Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 228 of 2012

Dated : 04th February, 2013

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member

In the matter of

M/s. S N J Sugars and Products Limited
Formerly known as
M/s. Sagar Sugars and Allied Products Ltd.
Nelavoy (V), Sri Rangarajapuram Mandal
Chittor District, Andhra Pradesh

Versus

1. Transmission Corporation of Andhra Pradesh Limited
   Vidyut Soudha, Khairatabad
   Hyderabad
   Andhra Pradesh – 500082

2. The Chief Engineer I.P.C.
   APTRANSCO,
   VidyutSoudha, Khairatabad
   Hyderabad
   Andhra Pradesh – 500082

3. The Superintending Engineer
   (TL & SS), APTRANSCO
   Kadapa Zone, Kadapa
   Hyderabad
   Andhra Pradesh – 517415

4. Andhra Pradesh Electricity Regulatory Commission
4th& 5th Floors
11-4-660, SingareniBhavan
Red Hills Hyderabad – 500004
Andhra Pradesh

Counsel for the Appellant(s) :Mr. Raju Ramachandran, Sr. Adv.
Mr. A. Sashidharan
Mrs. SanthanaLakshme
Mr. A. Venayagam Balan

Counsel for the Respondent (s) :Mr. P. Shiva Rao for R-1 to R-5

J U D G M E NT

PER HON'BLE MR. JUSTICE M. KARPAGAVINAYAGAM, CHAIRPERSON

1. M/s. S N J Sugars and Products Ltd., formerly known as M/s. Sagar Sugar and Allied Products Ltd. is the Appellant herein. The Transmission Corporation of Andhra Pradesh Ltd. (APTRANSCO) and its officers are the Respondents No. 1 to 3. The Andhra Pradesh Electricity Regulatory Commission ("State Commission") is the Respondent no. 4.

2. Aggrieved by the impugned order dated 27.8.2012 passed by the State Commission fixing the tariff of the Appellant's

power supplied to the APTRANSCO during the period between 13.1.2003 and 21.1.2004 when its sugar plant had not commenced its production of sugar, the Appellant has presented this Appeal mainly on the ground that State Commission had fixed the tariff much below the rate, without following the direction issued in the remand order passed by the Hon'ble Supreme Court.

3. The short facts leading to filing of this Appeal are as under:-

(a) The Appellant is a company which has set up a sugar plant with co-generation power plant with 20 MW capacity. The Appellant's company proposed to use bagasse, which is a by product of the sugar plant, as a fuel for the power generation.

(b) Accordingly, the Appellant approached the Non-conventional Energy Development Corporation of Andhra Pradesh Ltd. (NEDCAP) for setting up of power plant and obtained approval on 7.4.2000.

(c) In pursuance of the same, the Appellant entered into the Agreements with the local cane growers for supply of sugarcane to its sugar plant for crushing season of FY 2002-03 as it expected commencement of operation of Sugar Plant and co-generation plant by the end of December, 2002. The Appellant also approached the State Commission for permission to supply power generated in its plant to the Respondent –APTRANSCO. Accordingly, the permission was granted by the State Commission by order dated 25.1.2002. Thereupon, the Appellant entered into a Power Purchase Agreement with the APTRANSCO on 10.7.2002, which provided that power to the extent of 9.9 MW will be exported to the Grid for sale to the APTRANSCO (R-1) during the sugar season and power to the extent of 16.94 MW will be exported to the Grid for sale to the APTRANSCO during off-season.

(d) The Appellant Company established 20 MW co-generation power plants by 15.12.2002. However, the sugar plant could not be established during the crushing season of FY 2002-03 as contemplated, as there was a delay in import of the cane diffuser machine from Germany.

(e) In view of the above position, the Appellant obtained bagasse from the neighbouring sugar plants and used it for generating power. The cane growers who are supposed to supply the Sugar cane to the sugar plant of the Appellant were asked to supply cane to the neighbouring sugar plants. The bagasse obtained from the neighbouring sugar plants by crushing the cane was utilized by the Appellant for starting operation of the power plant of the Appellant.

(f) Thereafter, the Appellant by its letter dated 9.1.2003 intimated APTRANSCO (R-1) that the power plant was ready to start commercial production.

