpliciter.

55. Under Section 78-A of the Electricity Supply Act, the Electricity Board is always guided in its functions by the directions issued by the State Government on questions of policy. In fact, only pursuant to such policy directions issued by the Government, the Board entered into agreements with forty-one developers prior to the commencement of Andhra Pradesh Electricity Reforms Act and twenty agreements were entered into by A.P. TRANSCO after commencement of 1998 Act.
56. Under Section 56(2) of the Andhra Pradesh Electricity Reform Act Commission and the A.P. TRANSCO upon their constitution shall discharge the functions of the Board under Electricity Act, 1910 and Supply Act, 1948 to the extent they relate to the domain of these two functionaries. At the same time, it is clear that in terms of proviso to Section 56(2) *“the State Government is entitled to issue all policy directions*
57. From the facts of the case, it is clear that the power purchase agreements entered into by the Board with the Power Generating Companies are all subsisting except for a difference as to duration when the Commission assumed jurisdiction and initiated its misplaced and misdirected actions to modify the arrangement.
58. The stand of the Commission as reflected in its order is not acceptable. We do not know how a policy matter ceased to be a policy matter after coming into force of the Act and more so when the power of the Government to issue directions is preserved by Section 12 and 56(2) of the Reform Act, which includes giving directions in determination of tariff structure for supply of electricity to various classes of

consumers as well as under proviso to Section 56(2) of the Act. As far as generation and procurement of energy required, to meet the ever increasing demand is the primary responsibility of the State, which in turn having realized as early as 1990s invited private enterprises to establish Generating Companies by offering several incentives. Even the new 2003 Act is intended to open avenues for participation of private sector and increase competitiveness through participation of private sector and to manage electricity industry in an efficient, economical manner to ensure the social objective of fair deal to the consumer. The Commission is a statutory delegatee of the power of the Government, and Government is the policy maker. The Commission has no power to arrogate or abrogate itself with such absolute power ignoring the provisions of The Act.

59. It is to be pointed out that the notice published by the Commission on 21.2.2000 indicated that all power purchase and/or wheeling agreements with A.P. TRANSCO or any distribution companies after 3rd April, 1999 and also any extension or renewal of earlier PPAs or altering any terms and conditions of such PPAs require the consent of the Commission in terms of sub-clause (4) of Section 24 of APE Reform Act.
60. From the above it is seen that the purchase agreements that are likely to be entered after 3rd April, 1999 or any extension or renewal or alteration of any terms and conditions of the earlier PPAs require the consent of the Commission. To put it aptly, the power purchase agreements entered into by the Private Generating Companies with A.P. TRANSCO prior to 3rd April, 1999 continues to be in operation till the agreement period comes to an end. The Commission further reiterated the said view in Paragraphs 185 and 186 of the tariff order for 2002-2003. In this respect, the Commission has recorded thus :

“The issue whether a regulatory commission constituted under the Reform Act can or should examine the PPAs concluded before the constitution of the Commission is a different matter. Such concluded PPAs cannot be covered by the expression “enter into” used in Section 21(4) of the Reform Act. It is therefore not

possible for the Commission to reopen such PPAs concluded in all respects before the Reform Act came into force.”

61. The above portion shows beyond a shadow of doubt that the Commission is very clear in its mind that the concluded power purchase agreements before the Reforms Act came into force cannot be reopened. However, the Commission faulted itself by somersaulting and contending in Para 8.9 of the impugned order that the Commission as the regulator and further being vested with the statutory functions under the Reform Act has the authority to deviate from the charges agreed to be paid and also the terms and conditions contained in the Agreements earlier signed by APSEB. For the same reasons, as seen from the earlier notifications issued by the Government of A.P., it is the Commission’s only obligation to ensure that the charges for supply is fair.
62. As set out above the Commission has no authority to reopen the concluded contract or PPA nor it could try to over reach the policy directions already issued by state and binding on both sides. It is well settled law that where there is no clear provision in the new Act which can be pressed into service to take away vested rights of the parties, it is for the Legislature to take away the vested rights of the parties. It is not the case of Commission that it has power to set at naught or reopen or divest the rights vested on the parties.
63. In the light of the above discussions and consideration of various statutory provisions as well as the directions issued by the Government of Andhra Pradesh in GO MS No.116 and GO MS No.152, which are binding directions as per statutory provisions, the agreements entered into by the then Electricity Board in terms of the policy directions with Developers are subsisting on the crucial date and are enforceable not only against the Electricity Board but also transferees/ successors.
64. While following the ratio laid by the Supreme Court in *India Thermal Power Limited vs. State of MP, AIR 2000 SC 1005*, we have no doubt in holding that the agreements entered into by the Electricity Board and the generators are statutory and binding on

the successor APTRANSCO, the DISCOM as well as the Commission. The Commission cannot either nullify or modify the concluded contracts in purported exercise of its alleged regulatory powers vested in it.

65. In *Mst Rafiquennessa vs. Lal Bahadur Chetri*, AIR 1964 SC 1511, the Hon'ble Supreme Court held that "where vested rights are affected by any statutory provisions, the said provision should normally be construed to be prospective in operation and not retrospective, unless the provision in question relates merely to a procedural matter. It is not disputed by him that the Legislature is competent to take away vested rights by means of retrospective legislation. Similarly, the Legislature is undoubtedly competent to make laws which override and materially affect the terms of contracts between the parties; but the argument is that unless a clear and unambiguous intention is indicated by the Legislature by adopting suitable express words in that behalf, no provision of a statute should be given retrospective operation if by such operation vested rights are likely to be affected. These principles are unexceptionable and as a matter of law, no objection can be taken to them."
66. In *Mahanagar Telephone Nigam Ltd. v. Telecom Regulatory Authority of Delhi*, AIR 2000 Del. 208, Telecommunication Interconnection (Charges and Revenue Sharing First Amendment) Regulation, 1999. While considering the effect of *non-obstante* clause, Mr.Justice. *S.N.Variava* as he then was speaking for the Bench observed thus :

"In this behalf, it is very pertinent to note that even though Section 11 starts with a non-obstante clause which provides that the functions are to be exercised "Notwithstanding anything contained in the Indian Telegraph Act, 1885" the section nowhere provides that the functions are to be exercised notwithstanding "any contract or any decrees or orders of Courts." It is well settled now that when the Legislature intends to confer on a body the power to vary contracts of existing private rights, it has to do so specifically. In the absence of any provision authorizing the Authority to vary private rights under existing contracts or licences, no such power can be presumed or assumed. This is the law as laid down by the Supreme Court in the case of Indian

Aluminium Company v. Kerala State Electricity Board, reported in AIR 1975 SC 1967.

