Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated: 17th April, 2013

Present: HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. V J TALWAR, TECHNICAL MEMBER,

Appeal No. 117 of 2011
and
Appeal No. 100 of 2010

In The Matter of

M/s. Konaseema Gas Power Limited
2nd Floor, Progressive Towers, 6-2-913/914
Khairatabad, Hyderabad 500 004 ... **Appellant**

Versus.

1. Andhra Pradesh Electricity Regulatory Commission
   4th & 5th Floor, Singareni Bhavan
   Red Hills, Hyderabad 500 004
   Andhra Pradesh

2. State of Andhra Pradesh
   through its Principal Secretary (Energy)
   A. P. Secretariat, Hyderabad 500 022
   Andhra Pradesh

3. Transmission Corporation of Andhra Pradesh Limited
   through its Chairman and Managing Director
   Vidyut Soudha, Khairatabad
   Hyderabad 500 048, Andhra Pradesh

4. Central Power Distribution Company of Andhra Pradesh Limited
   H. No. 11-64-660, 3rd Floor,
   Singareni Bhavan Red Hills
   Hyderabad 500 004, Andhra Pradesh

5. Southern Power Distribution Company of Andhra Pradesh Limited
   Beside Srinivasa Kalyana Mantapam
   Tiruchanur Road, Tirupathi 517 501
   Andhra Pradesh

6. Northern Power Distribution Company of Andhra Pradesh Limited
   H. No. 1-1-503 & 504 (Opp. NIT Petrol Pump)
   Chaitanyapuri, Hanamkonda
   Warangal 506 004, Andhra Pradesh

7. Eastern Power Distribution Company of Andhra Pradesh Limited
   P&T Colony, Seetamma Dhara
   Vishakhapatnam 530 020, Andhra Pradesh

Counsels for the Appellants	Mr. Amit Sibal, Mr. Jafar Alam, Mr. Amardeep Jaiswal & Mr. Siddharth Silwal for Appellants. Mr Ramji Srinivasan Sr Adv Mr. Sanjay Bhatt, Ms Priya Pathania for Interveners
Counsels for the Respondents	Mr. Jayant Bhushan, Sr Adv Ms. Surbhi Sharma for R 3-7 Mr K V Mohan Mr. K V Balakrishnan for R-1

JUDGEMENT

Per Hon'ble Mr. V.J. Talwar, Technical Member

"Whether the Andhra Pradesh Electricity Regulatory Commission, while passing its Impugned Order dated its 20.6.2011, has complied with this Tribunal's directions given in its orders dated 16.12.2010 and 20.1.2011 in letter and spirit?" This is the question posed in this Appeal.

1 The Appellant, Konaseema Gas Power Limited ("**KGPL**"), a public limited company, is a generating company. It was formerly known as M/s. Konaseema EPS Oakwell Power Limited ("**Konaseema EPS**") and was renamed as KGPL on 10.10.2005 on which date a fresh certificate of incorporation was issued.

2 Respondent No.1 is the Andhra Pradesh Electricity Regulatory Commission (State Commission).

3 Respondent No.2 is the State of Andhra Pradesh (the "State Government") through its Principal Secretary (Energy).

4 Respondent No. 3 is the Andhra Pradesh Transmission Company (APTRANSCO). It was the transmission and distribution licensee responsible for transmission and distribution within the State of Andhra Pradesh in terms of Andhra Pradesh Electricity Reform Act 1998 (APER Act). Upon issuance of the third transfer scheme by the State Government on 09.06.2005, the functions pertaining to distribution were transferred to four distribution companies established in terms of Section 131 of the Electricity Act 2003 and APTRANSCO became deemed transmission licensee as per fifth proviso to Section 14 of the Electricity Act 2003.

5 Respondent No.4 is the Central Power Distribution Company of Andhra Pradesh Limited ("**APCPDCL**"), Respondent No.5 is the Southern Power Distribution Company of Andhra Pradesh Limited ("**APSPDCL**"), Respondent No.6 is the Northern Power Distribution Company of Andhra Pradesh Limited ("**APNPDCL**") and Respondent No.7 is the Eastern Power Distribution Company of Andhra Pradesh Limited ("**APEPDCL**"). They are power distribution companies, the successors-in-interest of the 3rd Respondent APTRANSCO. Respondents No. 4 to 7 are hereinafter collectively referred to as the **APDISCOMs**.

6 This case has got a chequered history. However, we shall refer to only relevant facts for the purpose of deciding this Appeal.

a. The Appellant along with three other IPPs viz.(1) M/s GVK Inds Ltd,(2) M/s Gautami Power Limited (GPL) and(3) M/s Vemagiri Power Generation Limited (VPGL) were permitted by the Government of Andhra Pradesh (GoAP) to set up gas based projects at Devarapalli, Jegurupadu, Peddapuram, and Vemagiri of E.G.Dist respectively. Subsequently, they entered into Power Purchase Agreements on 31-03-1997 (except for M/s.GVK Inds. Ltd., who entered into draft PPA on 05-12-2001). Certain amendments to the PPAs were made on 31-03-1997.

b. Amended draft PPAs were submitted to the State Commission for grant of consent under section 21 of the A.P. Electricity Reform Act, 1998. The State Commission invited objections from the public. After hearing the parties concerned as well as objectors it granted consent to the said Amendments / PPAs vide different orders of the State Commission dated 12-04-2003 in O.P.Nos 2,3,4 and 5 of 2002. In pursuance thereof, the Appellant entered in to amended PPAs with APTRANSCO (R-3) on 26.5.2003 and 21.11.2003. Other three IPPs entered into Amended PPAs on 18-06-2003.

c. In the month of July 2004, APTRANSCO (R-3) filed an application before the State Commission for deletion of usage of alternate fuel from the definition of fuel in the subsisting PPAs vide O.P. Nos 22, 23, 24 and 25 of 2004. While the said petitions were pending consideration before the State Commission, the State government issued the "Third Transfer Scheme" vide notification dated 09.06.2005. Through this notification, the rights and obligations and

agreements and contracts relating to procurement and Bulk Supply of Electricity and trading of electricity, to which APTRANSCO was originally a party were transferred and jointly vested with the four distribution companies (APDISCOMs).

d. While the above said petitions were pending before the State Commission, M/s. Vemagiri Power Generation Ltd. on 02-03-2006 submitted proposal to State government for deletion of alternate fuel provisions from the PPA. Pursuant to the above, State government conveyed approval for the amendments proposed, which were later initialled by M/s. Vemagiri Power Generation Ltd. and the APDISCOMs. Thereupon they were submitted before the State Commission on 06-06-2006 for consent. Accordingly, the consent was granted. Upon granting of the consent by the State Commission vide its orders dated 30-12-2006 an Amendment Agreement was executed between M/s. Vemagiri Power Generation Ltd. (VPGL) and the APDISCOMs on 02-05-2007.