In response to the said letter, APTRANSCO through its reply dated 11.1.2003 permitted the Appellant for synchronizing bagasse based plant with the Grid for supply of the power to APTRANSCO. Accordingly, the Power Plant was synchronized and started supplying electrical energy from 13.1.2003 onwards to the Grid of APTRANSCO. Though the co-generation power plant was completed, the erection of sugar plant could not be completed by that time due to unavoidable reasons. Hence, the Appellant filed an Application dated 1.3.2003 before the State Commission seeking permission to export the entire unutilized surplus power to the Grid of APTRANSCO by treating the crushing season period as off-season period.

(g) Accordingly, by the order dated 17.3.2003, the State Commission directed the APTRANSCO to amend the PPA to provide for the supply of surplus additional quantity of power by the Appellant.

(h) On coming to know of this order, the APTRANSCO on the same day, wrote to its officers directing them to stop the evacuation of power from the power plant of the Appellant and to cut off the supply on the ground that the power plant of the Appellant could not be classified as co-generation plant as the sugar plant of the Appellant was not commissioned.

(i) Aggrieved over the said letter sent by the APTRANSCO, the Appellant filed Writ Petition before the Andhra Pradesh High Court in WP No.7395 of 2003 challenging the same. The Single Judge of the High Court after entertaining Writ Petition passed the interim order dated 2.5.2003 directing the APTRANSCO to purchase power from the Appellant and to pay to the Appellant at the rate of Rs.2.00 per unit and issued notice to the Respondents.

(j) In the meantime i.e. on 8.4.2003, the APTRANSCO filed a Review Petition before the State Commission for cancellation of the earlier directions to amend the PPA issued on 17.3.2003. Accordingly, the State Commission cancelled the said order by the order dated 1.10.2003.

(k) As against this order dated 1.10.2003, passed by the State Commission, the Appellant challenged the same by filing an Appeal before the Division Bench in CMA no. 3613 of 2003 in the High Court and obtained interim stay of the said order dated 1.10.2003 passed by the State Commission.

(l) At this stage, the Writ Petition filed by the Appellant in Writ Petition No. 7395 of 2003 came up for final disposal in the High Court. The Single Judge of the High Court by the order dated 15.12.2003 quashed the letter dated 17.3.2003 of the Chief Engineer of the APTRANSCO and directed the

APTRANSCO to evacuate the power as agreed under the PPA. As against this order of Single Judge, the APTRANSCO filed a Writ Appeal in WA No. 371 of 2004 seeking to set aside the order of the Single Judge dated 15.12.2003.

(m) After entertaining the Appeal, the Division Bench passed interim order in the Writ Appeal on 12.2.2004 directing the APTRANSCO to make payment of charges to the Appellant at the rate of Rs.2.69 per unit instead of Rs.2.00 per unit as fixed earlier during the pendency of the Writ Appeal. In the meantime on 20.1.2004 the sugar plant of the Appellant started its operation.

(n) Finally, the Division Bench of the High Court by the order dated 30.7.2004 disposed of both the Writ Appeal no. 191 of 2004 filed by the APTRANSCO as well as CMA no. 3613 of 2003 filed by the Appellant by setting aside the order of Single Judge and

directing both the parties to approach the Appropriate Forum as contemplated under the provisions of the PPA for resolving the dispute in question. By this order, the Division Bench further directed that the Appellant would be entitled to interim relief at the rate of Rs.2.69 per unit in the mean time i.e. till the settlement of the dispute.

(o) Aggrieved by this order 30.7.2004 passed by the Division Bench, the Appellant filed a Civil Appeal before the Hon'ble Supreme Court . After entertaining the Civil Appeal, the Hon'ble Supreme Court passed the interim order directing the APTRANSCO to pay interim price to the Appellant at the rate of Rs.3.11 per unit during the pendency of the Appeal. Accordingly, APTRANSCO paid the differential amount to the Appellant during the pendency of the Civil Appeal before the Supreme Court.

(p) Ultimately, this Civil Appeal was taken up for final disposal. The Hon'ble Supreme Court by its final order dated 13.10.2011 disposed of the said Civil Appeal by remanding the matter and directing the State Commission to decide the dispute between the parties as to whether during the disputed period between 13.1.2003 to 21.1.2004 i.e. when the sugar plant of the Appellant had not commenced its production of sugar, the unutilized power supplied by the Appellant to the APTRANSCO will have the same price at par with the price of power supplied by other non-conventional energy projects earlier determined by the State Commission and fix the price of supply of power by the Appellant to the APTRANSCO during the disputed period.