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In *Indian Aluminium Co. vs. Kerala State Electricity Board* reported in AIR 1975 SC 1967, the Supreme Court held thus:-

“The principle that when a public authority is entrusted by statute with a discretionary power to be exercised for the public good, it cannot, when making a private contract in general terms, fetter itself in the use of that power or in the exercise of such discretion is not applicable on the facts of the present case. This is because the principle is limited in its application to those cases where the attempt to do so is otherwise than by the valid exercise of the statutory power. The position is different where a statutory power is exercised to enter into a stipulation with a third party which fetters the future exercise of other statutory powers. In such case even future exercise of another statutory power, it would be valid and the exercise of such statutory power would pro tanto stand restricted. That would follow on the principle of harmonious construction. The public authority would not, in such a case, be free to denounce the stipulation as a nullity and claim to exercise its statutory power in disregard of it.”

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“Neither S.49 nor S.59 of the Electricity Supply Act confers any authority on the Board to override a contractual stipulation as to rates in derogation of such contractual stipulation, even if it finds that the rates stipulated in the contract are not sufficient to meet the cost of production and supply of electricity and it is incurring operational loss.”

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We need not labour any further as in the present case neither there is a *non-obstante* clause nor any provision is made for repudiating the earlier agreements or divesting the vested rights. Unfortunately the Commission had dwelled on a misdirection and proceeded as if it has the power to reopen or invalidate a contract or part of it validly

entered long before it came to be constituted. This fallacy in its approach is fatal to the entire order appealed against.

67. These contentions advanced before us were raised before the Commission. It is seen that one of the preliminary and substantial objection raised by Developers before the APERC being the Commission has no jurisdiction to decide the issues set out in the notice. One of the issues, being whether the APERC has the jurisdiction and authority to fix tariff in respect of the NCE generation, who generate electricity and who could sell it to a trader or APTRANSCO or any third party after getting open access in terms of the Andhra Pradesh Electricity Reform Act 1998 or the Electricity Act 2003. But these contentions were brushed aside and did not receive due consideration in the hands of the Commission.
68. Before considering the remaining points framed for consideration let us examine the relevant provisions of the statutory enactments which govern the field of electricity in the State of Andhra Pradesh. Let us first examine the provisions of Andhra Pradesh Electricity Reform Act 1998. Sec 11(1) enumerates the functions of the Commission:

- “(a) to aid and advise, in matters concerning electricity generation, transmission, distribution and supply in the State;*
- (b) to regulate the working of the licensees and to promote their working in an efficient, economical and equitable manner including laying down standards of performance for the licensees in regard to services to consumers;*
- (c) to issue licences in accordance with the provisions of this Act and determine the conditions to be included in the licences;*
- (d) to promote efficiency, economy and safety in the use of the electricity in the State including and in particular in regard to quality, continuity and reliability of service and enable to meet all such reasonable demands for electricity;*

(e) *to regulate the purchase, distribution, supply and utilization of electricity, the quality of service, the tariff and charges payable keeping in view both the interest of the consumer as well as the consideration that the supply and distribution cannot be maintained unless the charges for the electricity supplied are adequately levied and duly collected;*”

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Excepting Clause (e), no other clause has a relevancy in this respect.

69. This clause (e) provides that the Commission is to regulate the purchase, distribution, supply and utilization of electricity, the quality of service, the tariff and charges payable etc. A Division Bench of the A.P.High Court had occasion to consider the scope of this clause and rightly pointed out that “Generation and transmission” are not embedded in Sec. 11(1)(e). In this respect the Division Bench in RCI Power Ltd., Chennai Vs. Union of India 2003(3)ALD 762 held thus:

“65. *From the above clauses, it is seen that the Commission’s role with regard to generation of electricity, transmission, distribution and supply in the State is only advisory in nature as per Section 11 (1)(a), (g), (h), “But under Section 11(e) the Commission is empowered to regulate the purchase of electricity, maintaining quality of service by the licensees and in fixation of tariff to be collected from the consumers keeping both the interest of the consumers as well as the licensees. In Clause (e) empowering the Commission to fix price for purchase of power and tariff to be collected from the consumers, the words “generation and transmission” are conspicuously missing. Hence, Section 11 itself made a clear distinction on the role of Regulatory Commission in matters concerning generation and transmission of electricity and in the matters relating to purchase of power and fixation of tariff for supply of electricity to consumers and as such it cannot fix the charges for transmission of the power generated by the Generating Companies.”*

The above pronouncement of the Division Bench which is on the point is being heavily and rightly relied upon by the learned counsel for Developers and there is force in this submission.