e. The Appellant along with GVK, GPL submitted initialled proposals before the State government in respect of their respective gas based projects for deletion of alternate fuel provisions from their subsisting PPAs similar to M/s. Vemagiri Power Generation Ltd. While the proposals were under examination by the Committee constituted by the State Government, suddenly without any notice, M/s. Gautami Company approached A.P. High Court and obtained interim orders for supply of natural gas and thereafter they withdrew

their earlier proposals to amend the PPA in line with M/s. Vemagiri Power Generation Ltd. Following M/s. Gautami Company, the Appellant and M/s GVK also withdrew their earlier initialled proposals similar to M/s. Vemagiri Power Generation Ltd.

f. In the meantime, during September 2007 M/s. GVK and M/s. GPL approached AP Power Co-ordination Committee and informed that they were agreeable for deletion of alternate fuel provisions in their PPAs and requested to permit them to sell 20% of the PPA capacities plus any tested capacities over and above the PPA capacities to third parties to enable them to recover the losses incurred by them due to non availability of natural gas. These proposals were referred to the Committee constituted by State government vide G.O.Ms.No.18, Energy (Power.I), Dept. Dt.25.02.2006 and G.O.Ms.No.113, Energy (Power.I), Dept. Dt.11.08.2006.

g. The Committee after careful examination of the proposals, reduced these proposals into writing in its deliberations in the form of 'Record notes of Discussions', accepted the proposals for deletion of alternate fuel provision from the definition of fuel making natural gas as the only fuel and suggested certain amendments to the concluded PPAs and for submission of such amendments duly signed by the parties herein to the State Commission for consent.

h. Accordingly, all the four IPPs and APDISCOMs on 26.05.2008 entered into 'Amendment Agreements to their respective PPAs and submitted to the State Commission on

30-05-2008 for its consent. M/s. Konaseema, the Appellant also through their letter dated 03-01-2008 informed that they were agreeable for deletion of alternate fuel provisions similar to M/s. Gautami Company and furnished draft amendments on 23-05-2008 in line with M/s. Gautami along with the loss calculations in capacity charges from 01-01-2007 to 31-08-2008. Thereafter the finalized draft amendments, having been examined by the Committee constituted by the State government had been submitted to the State Commission for consent through APPCC letter dated 14-10-2008.

i. In the meantime, M/s. Vemagiri vide their letter dated 16-07-2008 also agreed with the proposed amendments in line with other three IPPs viz. M/s. GVK, M/s. Gautami, and M/s. Konaseema. Thereupon, the State Government forwarded the proposals to the Committee constituted by it. After receipt of the recommendations of the Committee, it finally approved the proposed amendments on 02-02-2009.

j. Thereupon the APDISCOMs filed petitions bearing Nos. 9-12 of 2009 before the State Commission for approval to these amendments in the PPAs. The State Commission, while rejecting the proposed amendments issued an Order dated 5.12.2009 suggesting three options.

k. Aggrieved by the State Commission's order dated 5.12.2009 the Appellant filed Appeal No. 100 of 2010 before this Tribunal. While this Appeal was taken up for hearing before this Tribunal, the parties in the Appeal represented to this

Tribunal that they have reached a mutual agreement to adopt 'Option A' out of the three options suggested by the State Commission in its order dated 5.12.2009 and prayed for the suitable directions in the light of this mutual agreement to the State Commission. Accordingly, this Tribunal through its order dated 16.12.2010 which was modified by its Order dated 20.1.2011 directed the State Commission to work out the loss suffered by the Appellant to fix up the rate of additional fixed charges and the period of truing-up to make good of the alleged losses as per 'Option A' as per the mutual agreement. The Appeal No. 100 of 2010 was accordingly disposed of.

l. Thereupon, APDISCOMs filed petition being I.A. No. 5 of 2011 in OP 11 of 2009 before the State Commission praying for ascertaining the losses, if any, of the Appellant and to fix up the rate of additional fixed charges and the period of truing-up to make good of the alleged losses and requesting to issue consent to effect the proposed amendment as agreed by APDISCOMs and the Appellant.

m. The State Commission after hearing the parties passed the Impugned Order on 20.6.2011 holding that the Appellant did not suffer any loss on account of delayed Commissioning of its power plant.

n. Aggrieved by this Impugned Order the Appellant has filed this Appeal before this Tribunal. Since, the directions given in Appeal No. 100 of 2010, were not complied with by the State Commission, the Appellant filed an application to

restore the Appeal No. 100 of 2010. Accordingly, the same was restored.

7 The learned Counsel for the Appellant has made elaborate submissions assailing the impugned order dated 20.6.2011. They are as follows:-

a) This Tribunal had vide its order dated 16.12.2010 read with order dated 20.01.2011 directed the State Commission to ascertain the losses suffered by the Appellant, determine the Additional Fixed Charge (AFC) payable by Respondents No.4 to 6 to the Appellant and decide the petition filed by the APDISCOMs Respondents within two months from date of the said petition. The said orders were required to be complied with by the State Commission in letter, in spirit and as per the true intention behind them.

b) However, without complying with the directions of the Tribunal, the State Commission has held to the contrary that it could not consider an application seeking the ascertainment of losses and the approval of an amendment agreement, holding that "t*he Commission cannot* ***consider*** *the joint filing of request for consent with a blank space in the crucial "quantum of additional F.C." clause".*

c) In fact, the State Commission has decided the instant matter without reference to the said directions issued by this Tribunal as referred to above. Indeed, as evident from the first paragraph of the Impugned Order, the State Commission has decided the matter with reference solely to the prayer of the APDISCOMs (Respondents No. 4 to 7

herein), which has been reproduced in the said first paragraph of the Impugned Order.

d) There is no reference or discussion whatsoever over this Tribunal's directions given in the orders of remand dated 16.12.2010 and 20.01.2011 in the impugned order.

e) Furthermore, this Tribunal's directions, as given in the said orders, were in the nature of a limited remand. The State Commission was required to act strictly in accordance with the said directions and follow them in their true spirit.

f) It is not open to the State Commission to inquire into any other question which fell beyond the limits of the said directions of this Tribunal. However, the State Commission ventured to go far beyond the limits of the said directions by inquiring into the other issues which were irrelevant for ascertaining the losses suffered by the Appellant and determining the Additional Fixed Charge (AFC) payable to it .

g) It was beyond the jurisdiction of the State Commission to go beyond this Tribunal's said orders and "adjudicate" upon irrelevant questions, such as, "*Issue 4:* ***Is there an entitlement for capacity charges based on the alternate fuel clause of the existing PPA and if so*** *what is the period for such entitlement and what is the quantum thereof?*" instead of ascertaining the losses suffered by the Appellant simpliciter, as directed by this Tribunal.