(q) Pursuant to the said direction of the Supreme Court, the State Commission heard the parties and passed the impugned order dated 27.8.2012. By this

order, the State Commission fixed the price at the rate of Rs.0.92 per unit for the period 13.1.2003 to 31.3.2003 (FY 2002-03) and at the rate of Rs.0.97 per unit for the period 1.4.2003 to 20.1.2004 (FY 2003-04).

(r) Aggrieved by the price fixed by the State Commission for the disputed period, the Appellant has presented this Appeal.

4. The Learned Senior Counsel for the Appellant has made the following submissions:-

(a) The State Commission is wrong in holding that sugar plant was commissioned on 21.1.2004 and therefore that date alone could be taken as a commercial operation date. In fact, Article 1.3 of the PPA provides that the commercial operation date in respect of non-conventional based plant will be the date of synchronization of the first unit. In the present case by the letter dated 11.1.2003 APTRANSCO

permitted the plant of the Appellant to synchronize. Accordingly, on 13.1.2003 the power plant commenced its production and supplied power to the APTRANSCO Grid. Therefore, the finding of the State Commission that the date of commencement of sugar plant alone shall be taken as the commercial operation date of the power plant under the PPA is erroneous.

(b) The power plant of the Appellant's Company, in fact, produces two forms of energy as required by the co-generation plant even before the sugar plant was commissioned. Only dispute was with reference to the fact that one form of energy so produced was not used for processing of sugar in the sugar plant as the same was not operational during the period of dispute. Merely because, energy so produced by the power plant was not used for the processing of sugar for certain period, it could not be said that the plant is not

a co-generation plant. Hence, the finding of the State Commission to the effect that the power plant of the Appellant Company can be treated as a Bagasse based co-generation plant only after sugar plant is commissioned is erroneous. Hence tariff fixation on the basis of date of commissioning of sugar plant is not sustainable.

(c) Assuming that the sugar plant has to be commenced before the non-conventional energy power generated is fed into the Grid, bagasse was the fuel used for production on non-conventional energy during the period of dispute and fed into the Grid. It could not be denied that the energy so produced by using bagasse as fuel was only non-conventional energy and to treat it otherwise would be an arbitrary exercise of power by the authority concerned. The clear finding of Hon'ble Supreme Court in the remand order is that the order dated 20.6.2001 passed by the

State Commission has attained finality as it was not challenged. Therefore, the period between 13.1.2003 and 21.1.2004 should be considered for fixing the tariff in accordance with the order dated 20.6.2001 passed by the State Commission. In the said order, the prohibition for third party sale was imposed on all the non-conventional generators including the Appellant. In view of the above prohibition, the Appellant was not having any other option except to supply power to APTRANSCO.

(d) Without considering the relevant factors, including the order dated 20.6.2001, and without following the direction to decide the issue framed by Hon'ble Supreme Court in the remand order, the State Commission has proceeded to fix the tariff by framing some other issue which is wrong.

(e) The State Commission has fixed the tariff on the variable cost basis, although the relevant period i.e.

13.1.2003 to 21.1.204 was covered by a single part tariff fixed by its own order applicable to all non-conventional energy producers including the Appellant. Hence, the impugned order is not legal.

5. In reply to the above submission, the Learned Counsel for the Respondent 'APTRANSCO' has made the following submissions:-

(a) As per directions of the Supreme Court, the State Commission was obliged to consider all relevant materials and factors to determine the price or tariff of the Appellant for the said disputed period. When the State Commission was directed by the Hon'ble Supreme Court to give a finding on the issue by considering all relevant materials and factors, it is not permissible in law to find fault with the State Commission's impugned order which was passed after taking note of all materials.

(b) As a matter of fact, when the proceedings were going on before the State Commission after the remand, the Appellant again approached the Supreme Court and sought for direction that there was no necessity for the State Commission once again to go into the determination on the basis of all the relevant materials and factors. However, the Supreme Court declined to accept their claim. Consequently the Appellant withdrew the same and the same was dismissed.