70. Let us nextly take up Part VI of the Andhra Pradesh Electricity Reform Act, 1998, which provides for “Licensing of Transmission and Supply” Section 14 and 15 of the Act provides for licensing of Transmission and supply of electricity in a specified area of supply including bulk supply to licensees or any person. Sec 2(d) which defines the expression “license” as “a license granted under Section 15 of The Act”. Section 17 of the Act prescribes the “General duties and Powers of holder of a supply license or a transmission license only.
71. Only in Section 21, there is reference to “Generating Company”. Section 21 merely restricts the licensees’ viz. transmission licensee or supply licensee or generating company from acquiring license or the undertaking without previous consent of the Commission. Section 21(4), provides for transmission license entering into arrangements for the purchase of electricity from any person or Generating Company unless prohibited by the terms of license, but with the consent of Commission. The said provision reads thus :

“21(4) A holder of a supply or transmission licence may, unless expressly, prohibited by the terms of its licence, enter into arrangements for the purchase of electricity from,-

- (a) the holder of a supply licence with permits the holder of such licence to supply energy to other licensees for distribution by them; and*
- (b) any person or Generating Company with the consent of the Commission.*

(5) Any agreement relating to any transaction of the nature described in sub-section (1), (2), (3) or (4) unless made with or subject to such consent as aforesaid, shall be void.”

72. This is the only provision in the State Act, which enables the holder of a supply or transmission license to enter into arrangement for the purchase of power from a Generator or other licensee and such arrangement shall be with the consent of the Commission. Entering into such power purchase arrangement without consent is void in terms of Sub Section (5) of Section 21. This provision is prospective.
73. Part VIII of The 1998 Andhra Pradesh Reform Act provides for “Tariffs” such tariff as seen from Section 26 of The Act only relates to license granted under the Act. It is obligatory for the licensee under Sub Section (5) of Section 26 to provide the details to determine the licensee’s revenues and tariffs. This Section nowhere refers to a generating company or its affairs or for fixation of its Revenue or tariffs. As discussed herein, for generation no license is required and a generator does not fall within the definition of license as defined in Sec. 2(d).
74. On a conjoint reading of the provisions of A. P. Electricity Reform Act 1998, it is clear that no license is required for Generation under the Act nor there is an enabling provision for the Commission to fix the annual revenue or tariff of Generator, who generates Power in the State. The Regulatory Commission, if at all has a say only when a holder of a supply or transmission license enters into arrangement for the purchase of electricity from a Generator subject to Sec 21(5) and seeks for consent of the Commission. Such consent is to be obtained by the holder of Supply or transmission license for entering into arrangement for purchase. Only this alone within the tariff fixation while in other respects the entire generation sale or evacuation of power falls with the regulatory function, viz. according approval of PPA, when purchase arrangement is entered between a private generator and licensed Bulk or Retail suppliers as the case may be after coming into force of Reform Act, 1998. In respect of such regulatory and tariff fixation function the legislature has maintained a dichotomy and this requires to be sustained. The Regulatory function shall not be mixed with the policy or tariff determination function or exercise of power thereon. We may also hold that where Agreement for Power Purchase has

been entered before the Reform Act or before the constitution of Commission, no such consent is required. Same shall be position as well under 2003 Act.

75. In other words with respect to generation by a generator or sale of power by generator to persons other than the said two type of licensees, the Regulatory Commission has neither authority nor jurisdiction nor a say at all in terms of Andhra Pradesh Electricity Reform Act 1998 or for that matter under 2003 Act also. The Part-XII, provides for “offence and penalties”, namely Section 40, provides for penalty only in respect of the business of transmission or supply or use of energy alone. It is clear that except with respect to prohibition in Sub Section (1) of Section 21 and with respect to requirement of holder of a supply or transmission license to secure consent of the Commission to enter into arrangement for purchase, no power has been conferred on the Regulatory Commission under The Andhra Pradesh Electricity Reform Act 1998 in respect of “Generators”. The regulatory function is different from tariff fixation which is a quasi legislative function, now delegated to the Commission under the Act. In the light of the above, Section 11(1) (e) has to be read and it is clearly seen that Commission has no power with respect to a Generating Company or its affairs and it has neither the jurisdiction or authority to fix the annual revenue requirement of the NCE generator like the appellants or to fix tariff with respect to their generation and sale to any one except to licensees, be it a NCE Developer or any other Generator.
76. Taking up the provisions of the Electricity Regulatory Commissions Act 1998 (Central Act 14 of 1998) no notification has been issued by the State of Andhra Pradesh under Section 17 of the Act to establish a Commission. That apart, Section 22 of the Act, enables the Commission to regulate the Power Purchase and procurement of power from generator by the transmission utilities and distribution utilities including the price at which the power shall be procured from the generator etc. Section 22(1) of the Regulatory Commissions Act reads thus :

“22(c) to regulate power purchase and procurement process of the transmission utilities and distribution utilities including the price at which the power shall be procured from the generating companies, generating stations or from other sources for transmission, sale, distribution and supply in the State;”

77. Section 29(1) of the Regulatory Commissions Act, which provides for determination of tariff by State Commission reads thus :

“29(1) Notwithstanding anything contained in any other law, the tariff for intra-State transmission of electricity and the tariff for supply of electricity, grid, wholesale, bulk or retail, as the case may be, in a State (hereinafter referred to as the tariff) shall be subject to the provisions of this Act and the tariff shall be determined by the State Commission of that State in accordance with the provisions of this Act.”

78. This provision also do not provide for fixation of tariff in respect of a generator simpliciter. It is therefore clear that the Regulator under this Act also, i.e., the Commission has no jurisdiction or authority to fix the ARR or tariff of generators like the appellants. At the risk of repetition, we point out that the Regulatory Commission is conferred only with power to given consent for the purchase by transmission utilities and distribution utilities from generating companies and to regulate such Power Purchase or Procurement and approval of PPA.
79. This apart it is to be pointed that A. P. Electricity Regulatory Commission, has not been constituted under The Electricity Regulatory Commission Act 1998 but it owes its authority to Andhra Pradesh Reform Act 1998 initially and latter to 2003 Act. Hence, in any view, it is also not vested with the power to fix the ARR of a Generator or a tariff for generation assuming the above provision provides for tariff determination of a generator like appellants.
80. In contrast, Section 79(a) and (b) of The Electricity Act, 2003 provides to regulate tariff of generating companies owned or controlled by the Central Government and in

case of generating companies which has a composite scheme of generation and sale of electricity in more than one State. This dichotomy maintained by legislature is clear and shall not be lost sight. In any event, the only function of the Commission is to regulate the purchase price of power when licensee enters into arrangement with a generator for purchase.