h) The spirit of the said orders was the settlement between the parties, i.e., amendment agreement dated 06.11.2010. The

said agreement was a full and final settlement of the dispute between the parties, executed pursuant to exhaustive bilateral deliberations with a clear intention to bring about a quietus to the dispute, and not to carry it further. This is apparent from the phraseology adopted by the parties in their Affidavits dated 15.12.2010. In fact, Respondents No.3 to 7 in their Affidavit dated15.12.2010, have expressly stated that the amendment agreement dated 06.11.2010 had been signed in order to expedite an amicable resolution of the matter and with its execution no dispute survived between the parties.

i) Thus, pursuant to the execution of the amendment agreement, the only question to be examined was the quantum of losses suffered and the rate of AFC payable to the Appellant by Respondents No.3 to 7, as Respondents No.2 to 7 had agreed to "*adopt 'option-A' as specified by* APERC *in its order dated 05.12.2009, subject to ascertainment of losses by APERC and truing up*".

j) Only for deciding this question alone, this matter had been remanded by this Tribunal vide its orders dated 16.12.2010 and 20.01.2011 but the same has not been decided in the impugned order and as such the State Commission failed to comply with this Tribunal's orders dated 16.12.2010 and 20.01.2011 in letter and spirit.

8 The learned counsel for the State Commission in justification of the Impugned Order stated that the State Commission has complied with the directions of this Tribunal in its orders dated

16.12.2010 and 20.1.2011 in letter and spirit. His submissions are summarized below:

a. The State Commission held the view that there existed dispute relating to the claim of losses by the Appellant and that it was necessary for it to decide the same.

b. This Tribunal in its order dated 16.12.2010 directed the Respondent APDISCOMs to file the application and the APDISCOMs have filed an Interlocutory Application (IA) in OP no. 11 of 2009 before the State Commission and in that IA it was specifically prayed that the State Commission was to determine the **'losses if any'** of the Appellant.

c. The Appellant was well aware of the IA filed by the APDISCOMs before the State Commission in OP 11 of 2009 and preferred not to contest the prayer in the I.A. in his application before this Tribunal for modification of Tribunal's Order dated 16.12.2010.

d. If the Appellant was so clear that its ascertainment of losses alone was to be considered by the State Commission, it should have sought a clarification to that effect from this Tribunal. But it did not do so. On the other hand, it has participated in the proceedings, filed various documents and materials before the State Commission enlarging the scope. If the Appellant was only confined to the losses alone which it suffered, it should not have pleaded the same before the State Commission by making all such claims and also by producing all the materials.

e. There was no consensus between the parties on the alleged COD. The case of the Appellant Konaseema was based on notional COD dated 1.10.2006, whereas the Respondent APDISCOMs disputed the same and stated that the actual COD alone should be taken into account i.e. 30.6.2010 as per the terms of PPA and that there was no other COD. This position existed between the parties even before this Tribunal. The Appellant should have brought its case before this Tribunal and ought to have got a direction to the State Commission to proceed its case with the COD as 1.10.2006 and that its losses should be ascertained from that date from this Tribunal.

f. The order of this Tribunal has not dealt with this important aspect of the case and was not as categorical and clear as is attempted to be made out. In view of the above, it was bonafide on the part of the State Commission to decide that issue also relating to the Commercial date of operation from the materials produced by the parties.

g. The Appellant cannot be allowed to make any allegations against the State Commission before this Tribunal that the State Commission did not implement its order dated 20.1.2011 when it did not get a specific and categorical order from the Tribunal to the claim of the ascertainment of losses.

h. The order dated 5.12.2009 passed by the State Commission did not deal with any of the issues relating to losses of the Konaseema and also on the alleged COD. The options given were for all the parties who were before it. It is important to

point out that the other parties went to High Court challenging the order dated 5.12.2009 and the High Court directed them to approach this Tribunal. The Appellant challenged the order dated 5.12.2009 by raising various other issues. Only during the proceedings, on the suggestion of this Tribunal, that it agreed to settle the issues with APDISCOMs. If the APDISCOMs did not accept the claim of its losses at the settlement, it should have taken steps against them before this Tribunal.

i. The option A did not give scope to any party to approach the State Commission to claim losses on account of non supply of gas etc. Further the Appellant was very much aware that there existed no finding whatsoever with respect to its claim as to who was responsible for the claim of non supply of gas to it and there exists no specific order to that effect from this Tribunal also. In view of what is stated above, the State Commission decided to go into such issues as well.

j. The Appellant has participated before the State Commission. If it was very clear that the State Commission was to ascertain only the losses payable by the APDISCOMs, it should have approached this Tribunal and sought directions to that effect, instead of going ahead with the proceedings. Further, except one question of law, the rest of as many as 14 questions raised by in the present Appeal show that the Appellant was fully aware that the State Commission was to decide all the issues raised before it by the parties. Now, in this Tribunal, it has attempted to state that the State Commission has not implemented the orders passed by this

Tribunal. The Appellant has raised all those issues before the State Commission and the State Commission has dealt with such issues and before this Tribunal without satisfying such findings of the State Commission were wrong or illegal, the Appellant should not be allowed to restrict the issue only to the alleged losses. The Appellant also should not be allowed to state that the State Commission has not implemented the orders of this Tribunal.

9 The learned Senior Advocate, appearing for the Respondents relying upon the affidavit dated 15.12.2010 submitted by the APDISCOMs before this Tribunal pointing out that there was only a conditional acceptance of Option (A) as suggested by the State Commission in its order dated 5.12.2009. Elaborating this issue, the following arguments were advanced by the Respondents.

a) Aggrieved by the State Commission's order dated 5.12.2009, the Appellant had filed Appeal No. 100 of 2010 before this Tribunal. Thereafter, while the matter was pending before this Tribunal, the Appellant had offered that it was ready to accept "option (A)" in terms of the options proposed by the State Commission vide its order dated 5.12.2009. The APDISCOMs after giving due consideration to Option (A) agreed to the proposal given by the Appellant and accordingly filed affidavit dated 21.1.0.2010 before the Tribunal stating that it had agreed to adopt option (A), **subject to ascertainment of alleged losses if any, by the State Commission.**

b) Since the parties were not able to agree to inclusion of ascertainment and confirmation of loss suffered “if any” in the affidavit. Therefore, the parties filed two separate affidavits dated 15.12.2010 before the Tribunal. The APDISCOMs in their Affidavit had clearly mentioned that they have agreed to submit the Amendment Agreement before the State Commission for, inter alia, ascertainment and confirmation of the loss suffered if any by the Appellant.

c) In view of the agreement reached between the parties, this Tribunal in its Order dated 16.12.2010 directed the parties to approach the Commission. Accordingly, the APDISCOMs filed Application before the State Commission on 13.1.2011 seeking ascertainment of losses, if any, of the Appellant and fix up the rate of additional fixed charges and the period of truing up to make good the alleged losses.

d) In the meantime, the Appellant filed an application before this Tribunal being I.A No 5 of 2011 in Appeal No. 100 of 2010 seeking modification of the earlier order dated 16.12.2010. It is to be noted that in terms of prayer (ii) of the Application, the Appellant sought for disposal of the Appeal in terms of para 3 of the Affidavits filed by the Appellant and the Respondent No. 3 to 7. The para 3 of the Respondent No. 3 to 7 affidavit states as follows:

“*(a)* ***Ascertainment and confirmation of the loss suffered if any by the Appellant****;”*

10 We have heard the learned Counsel for the parties and have given our thoughtful consideration. The only question before us for consideration is this

"Whether the Andhra Pradesh Electricity Regulatory Commission, while passing its Impugned Order dated its 20.6.2011, has complied with this Tribunal's directions given in its orders dated 16.12.2010 and 20.1.2011 in letter and spirit?"