(c) The Appellant had no sanction of law to generate power in that period and since it had no sanction of law and even then supplied the power to the APTRANSCO against its will, the State Commission has to necessarily hold that the power has to be paid only on the basis of the variable cost and not on the basis of the fixed cost for the initial period and the payment of fixed cost to the Appellant would be

considered only from 21.1.2004 when it commenced co-generation plant.

(d) Since it was a co-generation plant which was not required to generate power without commencement of sugar plant, it does not entitle the tariff at par with other co-generation plants and therefore the State Commission is correct in holding the Appellant who supplied power to the APTRANSCO during the period when its sugar plant had not been commissioned, is eligible only for variable cost.

(e) The State Commission has considered the definition of the COD of the project and correctly held that the COD shall be 21.1.2004 when the co-generation plant was commenced. Therefore, the Appellant would be entitled to only variable cost especially when it had no authority to generate power and APTRANSCO had no obligation to purchase

power during the period when the Sugar Plant had not commenced operation.

6. In view of the above rival contentions urged by the Learned Senior Counsel as well as the Learned Counsel for the Respondent , the only question that would arise for consideration is as follows:-

> **"Whether or not during the period 13.1.2003 to 21.1.2004 i.e. when the sugar plant of the Appellant had not commenced its production of sugar, the unutilized power supplied by the Appellant to the APTRANSCO (R-1) will have the same price as the price of power supplied by other non-conventional energy producers as determined earlier by the State Commission? "**

7. The main contention of the learned Senior Counsel for the Appellant is that the Hon'ble Supreme Court after considering various relevant materials and factors remanded the matter to the State Commission by framing specific question and directing the State Commission to consider the relevant materials and factors to decide the said question and determine the price of power supplied

during the period 13.1.2003 and 21.1.2004 on the basis of the said question but, the State Commission, has totally failed to take note of the discussion and the directions of the Hon'ble Supreme Court and the question framed by the Hon'ble Supreme court, has simply proceeded to fix the tariff at variable cost for the relevant period in an arbitrary manner much below the rate in violation of the mandate of the Hon'ble Supreme Court.

8. In view of the above specific plea of the Appellant, at the outset, it would be necessary to refer to the discussions and directions of Hon'ble Supreme court dated 13.10.2011. The relevant portion of the said order is as under:

> "*These are the appeals against the common order dated 30.07.2004 passed by the Division Bench of the Andhra Pradesh High Court in Writ Appeal No. 191 of 2004 and C.M.A No. 3613 of 2003.*
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> *2. The facts relevant for deciding these appeals very briefly are that on 29.04.2000 the appellant entered into a Memorandum of Understanding with Non-Conventional Energy Development Corporation of Andhra Pradesh Limited (for short `the NEDCAP'), a nodal agency for non-conventional projects up to 20 MW, for setting up of a power plant in which power was to be generated from bagasse, a by-product of sugar factory. On 25.01.2002, the Andhra Pradesh Electricity Regulatory Commission (for short `the APERC') set up under the Andhra Pradesh Electricity Reforms Act, 1998, permitted the appellant-company*

to supply the power generated in its plant to the respondent no.1, which had taken over the functions of the erstwhile Andhra Pradesh Electricity Board. On 10.07.2002, a Power Purchase Agreement (for short `the PPA') was entered into between the appellant and the respondent no.1 which inter alia provided that the power to the extent of 9.99 MW will be supplied during the season and power to the extent of 16.94 MW will be supplied during the off season. On 11.01.2003, respondent no.1 permitted the appellant to synchronize its plant with the power grid and on 13.01.2003, the appellant started supplying electricity energy to the power grid. On 01.03.2003, the appellant wrote to the APERC to direct the respondent no.1 to purchase unutilized power of the appellant as sugar plant of the appellant could not be commissioned due to some difficulties and power generated in its power plant remained unutilized and on 17.03.2003, APERC directed the respondent no.1 to amend the PPA to provide for surplus/ additional quantity of power from the appellant. On 17.03.2003, the Chief Engineer of respondent No.1 wrote to Superintending Engineer directing him to stop evacuation of power from the power plant of the appellant and to cut off the supply on the ground that the plant of the appellant cannot be classified as co-generation till the sugar plant of the appellant was commissioned.