81. Now we have to examine The Electricity Act 2003, before concluding. It is not in dispute that there is no statutory requirement of obtaining license for generation of power under this 2003 Act. Section 7 is clear in this respect and what it mandates is compliance of technical standards relating to connectivity with the grid referred to in Clause (b) of Section 73. With respect to captive generation also, as seen from Section 9, a person may construct, maintain or operate a captive generating plant as well as dedicated transmission lines. Proviso to Sub-Section (1) of Section 9 provides that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company. Sub-Section (2) provides that a person who has constructed a captive generating plant shall have the right to open access for the purpose of carrying electricity from his captive generating plant to the destination of his use. Section 10 of the Act prescribes the duties of a generating company which includes establishment, operation and maintenance of generation stations, tie-lines, sub-stations and dedicated transmission lines connected their with.
82. Sub-Section (2) of Section 10 provides that a generating company may supply electricity to any licensee in accordance with this Act and the Rules and Regulations made there under and may also subject to the Regulation made under Sub-Section (2) of Section 42 supply electricity to any consumer. Such act of generation of electricity falls, under Part III of The Electricity Act 2003. While licensing is provided in Part IV of The Electricity Act 2003. Section 12 of The Electricity Act 2003 mandates that no person shall transmit, distribute or undertake trading in electricity unless he is authorized to do so by a license issued under section 14 of The Electricity Act 2003. Section 14 provides for grant of license to transmit as a transmission licensee, to

distribute as a distribution licensee or to undertake trading as an electricity trader. Section 15 prescribes the procedure for grant of a license. In respect of the activities of a licensee, be it a transmission licensee or be it a distribution licensee or be it a license to trade, provisions have been made in The Electricity Act 2003 but not in respect of Generators like the appellants herein.

83. In respect of distribution licensee, Part VI of The Act prescribes the duties and obligations of such licensee, its privileges to recover charges, its power to require security, power to recover expenditure, stipulations as to terms of supply and laying down the code of supply and standards of performance of licensees. Part VII provides for fixation of tariff. In terms of Section 61, the commission has to specify the terms and conditions for determination of tariff and the Commission shall be guided by the criteria set out in clauses (a) to (i) of Section 61. Section 62 provides for determination of tariff with respect to supply of electricity by a generating company to a distribution licensee, transmission of electricity, wheeling of electricity and retail sale of electricity not in any other contingency.
84. There is no doubt that tariff is required to be fixed only when supply of electricity by a generating company to a distribution licensee takes place and in particular to Sec. 79(1)(a) and (b). In other words, if it is a supply to a distribution licensee, who has secured a license under Section 14 of The Act, tariff fixation is mandatory. So also in respect of transmission licensee, transmission tariff or tariff for wheeling of electricity also is required to be determined by the Commission only in respect of transmission licensee, who had secured a license under Section 14.
85. Hedged, in this context, it is obvious that tariff is to be determined under Section 62(1) (d) for retail sale by a distribution licensee, who has secured a license under Section 14(b) of The Act. It is not as if tariff has to be fixed for generation of power or every sale or retail sale of electricity by a generator for which no license is prescribed or required as seen from Section 10 of The Act. Where the sale or transmission of electricity is not regulated by the license/s granted under The Act,

there is no requirement at all to regulate by virtue of the provisions contained in Part VII of The Act. Neither Section 63 nor Section 64 are applicable with respect to sale of electricity by a generator through its exclusive or dedicated transmission lines to an individual consumer in terms of contractual obligations or arrangement entered between them.

86. The learned counsel appearing for contesting Respondents as well as learned counsel appearing for the Regulatory Commission sought to contend that sale of power by the Appellants to the APTRANSCO will fall within the ambit of sale of electricity and therefore there could be a determination of tariff under Section 62 of The Act. Much reliance is placed upon Section 62 (1) (d). A point is made out by Respondent in this respect.
87. The fixation of tariff by the Commission in respect of power generated by NCE developers with respect to sale to licensees is provided in this Act by way of entering into arrangement for purchase. So also the Commission could regulate the purchase of power by licensee from the appellants/generator under Section 86 (1) (b), which could be only pursuant to terms of the bilateral agreement which the appellant and the Licensee entered between themselves. In fact, the parameters that may be applied by the Regulatory Commission while giving consent to the PPA or the arrangement entered between the parties, namely, PPA are distinct and different from the parameters prescribed for tariff fixation under Section 61; 62 etc., which is a quasi legislative function as has been held. The very Tariff fixation is by way of delegation of legislative power to the Commission as prescribed in the Act and within the four corners of the Act.
88. Apart from the various provisions referred to by us we are fortified by the Statement of Objects and Reasons behind The Act. The main features of the Bill as seen from the Statement of Objects and Reasons are as follows:-

- “(i) *Generation is being de-licensed and captive generation is being freely permitted. Hydro project would, however, need approval of the State Government and clearance from the Central Electricity Authority which would go into the issues of dam safety and optimal utilization of water resources.*
- (ii) *****
- (iii) *****
- (iv) *****
- (v) *****
- (vi) *****
- (vii) *For rural and remote areas stand alone systems for generation and distribution would be permitted.*
- (viii) *****
- (ix) *****
- (x) *Where there is direct commercial relationship between a consumer and a generating company or a trader the price of power would not be regulated and only the transmission and wheeling charges with surcharge would be regulated.*
- (xi) *****
- (xii) *****
- (xiii) *****”

89. In Kumar Jagdish Chandra Sinha v. Eileen K. Patricia D’Rozarie reported in 1995(1) SCC 164, the Hon’ble Supreme Court held thus:

“The Statement of Objects and Reasons accompanying a legislative bill cannot be used to ascertain the true meaning and effect of the substantive provisions of the legislation, but it can certainly be pressed into service for the limited purpose of understanding the background, the antecedent state of affairs and the object the legislation sought to achieve.”