11 While the Learned Counsel for the Appellant has contended that the State Commission did not comply with the directions of this Tribunal issued in its order dated 16.12.2010 and 20.1.2011, the Learned Counsel for the Commission as well as the learned Senior Counsel for APDISCOMs have submitted that the State Commission has fully complied with the directions of this Tribunal.

12 In view of the above, it is appropriate to refer to both the orders dated 16.12.2010 and 20.01.2011 in order to know the nature of directions issued by this Tribunal to the State Commission. Let us first set out the order dated 16.12.2010 which is hereunder-

"ORDER

We have heard the learned Counsel for the parties.

After the settlement talks the Appellant has decided to agree for option "A". The same has been reported today to this Tribunal.

In view of the above, it would be appropriate to direct the parties to approach the Commission for fixing the tariff. Accordingly, directed.

Respondent undertakes that they would file the necessary application before the Commission within two weeks from today i.e. on 16.12.2010. This process shall be completed

within two months from the date of the receipt of the Application. With these observations, this Appeal is disposed of.”

13 Perusal of the above order would reveal that this Tribunal recorded that the parties had entered into a settlement and decided to agree for ‘option A’ and directed the parties to approach the State Commission after referring to the undertaking given by the Respondents to file the necessary application before the Commission within two weeks from issue of the Order.

14 As undertaken, the Respondents APDISCOMs filed a petition before the State Commission on 13.1.2011 with the following title;

“In the matter of : Proposals of the M/s Konaseema Gas Power Limited, for deletion of alternate fuel provisions from the Restated Power Purchase Agreement dated 26.5.2003 and Amendment Agreements to the PPA dated 21.11.2003 and 12.01.2005 as per APERC orders dated 5.12.2009”.

15 This title of the Petition filed by the Respondents did not mention that the same had been filed in pursuance the directions of this Tribunal dated 16.12.2010. In para 7 of this Petition dated 12.1.2011 the Respondent APDISCOMs had stated as under :

“ 7 As per the Orders of ATE and as per the directions of GoAP, the present proposal of M/s KGPL were initialed on 6.11.2010 by M/s KGPL and APDISCOMs indicating that the losses of the company shall be ascertained by APERC and to make good of the same, it is agreed to increase the capacity charges to the extent of Additional Fixed Charges, at the rate and the period for truing up which shall be determined by APERC. “

16 Thus, the APDISCOMs had agreed that there had been losses to the Appellant and had also agreed to increase the Capacity Charges at the rate and period to be determined by the

Commission. The Respondent in para 8 of this Petition stated as under:

> *"Hon'ble ATE vide orders dated 16.12.2010 disposed the Appeal filed by M/s Konaseema and directed the parties to approach Hon'ble Commission for fixing the tariff and complete the process within 2 months from date of receipt of application"*

17 The Respondent APDISCOMs, however, did not enclose the copy of this Tribunal's Order dated 16.12.2010 along with their Petition and nor did it mention that the parties had agreed before this Tribunal, through its affidavit, for the 'Option A' proposed by the Commission in its order date 5.12.2009.

18 At this stage, the Appellant filed an application before this Tribunal with the prayer to modify the earlier Order dated 16.12.2010. Accordingly after hearing both the parties this Tribunal had passed an Order on 20.1.2011 modifying its order dated 16.12.2010. The said order dated 20.01.2011 is as follows:

"ORDER

The Order passed by this Tribunal dated 16.12.2010 is sought to be modified through the following prayer.

"Prayer:

i) The Respondent No. 3 to 7 have agreed to option –A:

ii) A direction to Respondent No. 1 to ascertain the losses suffered by the Appellant, determine the rate of AFC and the period for which it would be payable by the Respondent No. 3 to 6 to the Applicant and decide the Respondent's application with in two months from the date of an application being made therefore by the Respondent No. 3 to 6, in terms of the Affidavit dated 15.12.2010 filed on behalf of the Applicant and Affidavit dated 15.12.2010 filed by the respondent No. 3 to 7;

iii) Record the Appeal no 100 of 2010 was being disposed of vide order dated 16.12.2010 without prejudice to the rights and contentions of the parties in the Appeal."

We have heard the Counsel for the parties. As prayed for, the order dated 16.12.2010 is modified.

It is pointed out, the necessary application has already been filed before the State Commission. Accordingly, the State Commission is directed to pass the orders in the light of the above order within two months from the date of receipt of this order.
The Registry is directed to send the copy of this order to the State Commission forthwith."

19 The above order shows that this Tribunal in its order date 20.1.2011 categorically directed the State Commission (i) to ascertain the losses suffered by the Appellant and (ii) to determine the AFC and the period for it would be payable by the Respondent APDISCOMs.

20 Now let us deal with the question as to whether the State Commission has followed these directions in the Impugned Order. Before getting in to the findings of the State Commission, it would be worthwhile to quote the opening paragraph of the Impugned order as reproduced below:

Between

1. Central Power Distribution Company of AP Ltd
2. Southern Power Distribution Company of AP Ltd
3. Northern Power Distribution Company of AP Ltd
4. Eastern Power Distribution Company of AP Ltd … Petitioners

AND

M/s. Konaseema Gas Power Ltd.,
2nd Floor, Progressive Towers, 6-2-913 / 914,

Khairathabad, Hyderabad – 500 004. ... Respondent

This petition coming up for hearing on several occasions in the presence of Sri. P. Shiva Rao, Advocate for the petitioners and Sri. Jafar Alam, Advocate Sri. C.V. Narasimham, Advocate & Sri. Amardeep Jaiswal for the respondent, Commission passed the following:

ORDER

This is a petition filed by the petitioner to ascertain losses, if any, of M/s. Konaseema and to fix up the rate of additional fixed charges and the period of truing-up to make good of the alleged losses and also requested to issue consent to effect the proposed amendment as agreed by DISCOMs and M/s. Konaseema.The Commission has heard the matter."