3. The appellant then filed Writ Petition No. 7395 of 2003 in the Andhra Pradesh High Court challenging the letter dated 17.03.2003 of the Chief Engineer of the respondent No.1 and the learned Single Judge passed the orders on 02.05.2003 directing issue of notice to the respondents and directing the respondents, as an interim measure, to purchase power from the appellant and to pay to the appellant

Rs.2.00 per unit. The respondent No.1 then filed a review petition before the APERC for reconsideration of its earlier directions to amend the PPA issued on 17.03.2003 and on 01.10.2003 the APERC allowed the review petition and cancelled its directions issued on 17.03.2003. The appellant then challenged the order dated 01.10.2003 of the APERC before the Division Bench of the High Court in C.M.A. No. 3613 of 2003 and the Division Bench of the High Court granted interim stay of the order dated 01.10.2003 of the APERC.

4. On 15.12.2003, the learned Single Judge of the High Court allowed Writ Petition No. 7395 of 2003 of the appellant and quashed the letter dated 17.03.2003 of the Chief Engineer of the respondent No.1 and directed the respondent No.1 to evacuate the power as agreed under the PPA and as directed by the APERC by order dated 17.03.2003. Against the said order dated 15.12.2003 of the learned Single Judge, the respondent filed Writ Appeal No. 191 of 2004 and on 12.02.2004 the Division Bench passed an interim order that no further payment need to be made by respondent no.1 to the appellant. Thereafter, on 22.04.2004 the Division Bench modified its earlier interim order dated 12.02.2004 and directed the respondent to pay the appellant at the rate of Rs.2.69 per unit instead of Rs.2.00 per unit and the said order was to continue till further orders in the Writ Petition.

5. Finally on 30.07.2004, the Division Bench of the High Court passed the impugned order in Writ Appeal No. 191 of 2004 as well as in C.M.A. No. 3613 of 2003 setting aside the order dated 15.12.2003 of the learned Single Judge in Writ Appeal No. 7395 of 2003 and directed the parties to approach the appropriate forum chosen by the parties under the PPA for

resolving the dispute. By the impugned order the Division Bench also held that the appellant will be entitled to tariff as fixed by the Division Bench of the High Court in Writ Appeal No. 191 of 2004.

6. Dr. Rajeev Dhavan, learned senior counsel for the appellant, submitted that the sugar plant has, in the meanwhile, commenced the production on 21.01.2004 and the only dispute which has to be decided by this Court is with regard to the price of the power supplied by the appellant to the respondent during the period from 13.01.2003 to 21.01.2004.

7. Mr. Dhavan submitted that by the order dated 22.04.2004 of the Division Bench in Writ Appeal No. 371 of 2004, the respondent No.1 was to be paid at the revised rate of Rs.2.69 per unit and on 08.02.2006, this Court has by an interim order, directed that the appellant would be entitled to receive payment at the rate of Rs.3.11 per unit as an interim measure for the period from 13.01.2003 to 20.01.2004 and also at the same rate of Rs.3.11 per unit for the period 21.01.2004 onwards, as has been paid to other co-generating plants, excluding the money already paid. He submitted that in Transmission Corporation of Andhra Pradesh Limited and Another etc. etc. v. Sai Renewable Power Private Limited and Others etc.etc. [(2010) 6 SCALE 541= (2010) 8 SCR 636 = JT 2010 (7) SC 1] this Court has issued some directions relating to price payable for power supplied by non-conventional power projects. He referred to Para 4 of the judgment of this Court in the aforesaid case to show that the APERC had approved the rate of Rs.2.25 per unit with 5% escalation per annum from 1994-1995, being the base year, for supply of power generated by the non-conventional power projects and this was also the price fixed in clause 2.2 of the P.P.A

for supply of electricity by the appellant to the respondent no.1. He submitted that the benefit of the aforesaid judgment of this Court delivered on 08.07.2010 should therefore be granted to the appellant and directions be issued to respondent no.1 accordingly.