90. In Deepal Girishbhai Soni v. United India Insurance Co. Ltd. reported in 2004 (5) SCC 385, the Hon’ble Supreme Court held thus:

“It is now well settled that for the purpose of interpretation of a statute, the same is to be read in its entirety. The purport and object of the Act must be given its full effect by applying the principles of purposive construction.”

91. From the discussions it is clear that with respect to sale of power by a private generator to any third party the Commission has no jurisdiction to fix the tariff or regulate the arrangement. However, when the sale is to a Transmission Licensee or Discom, there could either be a tariff regulation by the Commission under Section 86(1)(b) or Section 62(1)(a) which is a special provision for the particular contingency or regulation of purchase of power or procurement by Distribution Licensee from the generator. Sec.62(1)(a) reads thus:-

“62. Determination of tariff – (1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for –

(a) supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;”

Section 62 is a general provision with a special reference to Sec 79(1)(a)(b) and 86(1)(a) and it has to be read in that context alone. The special excludes the general provision is the well settled rule of interpretation. The provisions of the Act also open for such a stand and Sec 86(1)(b) stands apart and full implication has to be given.

92. The PPA has been entered on the basis of policy directions of the State Government as per its order and the rate of purchase per unit of power has been agreed in terms thereof. Such PPA entered after the Constitution of Commission has been consented to by the Regulator after due consideration and on a prudent check, which is a statutory exercise by the Commission. None has challenged or expressed grievance in respect of PPA entered for purchase of power from the appellants / generators, either at the inception or after formation of APER Commission. PPAs so entered is binding on the APTRANSCO as well as DISCOMS, being the successors on unbundling and reconstitution.

93. The right to review the rate of purchase by the Regulatory Commission, assuming to be valid, it just confers the power to revise the rate of supply so as to have a second look and to so adjust from time to time the cost of procurement and the cost of supply, which operations a transmission licensee or DISCOM under the Act has to undertake, without sustaining a loss. It is not as if the contract entered between the parties would be subjected to alteration by a future legislation or by the regulator stepping in. What were agreed are contractual stipulations with the statutory background under the AP Reform Act, by virtue of conferment of regulatory power to approve the rate of purchase. The State which owned the Electricity Board as well as its successor, namely, Transmission Corporation as well as DISCOMS are bound by the stipulations and the regulator's power is limited to the extent of regulating the power purchase rate and it has to just satisfy itself that such a purchase is economical or fair and it will not affect the consumers to whom supplies are made through DISCOM. The scope of exercise of regulatory power by Commission has to be in the above terms and not for determination of tariff in respect of private generators like the appellants – NCE Developers.
94. We shall now take up the remaining points relating to estoppel and legitimate expectation. The Order impugned is challenged in all the appeals by advancing the plea of estoppel and legitimate expectation by all non-conventional energy developers. It is the plea that the Government of India accepted, the resolution adopted by United Nations' General Assemble with regard to establishment of power projects through renewable sources and the Government of India announced its policy to promote energy from renewable sources. In fact, a separate Ministry of Non-conventional Energy Resources was also created to look into the policy matters, draw up programme, schemes to popularize the energy generated through renewable sources. The Central Government also directed the respective State Governments and the Electricity Boards to encourage generation and provide facilities including wheeling, banking and third party sale and purchase of power by the Electricity Boards on remunerative prices in their policy.

95. Following the policy direction, issued by the Central Government, the Government of Andhra Pradesh, apart from providing incentives directed by the Central Government, took a policy decision to deduct 2% of the energy generated to be wheeled for banking by the developers of non-conventional energy initially for a period of 5 years and the same has been extended from time to time. The Government *suo moto* took review of the incentives to take effect from and ultimately on 01.04.2001. The Government also directed that there would be further review of the purchase price with specific reference to each developer on completion of 10 years from the date of commissioning of the project as seen from GO Ms No.93 Energy (RES) Department dated 18.11.1997. We have already referred to the elements of incentives, as found in GO.
96. The various developers who proposed to set up generating plants in the State on the representations made by the Government and on the invitation of AP Electricity Board and of NEDCAP, which is the nodal agency appointed by the State Government. The projects were processed and approved by the said NEDCAP. Based on the approval of the NEDCAP, who provided all the required details of the project, the developers applied for institutional loan which were sanctioned by IREDA. Under the supervision of NEDCAP, the non-conventional energy generating projects were built. In fact, on the approval of the NEDCAP, the developers entered into Power Purchase Agreement with Electricity Board on various dates. The said PPA contained exhaustive stipulation and PPA was entered on the basis of approval given on behalf of State Government by NEDCAP. The rate for payment of energy was agreed to at Rs.225 paise per unit with escalation at 5% per annum, with 1994-1995 as base year and to be revised on 1st April of every year up to 2003-2004 and beyond 2003-2004, the rate to be decided by a review. The projects were executed, completed on different dates by various developers and connected to APTRANSCO Grid for evacuation of power. The Power Purchase Agreement, provides that it shall be in force for 20 years from the date of commercial operation and subject to further

renewal to be agreed between the parties. All these are factual and took place long prior to constitution of the Regulatory Commission.