21 Perusal of the above would indicate that the State Commission has not mentioned that the said impugned order was being passed in pursuance of this Tribunal's categorical directions issued in the Orders dated 16.12.2010 and 20.1.2011. In fact, there is no reference to the Tribunal's directions passed in its Order dated 20.1.2011 in the entire impugned Order. However, in Paragraphs 15 and 16 of the Impugned Order, the State Commission mentioned about this Tribunal's Order dated 16.12.2010 which are reproduced below:

"15. Before adverting to rival contentions it is necessary to mention that, in the year 2009, petitioners herein filed four separate applications in respect of four different power projects that of the respondent herein vide OP No. 11 of 2009 seeking grant of consent for certain amendments proposed and initialled between the parties. By a common order dated 05.12.2009,The Commission disposed off all the said applications. The respondent herein preferred appeal vide Appeal No. 100 of 2010 before Hon'ble ATE, challenging the above mentioned order on several grounds. After hearing the parties, the Hon'ble ATE passed an order on 16.12.2010 wherein it is recorded that the respondent

herein (appellant before ATE) agreed for 'Option – A' mentioned by the Commission in its order dated 05.12.2009. Accordingly the ATE directed the parties to approach Commission for fixing tariff. The petitioners herein (Respondent 3 to 6 before ATE) under took to file necessary application before the Commission, thereupon the ATE disposed off the Appeal No. 100 of 2010 with a direction to dispose off such application to be filed before the Commission within two weeks from that day i.e. 16.12.2010.

16. However, the respondent herein filed an application before ATE seeking certain modifications to the order passed by the ATE dated 16.12.2010 in Appeal No. 100 of 2010. Upon hearing the counsel for the parties the Hon'ble ATE modified its order dated 16.12.2010. As the necessary application was already filed before the Commission, the ATE directed the Commission to dispose off the said application within two months from the date of receipt of the said order of ATE dated 20.01.2011. At the request of the Commission, the Hon'ble ATE extended time upto 25.05.2011."

22 As mentioned earlier the State Commission was directed to ascertain the losses suffered by the Appellant and to determine the rate of AFC and the period for which additional AFC was required to be paid. Unfortunately the State Commission, completely ignored the directions of this Tribunal and dealt with other aspects of the matter on the following issues, framed for its consideration:

"32. In the light of the above rival contentions, the following are the issues that emerge for consideration of the Commission:

Issue 1:
Whether the petitioners have the responsibility as per the PPA to make gas available to the respondents for testing purpose?

***Issue** 2:*

Whether non-recommendation of gas by the GOAP for testing purpose as expected by the respondent will entitle the respondents to claim that, the respondent was notionally ready to generate power for invoking the alternate fuel clause as per the existing PPA in the context of capacity charges based on alternate fuel clause?

Issue 3:
What is the day on which the respondents can be said to have established readiness from the point of view of claiming capacity charges in terms of the alternate fuel clause of the existing PPA?

Issue 4:
Is there an entitlement for capacity charges based on the alternate fuel clause of the existing PPA and if so, what is the period for such entitlement and what is the quantum thereof?

Issue 5:
Whether there is justification to accord consent by the Commission to the PPA amendment package as filed jointly by the two parties?

33. The above issues are examined in detail as hereunder:"

23 Bare reading of the above questions framed by the State Commission for consideration would indicate that the State Commission has not taken note of the directions on two occasions issued by this Tribunal to the State Commission to ascertain the losses suffered by the Appellant and to determine the AFC. On the other hand, the State Commission has dealt with the question of the entitlement for the capacity charges on the alternate fuel clause of the PPA and if the answer to this question is in the affirmative, only then the State Commission would decide period and quantum of such entitlement. Further, while considering the Issue 5 quoted above, the State Commission has made the following observations:

38. Issue 5:

Whether there is justification to accord consent by the Commission to the PPA amendment package as filed jointly by the two parties?

a. As regards consent to the PPA amendments, the Commission notes that in the present hearing, the predominant issue that was addressed by the two parties is about the reimbursement of "losses" discussed in "Issue – 1 to 4". No views were expressed in detail regarding the desirability of each of the various amendments proposed in the amendments for which consent was sought. Only Mr.Raghu, one of the objectors addressed this issue in detail. The two sides merely sought consent to the amendments package without making their stand known on the merits of each amendment and also did not indicate any agreement on the quantum of Additional Fixed Cost (AFC). The respondents were seeking almost 70 paise increase in the F.C. as a part of the amendment. The DISCOMs on the other hand were seeking the consent for amendments while simultaneously claiming that no additional F.C is payable. In view of this vast divergence between the stands of the two parties on issue of quantum of Additional F.C, it cannot be considered that the two parties have achieved "consensus ad-idem" regarding the terms of the agreement. The two sides appear to have agreed on the amendment package in the light of their respective expectations regarding the quantum of additional F.C., which are grossly at variance with each other. The Commission cannot consider the joint filing of request for consent with a blank space in the crucial "quantum of additional F.C". clause, as a blanket acceptance in advance of any adjudicated figure to be filled in by the Commission, as a precursor to giving consent to the entire amendments package.

b. Further, the Commission has to have before it, a complete proposal, as mutually agreed between the two parties, including the proposed methodology for true-up, to enable the Commission to take the issue of consent thereto, by undertaking the case in public hearing mode to test the proposed amendments from overall public interest point of view.

c. In the above circumstances, the Commission's view is that the two sides may pursue further consultations on the issue of PPA in the light of findings of the Commission against "Issue – 1 to 4" and come up with specific proposals as they deem fit after arriving at a mutually acceptable specific PPA amendments in complete shape without any blank columns, including the proposed methodology for true-up, before seeking the consent of the Commission.

24 Perusal of the above question and findings of the State Commission would clearly show that the State Commission had passed the Impugned Order in the petition filed by the Respondent APDISCOMs to approve the amendment to the existing PPA without considering the directions of this Tribunal to ascertain the losses of the Appellant and to determine the rate of AFC and the period. This is clearly in violation of our directions.

25 The main objection of the Respondent APDISCOMs relating to loss suffered by the Appellant is that although the gas was made available to the Appellant on 1.4.2009, the Appellant was not in the state of readiness to deliver power before 1.6.2010 as the CoD was achieved by the Appellant only on 1.6.2010 after successful Commissioning of steam turbine and as such there is no concept of notional COD in terms of existing PPA.

26 In this connection, it would be pertinent to point out that the Respondent APDISCOMs, in their Affidavit dated 27.4.2009 before the State Commission in OP No. 9 to 12 of 2006 had themselves indicated notional COD in respect of each of the four IPPs. This has been referred to in the impugned order. The relevant portion of State Commission's Order dated 5.12.2009 is reproduced below:

"Chapter VI

1. The public hearing was resumed on 02-04-2009. The IPPs broadly responded to the objections and suggestion of the general public while explaining the proposed amendments before the Commission. During the hearing AP DISCOMs / IPPs were directed to submit detailed financial analysis on the proposed amendments. The above were to be filed by 20-04-2009. In response to the above, the DISCOMs and IPPs furnished their calculations on 27-04-2009 and 20-04-2009 (GVK, KEOPL) & 24-04-2009 (VPGL) respectively. The summary of AP DISCOMs submission is as detailed hereunder. However, the summary of submission of IPPs is presented in the subsequent chapters (relating to proceedings on 18-05-2009), since the IPPs presented their case on the loss calculation submitted by them on the date indicated above.