8. Learned counsel for respondent no.1, on the other hand, submitted that the judgment of this Court delivered on 08.07.2010 in Transmission Corporation of Andhra Pradesh Limited and Another etc. etc. v. Sai Renewable Power Private Limited and Others etc.etc. (supra) was on tariff and purchase price of power produced by co-generation non-conventional energy plants and the plant of the appellant was not a co-generation plant during the period from January, 2003 to January, 2004, as there was no production of sugar in the plant during the aforesaid period and therefore the judgment of this Court in Transmission Corporation of Andhra Pradesh Limited and Another etc. etc. v. Sai Renewable Power Private Limited and Others etc.etc. (supra) has no relevance to the price of power supplied by the appellant to the respondent No.1 during January, 2003 to January, 2004.

9. We have considered the submissions of the learned counsel for the parties and we find that clause 2.2 of P.P.A. between the appellant and respondent no.1 reads as follows:

> *"2.2. The company shall be paid the tariff for the energy delivered at the interconnection point for sale to APTRANSCO at Rs.2.25 paise per unit with escalation at 5% per annum with 1994-95 as base year and to be revised on 1st April of every year up to the year 2003-2004. Beyond the year 2003-2004, the purchase price by APTRANSCO*

will be decided by Andhra Pradesh Electricity Regulatory Commission. There will be further review of purchase price on completion of ten years from the date of commissioning of the project, when the purchase price will be reworked on the basis of Return on Equity, O& M expenses and the Variable Cost".

The dispute between the Appellant and Respondent No.1 before us is whether or not during the period 13.01.2003 to 21.01.2004, when the sugar plant of the Appellant had not commenced production of sugar, the unutilized power supplied by the Appellant to the Respondent No.1 will have the same price as the price of power supplied by non-conventional energy projects in the State of Andhra Pradesh determined by the APERC. It will be more appropriate for the APERC, which is a regulatory commission with expertise in determination of price and tariff of power, to decide what would be the price for supply of power by the Appellant to the Respondent No.1 during the disputed period 13.01.2003 to 21.01.2004 and thereafter. By the judgment dated 08.07.2010 of this Court in Transmission Corporation of Andhra Pradesh Limited and Another etc. V. Sai Renewable Power Private Limited and Others etc (supra), this Court has also remanded the matters to APERC to decide the 'purchase price' for procurement of the electricity generated by non-conventional energy developers in the facts of the circumstances of the case.

10. We, therefore, dispose of these Appeals by directing that the APERC will consider all relevant materials and factors and finally determine the price of power supplied during the period 13.01.2003 to 21.01.2004 and thereafter and in accordance with the determination made by the APERC, balance

payments, if any, will be made by the Respondent No.1 to the Appellant. The Appeals are disposed of accordingly. There shall be no order as to costs".

9. **The crux of the judgment of Hon'ble Supreme Court is as follows**:

(a) M/s. Sagar Sugars and Allied Products Limited entered into a MOU with NEDCAP, a nodal agency for non-conventional projects upto 20 MW for setting up of a power plant in which power was to be generated from bagassee. The State Commission permitted the Appellant to supply power generated in its plant to the APTRANSCO.

(b) On 10.7.2002, a Power Purchase Agreement was entered into between the Appellant and APTRANSCO.

(c) On 11.1.2003, the APTRANSCO permitted the Appellant to synchronize its plant with the power grid. From 13.1.2003, the Appellant started supplying power to the Power Grid.

(d) On 1.3.2003, the Appellant requested the State Commission to direct the APTRANSCO to purchase unutilised power of the Appellant, as Sugar Plant of

the Appellant could not be commissioned due to some difficulties.

(e) By the order dated 17.3.2003, the State Commission directed the APTRANSCO to amend the PPA to provide for surplus quantity of power from the Appellant. On the same day, APTRANSCO, through its Chief Engineer wrote to Superintending Engineer directing him to stop evacuation of power from the power plant of the Appellant as the Appellant cannot be classified as a co-generation.

(f) The Appellant filed a Writ Petition challenging the letter dated 17.3.2003. The Single Judge while directing the issue of notice, directed the APTRANSCO, as an interim measure to purchase power from the Appellant and to pay to the Appellant Rs.2.00 per unit.

(g) At this stage, the APTRANSCO filed a review Petition before the State Commission for reconsideration of its earlier directions dated 17.3.2003. Accordingly, the State Commission allowed the review petition by cancelling its directions by the order dated 1.10.2003. This was challenged by

the Appellant in an Appeal before the High Court Division Bench and interim stay was granted.