97. We have already extracted the sanctioned proceedings of NEDCAP. The said sanction is by virtue of delegation of power by the Andhra Pradesh Government. It is in fact, as sanctioned by the State Government, to set up power plant based on industrial waste/ bio mass/ wind/ municipal waste and etc. Loans were sanctioned by IREDA, another governmental agency and projects were put up on the representations that the State Government shall not only purchase and evacuate the power but also assure that at least for a period of 20 years, there will be purchase of power to begin with and subject to renewal thereof by the Electricity Board or the State Transmission Corporation or its successor.
98. In fact, Regulatory Commission in the joint petition filed by the Transmission Corporation Developer, accorded approval for the PPA entered after its constitution. In its initial order, the Regulatory Commission made it clear that there are not only the existing projects but also the projects that are coming up or being put up, will have the same incentives as well as the tariff rate for the sale and purchase of power by Transmission Corporation or its predecessor, the electricity Board the Commission reiterated that the Developers are entitled to plan their investments on the principles set out in its Order without any need for any further Order from the Commission. The Commission, in fact, granted liberty to each Developer to come forward with any specific issue. The very Order of the Commission dated 20th June, 2001, has already been extracted above. The Commission has, in fact, reiterated the encouragement and, at the same time, to provide a regular supply to the TRANSCO directed that from August, 2001 all generators of non-conventional energy to supply power to APTRANSCO.
99. The Commission in its over enthusiasm further observed that there will be a review of the purchase price with specific reference to each Developer on completion of 10

years from the date of commissioning of the project, as in its view, the loan from financial institution would have been repaid by then.

100. Having invited the entrepreneurs to set up project on the representations made in this behalf by the State Government as well as NEDCAP and the Electricity Board as well as its successor, APTRANSCO, and the Generators were made to spend a huge amount in the execution of the project. After the completion of the project by the non-conventional energy generators on different dates, ignoring the national policy underlying the establishment of such non-conventional energy generation, contrary to the earlier assurances and representation given by the Government and its agencies, at the instance of the APTRANSCO, the Commission sought to slash down the rates fixed in terms of the Government's policy. It is no one's case that the State Government has reviewed its policy or the earlier policy has lapsed or the policy has been given up or revoked. There is no difficulty in holding that, but for the invitation, promises and assurance, the developers would not have taken up the ventures and change their position to such a financial situation and contingency.
101. The Regulatory Commission, it is to be pointed out, instead of ascertaining the views of the State Government simply assumed the power of the State government and taken a stand as if the Andhra Pradesh Electricity Reform Act confers powers on it and as if the policy direction given by the State Government is not binding on it or could be done away with. It is nobody's case that policy directions are not binding on the parties, but policy directions came to be issued even after coming into force of Andhra Pradesh Electricity Reform Act. The said Act also did not provide that the policy directions issued by the State Government ceases or stands cancelled or revoked and that the regulator has been conferred with the power to meddle with the policy directions.
102. In fact, The Reforms Act provides that it is the State Government which alone is entitled to take policy decisions on all matters concerning electricity in the State including overall planning and coordination. It could be well said that under Section

12 of The Andhra Pradesh Reform Act, the State Government's power to issue directions on policy matters concerning electricity in the State is well preserved. Section 12 of The Reform Act provides that the State Government has the power to issue policy directions on matters concerning electricity. Such policy directions shall be consistent with the objects sought to be achieved by the Act, but the same shall not adversely affect or interfere with the functions and powers of the Commission. Sub section (3) of Section 12 also provides that the State Government shall be entitled to issue policy directions concerning subsidies to be allowed.

103. As seen from Section 11(1)(a)(g)(h) of the Andhra Pradesh Electricity Reform Act, the role of Commission is advisory, in respect of the matters falling under the said clauses. Section 56(2) of The Reform Act, 1998 provides that the State Government shall be entitled to issue all policy directions and undertake overall planning and coordination, as specified in Section 12 of the Act and to this extent, the powers and functions of the Andhra Pradesh State Electricity Board, as per the provisions of The Electricity Act, 1910 and The Electricity (Supply) Act, 1948 or rules there under, shall vest in the State Government and the State Government shall coordinate and deal with the Central Government and the Central Electricity Authority. This policy which was announced by the State Government prior to The Reform Act and had not been varied or modified and the entrepreneurs invested huge sum, availed loan, changed their position and built non-conventional energy generating stations on the basis of agreement entered with Electricity Board and NEDCAP and their assurances. In fact, the Commission took note of the policy of the Government, the encouragement to be given by the incentives offered had in fact been find a place in PPAs and they were approved by the Commission. Surprisingly, the Commission had plunged itself to misdirection forgetting the invitation of the Government as well as of the NEDCAP and of the Board and on that basis only the enterprises came forward to set up the NCE generating stations.

104. In fact, the Government in its letter dated 20.10.99, after the coming into force of The Reform Act, 1998, directed that the incentives and concessions provided prior to The Reform Act, shall continue to be valid. The Government's letter reads thus:-

“the incentives provided to Non-conventional Energy Developers based on reasonable resources in G.O. Ms. No.93, Energy (RES) Department, dated 18.11.1997 and G.O. Ms. No.112, Energy Department, dated 22.12.1998 are within ambit of and in accordance with the law governing the subject on the dates of issuance . The A.P. Electricity Reforms Act, 1998 which came into force later is prospective and was not made retrospective in its operation expressly or impliedly and therefore except to the extent specifically provided in the said Act, the rights and liabilities created under the law prior to A.P. Act 30/98 coming into force stand preserved and not obliterated by virtue of the principle of Section 6 of the General Clauses Act, 1897 or Section 8 of the A.P. General Clauses Act, 1891. Hence, unless a different intention appears from the A.P. Act 30/98, the incentives and concessions under G.O. Ms. No.93, read with G.O. Ms. No.112 continue to be valid and operative in terms of the said Government orders and cannot be interfered with. In view of the above legal position, the A.P. Electricity Regulatory Commission cannot interfere with the validity and operability of the said two G.Os. during the period of their currency, unless there is any specific enabling provision in A.P. Act 30/98 and it is only after the expiry of the period prescribed by the said G.Os. for undertaking any review, the A.P.E.R.C. can exercise any powers or functions in respect of the same as conferred on them by A.P. Act 30/98.”