2. DISCOMs have furnished the calculations in respect of all the four upcoming gas based projects** viz., (1) Vemagiri Power Generation Ltd., (2) GVK Industries Ltd., (3) Konaseema Gas Power Ltd., and (4) M/s. Gautami Power Ltd. **Their submission relates to broadly three areas as detailed herein below:

(a) Assumptions

The Discounting Factor : 10%,
US $ exchange rate escalation: 0.11% (as per CERC Notification dt.27.03.2009.)

(b) Entitlements of capacity charges

Sl. No.	*Name of the IPP*	*Capacity of the plant*	*COD/ **Notional COD** **	*Capacity charges to be received for 15 yrs as per original PPA Rs. Crs (NPV)*	*Capacity charges not received due to unavailability of Natural Gas Rs. Crs (NPV)*
1	*VPGL*	*370*	*16-09-2006*	*1872.4*	*539.86 (22-01-2006 to 31-03-2009)*
2	*GVK*	*220*	*22-01-2006*	*1075.3*	*378.32 (22-01-2006 to 31-03-2009)*
3	*KEOPL*	*445*	*01-01-2007*	*2253.2*	*581.90*

					(01-01-2007 to 31-03-2009)
4	*Gautami*	*464*	*01-10-2006*	*2348.3*	*539.883 (01-10-2006 31-03-2009)*

* ***Date of readiness of the project***

(c) Future estimates of the market sale of the energy given up:

20% of PPA capacity plus excess capacity over and above the PPA capacity is agreed to between the parties as approved by GoAP to be sold to third parties by the IPPs. However, AP DISCOMs are unable to provide financial analysis for the part of the capacity for merchant sale, since there is no fixed methodology or model on price behaviour of the energy backed by any statue/pronouncement of any authority, thus making it difficult for DISCOMs to mathematically estimate accurately the value of energy given up in amendments.” ***{emphasis added}***

27 Thus, it is clear that the Respondent APDISCOMs could not provide the future estimate for market sale of the energy given up but it had evaluated the losses of the Appellant in terms of the non-availability of the Natural Gas based on ‘Notional CoD’.

28 From the above, it is manifestly clear that the Respondent APDISCOMs had accepted the ‘Notional CoD’ as the date of readiness of the Project and accessed the capacity charges not received due to non-availability of Natural Gas based on ‘Notional CoD’. The Respondent APDISCOMs cannot now be permitted to change their stand and claim that there was no concept of ‘Notional CoD’ in the existing PPA.

29 Let us now examine the findings of the State Commission related to issue no. 3 & 4 framed by the Commission and reproduced above which deals with the readiness of the Appellant and entitlement of the capacity charges. The findings of the State

Commission in respect of issue no. 3 has been recorded in para 36 of Impugned Order and the same is quoted below:

> ***36. Issue 3 : What is the day on which the respondents can be said to have established readiness from the point of view of claiming capacity charges in terms of the alternate fuel clause of the existing PPA?***
>
> *a. Claiming of the capacity charges under the PPA, by the respondent would arise only after declaration of Commercial Operation Date (COD). As a prelude to declaration of COD and in terms of Schedule – F of the PPA, the company has to give 15 days prior notice, the date on which the tests would commence, then both the company and petitioners have to designate representatives to witness and observe each test and ensure that the tests are being performed in accordance with test procedures.*
>
> *b. However, no written notice with a date prior to 01.07.2006, has been produced before this Commission to show the readiness on the part of the respondent as on 01-07-2006. Even in the letter dated 19.08.2006, the respondent has not mentioned about their readiness w.e.f 01-07-2006. If really they were ready by 01.07.2006, they should have mentioned the same at least in this letter which is subsequent to that date. In the said letter addressed to GAIL, they have requested GAIL to supply gas as per the revised schedule commencing from 10.09.2006 for Commissioning of gas turbines. No mention has been made in this letter about the readiness by 01.07.2006 or that it could not be done due to non-supply of gas or non-cooperation of the petitioners. Further, the respondent has not mentioned anywhere even in the letter dated 01.12.2006 about their readiness, though they have mentioned about the processing of PPA, but never mentioned about the readiness of the unit.*
>
> *c. From the beginning, the respondent is claiming that the department was not cooperating in making interconnection facility and also in supplying gas. If really they were ready, they should have issued a notice as contemplated under Schedule - F demanding the petitioners to comply with the requirements to commence COD. The record clearly reveals that the interconnection facility had already been provided by*

the department and the same fact is borne out from the letters addressed by both the parties.

d. Against the above back-drop, on 01.09.2009, the respondent has addressed a letter to CE/IPC stating that due to unforeseen circumstances the synchronization of steam turbine could not be done and that they were unable to undertake COD on scheduled date 02.09.2009 and requested for postponement of COD on 02.09.2009. Even thereafter, in another letter addressed on 07.09.2009, a request was made for fixing COD. Again same was also postponed on their request due to certain unresolved technical snags in the steam turbine generators; it could not be fully rectified yet. On 25.05.2010, the respondent has addressed a letter to CE/IPC to depute the officials concerned for witnessing the plant performance and declaration of COD.

e. Furthermore, there is no data placed before the Commission to show that the responsibility to be shouldered by the respondent has been discharged by giving notice to the petitioner under schedule – F of PPA for conducting the test for declaring COD of units 1 & 2. The admissions made by the respondent in the letters subsequent to that date have clearly disclosed that they were not ready by 01.07.2006 as claimed. The counsel for the petitioners has also submitted that the admissions made by the respondents in the documents filed by them are sufficient to hold that the respondents were not ready by 01.07.2006. The respondent has to establish that they are ready by 01.07.2006 in order to claim any capacity charges w.e.f that date under alternate fuel clause. Ignoring their own admissions in the documents filed before the Commission, they have simply stated that they are ready by 01.07.2006. The learned counsel for the petitioners relied upon 2009(3) Supreme 2004 U.P.Power Corporation Ltd. vs National Thermal. The record placed before the Commission by the petitioners has clearly established that the COD was declared on 30.06.2010 but not by 01.07.2006.

f. In the result, it is held that 30-06-2010 is the date on which the respondent established his readiness to produce power and hence the question of claiming any capacity charges

based on alternative fuel clause before this date does not arise.