(h) On 15.12.2003, the Single Judge of the High Court quashed the letter dated 17.3.2003 of the Chief Engineer and directed the APTRANSCO to evacuate the power as agreed to under the PPA. Against this order, the APTRANSCO filed Writ Appeal before Division Bench. The Division Bench passed the interim order directing the APTRANSCO to pay the Appellant at the rate of Rs.2.69 per unit instead of Rs.2.00 per unit.

(i) Finally, the Division Bench of the High Court passed the order both in the Writ Appeal filed by the APTRANSCO and the Appeal filed by the Appellant directing both the parties to approach the appropriate forum under the PPA for resolving the dispute.

(j) This was challenged before this Court (Supreme Court). According to the Appellant, earlier the Supreme Court issued same directions relating to price payable for power supplied by non-conventional power projects and the benefit of the said order should be granted to the Appellant also by giving similar directions.

(k) On the other hand, APTRANSCO submitted that the said directions would not apply to the present case as the plant of the Appellant was not a co-generation plant during the period from January, 2003 to January, 2004.

(l) We have considered the submissions of the learned Counsel for the parities. On going through the PPA we find that Clause 2.2 is significant. As per this clause, the Appellant shall be paid the tariff for the energy delivered at Rs.2.25 per unit with escalation at 5% per annum with 1994-95 as base year and to be revised on 1st April of every year to the year 2003-2004. Beyond that year, the purchase price will be decided by the State Commission.

(m) The dispute between the Appellant and the Respondent, APTRANSCO is whether or not during the period from 13.1.2003 to 21.1.2004, when the Sugar Plant of the Appellant had not commenced production of sugar, the unutilised power supplied by the Appellant to the APTRANSCO, will have the same price as that of the power supplied by the other non-conventional energy projects determined by the State Commission.

(n) Earlier, we have decided this issue in the case of Transmission Corporation of Andhra Pradesh Ltd., Vs Sai Renewable Power Private Ltd in the judgment dated 8.7.2010 and remanded the matter to the State Commission to decide the purchase price for procurement of the power generated by non-conventional energy developers.

(o) In the light of the said order, we dispose of this Appeal by remanding the matter to the State Commission to take into consideration of our observation and all relevant materials and factors and to determine the price of power supplied during the period 13.1.2003 to 21.1.2004 and thereafter in accordance with the said determination, the balance payments if any, will be made by the APTRANSCO to the Appellant.

10. The above discussions and directions issued by the Hon'ble Supreme Court would clearly indicate that the dispute between the parties as to whether during the period 13.1.2003 to 21.01.2004 when the sugar plant of the Appellant had not commenced production of sugar, the unutilised power supplied by the Appellant to the APTRANSCO will have the same price as that of the price of power supplied by the other non-conventional energy projects in the State of Andhra Pradesh earlier determined

by the State Commission. So, the State Commission has to decide the price for the disputed period by comparing the price of power supplied by the other non-conventional energy projects earlier determined by the Andhra Commission.

11. Let us now refer to the impugned order whether such an issue as indicated by the Hon'ble Supreme Court, had been framed and decided on the said dispute through the impugned order. The relevant portion of the order is as follows:

> "16. *Now the issue to be decided by the Commission is, what shall be the tariff payable for the power supplied during the period between 13-01-2003 to 20-01-2004 and thereafter?*
>
> *17. While addressing the above issue, certain actual information needs to be borne in mind as hereinafter indicated. The co-generation facility started functioning from 20-01-2004. Commission passed order dated 20-03-2004 in R.P.No. 84/2003 in O.P.1075/2000, wherein, the tariff for non-conventional projects including Bagasse based co-generation plants has been fixed effective from 01-04-2004. The tariff included both fixed cost component and variable cost component. While, the fixed cost component is fixed for a period of 10 years, the variable cost is fixed on financial year basis. The fixed cost is paid based on year-of-operation reckoning from commercial operation date of the plant. A further review of the individual projects is to be undertaken on*

completion of 10 years from the date of commissioning of the project (by which time the loan is expected have been substantially repaid) and the purchase price will be based on O & M expenditure, Return on Equity, Variable Cost and residual depreciation if any. The tariff applicable for the period prior to 01-04-2004 is single part tariff based on MNES guidelines.