105. From the above, it is clear that it is the policy direction issued by the Government or deemed to have been issued by the Government by virtue of the power, it has reserved itself under The Reform Act. No provision in The Reform Act has been shown to hold that the right and powers of the Government to give direction on policy matters have been taken away or stand vested with the Commission.
106. It is clear from the Impugned Order passed by the Andhra Pradesh Regulatory Commission, it has chosen to set aside the policy and solemn promise given by the State Government and its agencies to the NCE Developers for generating and supplying of electricity. It is patently clear that no such power has been conferred on the regulator under The Reform Act as already discussed supra.

107. The Regulatory Commission, being a creature of The Andhra Pradesh Reform Act or The Electricity Act 2003 , is bound to act within the four corners of the Act and it cannot act beyond the power conferred on it under the said enactments. Section 11(2) of The Andhra Pradesh Electricity Reform Act mandates that the Commission has always to act consistent to the objects and purposes for which the Commission has been established as an independent statutory body and all its acts or decisions and orders shall be pursuant to and seek to achieve such objectives and purposes, while it is bound to give effect to the policy directions of the State Government.
108. The Electricity Board as well as the APTRANSCO at the directions of State Government have entered into PPA with all NCE generators while making them to believe that the Board is competent to enter into an agreement for the purchase of power and such Power Purchase Agreement in no way contravene any of the statutory provisions of the Act or Regulations. In such agreement, it is solemnly provided, that the terms shall be in force to begin with 20 years and to be reviewed thereafter. All the agreements entered are all subsisting. The rights, liabilities and privileges of the Board do stand and vest with the APTRANSCO. In most of the cases, it is the APTRANSCO which entered into PPA. The statutory vesting is clear from Section 23(6) of the transfer scheme dated 29.01.99 as well as the subsequent schemes. Subsequently, APTRANSCO has been substituted by the various DISCOMS and all the contracts, obligations and debts to be entered or incurred by the Board with third parties or APTRANSCO with third parties before the transfer schemes have been kept intact and they are deemed to be incurred by the transferee, namely, APTRANSCO or DISCOMS and the said bodies cannot wriggle out the same. The Power Purchase Agreements entered speaks for itself and there is no doubt. Such power purchase agreements have been approved by the Regulatory Commission as well, while taking the view that the price agreed is fair or reasonable.
109. In this respect, the learned counsel for appellants placed strong reliance on the Division Bench Judgment of the High Court arising on the very same set of facts. The Andhra Pradesh High Court in RCI Power Ltd. Vs Union of India & Others

reported in 2003(3) ALD 762, the Division Bench sustained the plea of estoppel as well as the plea of legitimate expectation. The Division Bench, after analyzing the case law, held thus :

“From the above, it is seen that the Government as well as the Electricity Board made not only several promises, but also entered into agreements with the Generating Companies that giving effect to the promises made by them, where under the period of agreement was also mentioned in all the agreements. That apart, we have also held that the State Commission constituted under Electricity Regulatory Commission Act, 1998 is alone competent to fix the wheeling charges payable by the Generating Companies for using the transmission lines of the licensee. We have also held that under the provisions of the Reforms Act, the Commission is not competent to reopen the concluded contracts and revise the wheeling charges as the same falls in the realm of policy matters on which the Government alone is competent to take decisions and the role of the Commission is only advisory. Hence, we have no hesitation in holding that the principle of promissory estoppel applies to the facts of the case with all the force and the Commission as well as the licensee or the State Government wherever it relates to general policy matters under Section 56(3) (I) and (V) of the Reforms Act have stepped into the shoes of the Board are pinned down to the promise held out by them since the same do not contravene the provisions of any statute. On the other hand, the promise held out by the authorities is protected by the statute and they were made binding on the successors-in-interest under the provisions of the Reforms Act and the Transfer Scheme Rules.

The contention of the Commission that the promissory estoppel can neither be claimed by the Generating Companies nor can be pleaded in the larger interests have no substance in view of our findings on various issues that cropped up for consideration in these batch of cases. The entire fiasco in this case is the result of thinking of the Commission that there are no fetters in exercise of its powers under the Act and the Generating Companies for the sin of using the transmission lines of the licensee have to bear the distribution losses and incurred at the DISCOM level like faulty meter readings, theft of energy etc., and the network charges of the licensee like wages of its employees, legal charges etc., is highly perverse.”

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“From the facts of the case on hand, all the Generating Companies acting on the representation made by the State as well as the then State Electricity Board established Generating Companies in private sector by raising loans from the financial institutions both at the Central and the State level and by this arbitrary action if the Commission alters the position of the

Generating Companies in violation of the promise held out by the Government and revise the wheeling charges on an imaginary and unrealistic grounds, which amounts to collecting about 56.8% of the power generated by the Generating Companies and if the wheeling charges are to be collected in kind will amount to unfair exercise of the power and abuse of the power vested in it. On this ground also the impugned order is liable to be set aside. Since the Generating Companies altered their position to their disadvantage, it amounts to breach of legitimate expectation that has been created in the minds of the Generating Companies by the promises made by the State Government as well as the Electricity Board. On this ground also the action of the Commission cannot be sustained.”