30 The State Commission, as referred to above, has based its findings on the fact that the Appellant had not declared CoD as required under Schedule – F by giving 15 days notice to the Respondents. The State Commission had also observed that the Appellant could not achieve the CoD even on 2.9.2009 and got it postponed further. These facts were available before the State Commission even on the date of passing of the earlier order dated 5.12.2009, wherein the State Commission had suggested three options to mitigate the losses suffered by the Appellant due non availability of Natural Gas. In this context, it would be appropriate to set out the findings of the State Commission in its order dated 5.12.2009.

"14. (c) Concerns regarding commensurateness of the benefits likely to accrue to either party to the PPAs as compared to the amounts likely to be foregone by them respectively as a result of the proposed amendments.

Coming to the issue whether the benefits likely to accrue to either side are commensurate with the amounts likely to be foregone by them respectively as a result of the proposed amendments, in the light of already existing PPAs, the important point to be taken into account is the duration for which the alternate fuel is proposed for deletion vis-à-vis the period for which the 20% free sale permission is contemplated. As of now, gas is available with effect from 01-04-2009 and the question of fixed charge entitlements does not arise after 01-04-2009. Theoretically, the IPPs could have declared COD on a date prior to 01-04-2009 and theoretically, fixed charge payments might have become due for the period from the date of COD to 01-04-2009.

15. The exact quantification of these charges will no doubt depend on the conceptualisation of a notional or deemed COD and presumed request from the DISCOMs to the IPPs

> *to back down from producing power from costly alternate fuel. But since the negotiation process between the IPPs and the DISCOMs has been in progress from quite some time including the proceedings of the committee appointed by government and subsequent filing of request for consent before the Commission for the amendment package,* ***it would not be fair to deny fixed charges entitlement to the IPPs on the ground of non-declaration of C.O.D., as such, by them. Any quantification of the entitlement of IPPs for fixed charges prior to 01-04-2009 has to be done keeping in view the circumstances of the negotiations which preceded the filing of the request for the consent for the amendments and the state of readiness on the part of the IPPs, but for these circumstances, to declare COD. Be that as it may, the fixed charge entitlements up to 31-03-2009 can be specifically quantified.***

31 Bare reading of the above findings would reveal that the State Commission had categorically held that "***it would not be fair to deny fixed charges entitlement to the IPPs on the ground of non-declaration of C.O.D., as such, by them."*** *Thus the State* Commission has completely ignored its own findings in its own order dated 5.12.2009 and has adopted totally opposite approach and denied the fixed charges entitlement to the Appellant only on the ground that it had not declared CoD as per the provisions of the PPA. As mentioned above, the facts on which the State Commission relied upon were already there before the Commission at the time of passing of order dated 5.12.2009, why then, it was not taken note of by the State Commission? No explanation - this sort of attitude shown by the State Commission which is a statutory authority created under the Act, cannot be approved of as the same is not appreciable.

32 At this juncture, it has to be pointed out that the State Commission, in its order dated 5.12.2009, recorded the apprehensions of the

consumers about 20% of power for third party sale by the Appellant and also observed that it would not be in the interest of the consumers to allow the Appellant to sell 20% of its power to third party as the State was chronically deficient in power. It was also mentioned in that order that the Respondent APDISCOMs were resorting to purchase of high cost power to meet the requirements of Consumers in such a scarcity situation and if the DISCOMs forego 20% of the PPA capacity, plus any tested capacity over and above the PPA capacity, the deficit would further increase and in that event, it would become unmanageable or very expensive if the consequential deficit is sought to be made good by purchase of costly power from the open market. It is further observed that In such situations power may have to be drawn from interstate grid in which case exorbitant U.I. charges might become payable imposing a very heavy financial burden on the consumers. The relevant portion of the State Commission's Order dated 5.12.2009 is quoted below:

58. Issue No.(iii):

Whether permitting the IPPs to sell in the open market 20% PPA capacity plus any tested capacity above the PPA capacity is the only method to enable the IPPs to recover their fixed cost entitlements.

The Government in G.O.135 has not spelt out clearly how the deficit of 20% of PPA capacity plus any tested capacity over and above the PPA capacity is proposed to be made good by the DISCOMs in case of implementation of the amendments. This point was also raised during the public hearing. ***The objectors pointed out that the State of Andhra Pradesh is chronically deficient in power and the DISCOMs are frequently resorting to purchase of high cost power from the open market to meet the requirements of the consumers.*** *The farming community is also looking forward to supply of power for 9 hours as*

promised by the government. ***The objectors pointed out that in such a scarcity situation, if the DISCOMs forego 20% of the PPA capacity, plus any tested capacity over and above the PPA capacity, the deficit would further increase and either become unmanageable or very expensive if the consequential deficit is sought to be made good by purchase of costly power from the open market. In some situations power may have to be drawn from interstate grid in which case exorbitant U.I. charges might become payable imposing a very heavy financial burden on the consumers.*** *The burden on the DISCOMs in such a situation would be unmanageable and the impact would ultimately have to be borne by the consumers.*

59. ***This point has been examined by the Commission and the Commission feels that it is well taken,*** *particularly in the context of absence of a specific commitment from the GoAP in G.O.135 in terms of section 65 of Electricity Act, 2003, to make good the financial deficits likely to be caused to the DISCOMs due to their foregoing 20% of PPA capacity plus any tested capacity over and above the PPA capacity.*

60. ***The basic principle underlying G.O.135 is that the DISCOMs are not in a position to make lumpsum payment of fixed charge entitlements that might have become due under the terms of the existing PPAs in the context of alternate fuel clause and that a mechanism has to be evolved to enable the IPPs to receive their entitled payments*** *and that permitting free sale of 20% PPA capacity plus any tested capacity over and above the PPA capacity is the suggested mechanism to achieve this objective.*

61.The ***Commission is agreeable to the first part of the above proposition.*** *However, the approach contained in the above proposition need not necessarily be the sole method to achieve this objective. There are a number of implications in this approach. Quite apart from the issue of commensurateness of the financial benefits arising from an open ended permission, the proposed methodology is likely to severely aggravate the already scarce and precarious power supply position being faced by the State. In this overall scenario of shortage of power, it would not appear desirable to forego 20% of PPA capacity of these four IPPs.*

It would be much better to evolve some mechanism to enable the IPPs to make good their likely foregone fixed charge entitlements without depriving the DISCOMs of this 20% PPA capacity. This could be achieved in the following three ways.

(a) One option for the DISCOMs could be to pay an additional rate per unit for the entire PPA capacity and adjust this quantum and the period of entitlement therefor to balance the foregone fixed charge entitlements amounts of the IPPs. In fact, a proposal to levy additional tariff of twenty four (24) paise per unit over the PPA tariff appears to have been one of the options posed before the committee appointed by the government. This option was somehow not accepted by the committee. Reconsidering this stand of the committee by the Government could result in a methodology by which the State would retain access to the full PPA capacity power while at the same time, the IPPs could protect their interests and the DISCOMs and the consumers of the State not be deprived of scarce power. An element of truing-up would be a necessary feature of this arrangement.

(b) Another option would be for the DISCOMs to retain access rights for entire 100% PPA capacity with the DISCOMs but pay a higher rate for 20% of the PPA capacity only and adjust the period this entitlement to achieve balance with the forgone fixed charge entitlements amounts of the IPPs. In this approach, the 20% PPA capacity methodology evolved by the government would continue to operate but in a modified manner. Truing-up would be an ingredient of this arrangement also. In this arrangement also the power requirements of DISCOMs and consumers in the State would be taken care of while protecting the interests of the IPPs.

*(c) Another option would be to permit the IPPs to sell 20% PPA capacity plus any tested capacity over and above capacity **in the** open market with a truing-up mechanism as discussed in the above paras built into the same.*

In all the above options, the issue of future gas risk beyond 31-03-2009 would have to be appropriately addressed.

33 The Appellant has submitted that it has been declared as Non Performing Asset (NPA) by all the financiers. As such, the power Station would be forced to shut down unless it is compensated for the loss it had suffered due to non availability of the natural gas. The State Commission has shown its anxiety to retain 20% of power for the use within the State in the larger public interest and had proposed the APDISCOMs to pay an additional rate per unit for the entire PPA capacity and adjust this quantum and the period of entitlement thereof to balance the foregone fixed charge entitlements amounts of the IPPs. This proposal of the State Commission was the 'Option A' agreed to by both the parties before this Tribunal. The State Commission has completely forgotten its own findings recorded in the order dated 5.12.2009 and failed to consider the aspect that in case of complete shutdown of the project, due to declaration of NPA by the financiers, the APDISCOMs would be forced to purchase the 100% capacity of the Appellant's plant at much higher price which would be more detrimental to the public interest.

34 The Learned Senior Counsel for the Respondent APDISCOMs has submitted that it had agreed to 'Option A' before this Tribunal in view of its Affidavit dated 15.12.2010 wherein in had clearly stated that it had agreed to adopt the said option-A, subject to ascertainment of alleged losses, **if any**, by the State Commission and the same has been incorporated by this Tribunal in its Order dated 16.12.2010 and the order dated 20.1.2011. We are unable to appreciate this contention of the Respondent APDISCOMs for the reason that if there was no loss to the Appellant, then the question of adoption of Option-A would not have arisen at all.

35 It is a fact that the Respondent APDISCOMs had filed petition in No. 11 of 2009 before the State Commission for approval of the amendment to the existing PPA with the Appellant. In order to compensate the Appellant for the loss it had suffered due to non-availability of natural gas and could not have achieved CoD as per PPA, the Respondent APDISCOMs had proposed to surrender 20% of power generated by the Appellant's generating plant for outside sale and hence it filed the said petition No. 11 of 2009.

36 Thus, the Respondent APDISCOMs had actually accepted that the Appellant had suffered losses. Having accepted the same and filed the petition before the State Commission for providing compensation to the Appellant in lieu of losses it had suffered due to non-availability of natural gas, the Respondent APDISCOMs cannot turn around now and claim that there was no loss to the Appellant and that it had agreed for Option-A only if the Appellant had suffered any loss.

37 We are constrained to express our displeasure with reference to the manner in which the State Commission has conducted itself in the matter of non implementation of the directions in the Judgment rendered by this Appellate Tribunal by ignoring the same.

38 Judicial discipline has to be maintained by the State Commission by following the directions issued by this Tribunal in letter and spirit.

39 If this is not done, we are constrained to strongly condemn the attitude of the Regulatory Commission for having conveniently omitted to refer to the directions of this Tribunal while at the same

time by trying to over-reach the judgment of this Appellate Tribunal.

40 Attempts to ignore our directions are apparent. Equally, the failure to maintain standards of conduct by the Regulatory Commission is also apparent.

41 In our considered view, the failure on the part of the State Commission to implement the directions issued by this Appellate Tribunal, despite our Judgment being brought to its notice, deserves to be deprecated.

42 The State Commission has not conducted itself properly in a manner expected of it and in fact, it has overreached the orders of this Tribunal. Hence, with great anguish, we express our displeasure to the conduct on the part of the Andhra Pradesh Electricity Regulatory Commission. This will atleast send a right signal to the said Commission to correct itself in the future.

43 Conclusion: This Tribunal in its Orders dated 16.12.2010 and 20.1.2011 had directed the State Commission to ascertain the losses suffered by the Appellant and to determine the rate of AFC and the period for which additional AFC was required to be paid. Unfortunately, the State Commission has completely ignored these directions of this Tribunal. Bare reading of the State Commission's Impugned Order would clearly establish that the State Commission has passed the Impugned Order without considering the directions of this Tribunal. This is clearly in violation of our directions.

The Respondent APDISCOMs have themselves introduced the concept of 'Notional COD' in their submissions before the State Commission in OP 11 of 2009. The APDISCOMs cannot now be permitted to change their stand and claim that there was no concept of 'Notional COD' in the existing PPA.

44 In view of our findings as above, the Appeal is allowed, The impugned order is set aside. We reiterate the directions given in our orders dated 16.12.2010 and 20.1.2011 and direct the State Commission to ascertain the losses suffered by the Appellant in accordance with its findings in order dated 5.12.2009 i.e. from the date of Notional COD and fix the rate of additional Fixed Charge along with the period for which such AFC is payable by the Respondent APDISCOMs to the Appellant within two months from issue of this Order. No order as to costs.

45 Before parting with this case, we have to express our disapproval to the conduct of the Respondent APDISCOMs also for having taken a different stand which lacks bona fide.

46 The Hon'ble Supreme Court has laid down following principles relating to the statutory authorities and the State agencies:

a. It is high time that Government and public authorities adopt the practice of not relying upon the technical pleas for the purpose of defeating legitimate claims of citizens and do what is fair and just.

b. Statutory authorities exist to discharge Statutory functions in public interest. They should be responsible litigants. They cannot raise frivolous and unjust objections, nor act in a

callous and high handed manner. They cannot behave like some private litigants with profiteering motives.

c. It must be remembered that the State is not an ordinary party trying to win a case against some of its own citizens by hook or crook. The interest of the State is to meet honest claims and never to score a technical point or overreach a weaker party to avoid a just liability and secure unfair advantage.

47 The above principles laid down by the Hon'ble Supreme Court would apply squarely to the present case. Even though we feel that this is a fit case for imposing exemplary cost in view of the conduct of the Respondent APDISCOMs, we refrain from doing so in the hope that the Respondent APDISCOMs being a Public Utility, atleast in the future, would not commit similar mistakes.

48 In view of our above findings in Appeal No. 117 of 2011, the prayer in Appeal No. 100 of 2010 becomes infructuous. With these observations Appeal No. 100 of 2010 is also disposed of.

(V J Talwar) **(Justice M. Karpaga Vinayagam)**
Technical Member **Chairperson**

Date 17th April, 2013

Reportable/ ~~Not Reportable~~