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110. Though the State Govt. has not been made a party, the erstwhile Electricity Board which invited the promoters to come forward to set up NCE generating units and entered into arrangement as per directions of State Government with NEDCAP and Generators. Therefore, there is no escape for Andhra Pradesh Electricity Board and its successor viz. Transmission Corporation and Discom to avoid the consequence as they are state instrumentalities and have concluded the purchase arrangements. Apart from the two principles of estoppel and legitimate expectation, it is to be pointed out the stipulations in the PPA entered are binding and they shall not be avoided, much less at the fancy of Regulatory Commission.
111. Hence, following the judgment of the Division Bench both the pleas advanced deserve to be sustained and answered against Respondents and in favour of developers. However, we add that it is the PPA which is binding on parties.
112. We called upon the respondents to furnish details to assess the effect of payment to NCE Developers on consumers. During hearing of the appeals, the counsel for respondents furnished details and figures of total energy purchased, sold, transmission loss, purchase of units from NCE developers and claimed that the higher cost paid to NCE developers may be in the order of 6 to 7% on the total cost of supply to consumers. However, we find that the total T&D loss in the entire state is in the range of 23 to 29%. Be that so, it shall not be forgotten that the NCE and mini hydel generators who generate power ranging from 1 MW to 10 MW are to be viewed as

distributed generation system for local area consumption and even if they are connected to the grid the energy so supplied are being consumed primarily in the respective local areas, which leads to reduction in T&D loss. This means that aggregate energy loss by such projects will be reduced considerably when compared to state wide transmission and distribution loss.

113. The impact by payment of higher price to NCE developers will be reduced considerably if the T&D loss in the state is reduced even by few percentage and consequently the impact on consumers will be negligible. Viewed from this angle also, the higher price paid to the NCE developers could very well be assimilated by the system. Let us not forget that the peak hour demand and consequential cost of purchase to meet peak hour demand is higher than the price which is being paid to NCE developers, while NCE developer is a reliable source through out the day. Hence, in any view of the matter, the impact by payment of higher price to NCE developers on retail tariff would be rather negligible. Let us not forget that it is a renewable source of energy, which in no way affects the ecology or environment besides it also utilizes disposable waste. Cumulatively considering the above benefits the impact on consumers on unit wise consumption shall not be grudged at all by the consumers as well as the authorities.
114. As a result, we hold that it is not necessary to take up the issue relating to validity of determination of tariff for each type of NCE Developer using different fuel or energy by the Commission. We answer the points framed above as under:-
- (i) On the point 'A', we hold that the Regulatory Commission has neither the power nor the authority nor jurisdiction to compel the Developers to sell the power generated by them to APTRANSCO or DISCOMS.
 - (ii) On the point 'B', we hold that the Regulatory Commission having approved and regulated the purchase price agreed to between the Developer and the TRANSCO in terms of Section 21(4)(b) and

11(1)(e) of the Andhra Pradesh Electricity Reform Act 1998 read with Section 86(1)(b) of 2003 Act cannot re-fix the regulatory purchase price by resorting to tariff fixation under Section 62;64 read with Section 86(1)(a) of 2003 Act, as Section 86(1)(b) being a special provision excludes the applicability of Section 86(1)(a) of the 2003 Act to private Generators.

- (iii) On the point 'C' and F, we hold that the Andhra Pradesh Regulatory Commission has no power or authority to alter the policy direction issued by the State Government and the said Commission has no executive power nor a plenary power as claimed by it.
- (iv) The points 'D' & 'E' are answered in favour of the appellants and they are substantiated by the appellants.
- (v) On the point 'G', we hold that the Andhra Pradesh Electricity Regulatory Commission is bound by Policy directions already issued by the State Government so long as they are not modified or altered.
- (vi) On the point 'H', we hold that the Regulatory Commission has no authority to alter or change the PPAs entered between the NCE Developers and Electricity Board/ APTRANSCO.
- (vii) On the point 'I', we hold that the procurement arrangement/ PPA is statutory and the Commission has no authority to interfere with the same.
- (viii) On the point 'J', we hold that the Commission is just a regulator to approve the PPA entered between the appellant generator and the APTRANSCO by examining as to whether the purchase is economical and it is in terms of State Policy.

- (ix) In the result on the point 'K', we hold that the appeals preferred by the NCE Developers – Appellants in appeal Nos.1, 2, 5, 6, 7, 8, 9, 10, 12, 15, 16, 17, 18, 19, 20, 21, 22, 34, 46, 47, 52, 58, 67 & 80 of 2005 are allowed and the impugned proceedings of the Regulatory Commission are set aside and there will be a direction to the APTRANSCO, the Transmission Corporation of AP, the Central Power Distributing Company of AP Ltd., the Southern Power Distributing Company of AP Ltd., the Northern Power Distributing Company of AP Ltd. and the Eastern Power Distributing Company Limited of AP Ltd. to continue the Power Purchase and at the same rate at which the power generated by NCE Developers supplied to them are being paid before passing of the impugned order of the Commission dated 20.03.2004 and 07.07.2004 made in R.P.No. 84/2003 and O.P. No. 1075/2000 with all differences and arrears thereof, up to date and continue to pay at the same rate, until a new PPA is entered by agreement between them in terms of State Government Policy direction, that may be made hereafter and approved by the Regulatory Commission. This Judgment shall be given effect from the date of communication. For payment of tariff difference and arrears, the respondents shall have six weeks from the date of this Judgment, failing which the respondents shall be liable to pay interest at 9% per annum with effect from the month on which the difference in tariff rate remains to be paid and till date of payment.
- (x) Consequently the Appeal Nos.46, 48, 49 & 50 of 2005 preferred by the AP Transmission Corporation and the four Discoms will stand dismissed as there are no merits in them.
- (xi) The parties shall bear the respective cost throughout.

Pronounced in open court on this 2nd day of June 2006.

(Hon'ble Mr. Justice Anil Dev Singh)
(Chairperson)

(Hon'ble Mr. Justice E Padmanabhan)
Judicial Member

(Hon'ble Mr. A. A. Khan)
Technical Member

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