18. Having regard to the above facts, the plant can be treated as Bagasse based co-generation plant only after the sugar plant is commissioned. Since, the sugar plant is commissioned on 20-01-2004 and supplying power, that date alone, can be taken as the Commercial Operation Date (CoD) under the Power Purchase Agreement covering this Bagasse based co-generation plant and any earlier date is not justifiable. Having decided that the CoD is 20-01-2004, the payments for the power supplied are to be regulated from this stand-point. Accordingly, from 20-01-2004 till 01-04-2004 the tariff paid has to be in terms of tariff derived from MNES guidelines applicable for this project and generally being paid for similarly placed projects. The tariff from 01-04-2004 has to be in terms of the order dated 20-03-2004 in R.P.No. 84 / 2003 in O.P. 1075/2000. However, coming to the issue of what tariff needs to be paid for the power supplied prior to CoD i.e., 20-01-2004 (which is also called as infirm power in electricity parlance), only variable cost needs to be paid, in as much as in cost-plus approach route, there is a provision for full fixed cost recovery in the period of time subsequent to date of COD. If any payment towards fixed cost is made for the infirm power, for the period prior to date of COD, it amounts to making double payment. As can be seen from the above, only, variable cost can be paid in the present

case for the period from 13-01-2003 to 20-01-2004. However, the two-tier tariff is not in place for the above said period. The two-tier tariff came into operation only from 01-04-2004. In order to arrive at the possible variable cost applicable for the period from 13-01-2003 to 20-01-2004, the only way is to work backwards based on the principles laid down in 20-03-2004 order. Further, it is also to be noted that since, the variable cost is financial year dependant, the above period to be segregated financial year wise, which is as hereunder:

Period	***Financial Year (FY)***
13.01.2003 to 31.03.2003	*FY 2002-03*
01.04.2003 to 20.01.2004	*FY 2003-04*

19. The further task before the Commission now is to work out variable cost for the FY 2003-03 and FY 2003-04 by working backwards based on the principles laid down in 20.03.2004 order. In 20.3.2004 order, the following formula is used for determining the variable cost:

[(SHR/GCV)*(CF/1000)] / [1-(AC/100)]

Where
SHR = Station Heat Rate in k.cal/kWh
GCV= Gross Calorific Value in k.cal/kg
CF = Cost of Fuel in Rs./MT
AC = Auxiliary Consumption

20. The value adopted by the Commission in 20.03.2004 order, while working out the variable cost for FY 2004-05 are as under:

SHR = 3700 K.CAL/KwH
GCV = 2300 K.CAL/kg
CF = Rs.575/MT
AC = 9%

Accordingly, the tariff works out to Rs.1.02 for FY 2004-05. In working out the tariff for the future financial years, a fuel price escalation of 5% year-on-year is adopted by the Commission. By applying the same principle, the fuel cost for FY 2003-04 and FY 2002-03 works out to Rs.546/MT and Rs.519/MT respectively. Based on the above, the variable cost for FY 2003-04 and FY 2002-03 works out to 0.97 per unit and 0.92 per unit respectively.

As a result, the tariff that is payable for the energy supplied shall be as follows:

Period (FY)	***Tariff applicable***
13.01.2003 to 31.03.2003 (FY 2002-03)	*Variable cost of Rs.0.92 per unit*
01.04.2003 to 20.01.2004 (FY 2003-04)	*Variable cost of Rs.0.97 per unti*
21.01.2004 to 31.03.2004	*As per MNES Guidelines paid to similarly placed generators*
01.04.2004 onwards	*As per order dated 20.3.2004 and such other subsequent applicable orders issued from time to time*

16. This order is subject to the result of the appeal filed in APTEL by M/s.SLS Power Ltd., in appeal No.150 of 2011 and batch against the order dated 12-09-2011 in R.P.No.84/2003 in O.P.No.1075 / 2000 upon remand from Hon'ble Supreme Court in Civil Appeal No.2926 of 2006 & batch dated 08-07-2010.
This order is corrected and signed on this 27th day of August'2012"

12. The crux of the impugned order is as follows:

(a) The issue to be decided is what shall be the tariff payable for the power supplied during the period between 13.1.2003 and 20.1.2004.

(b) The co-generation plant started functioning only from 20.1.2004.

(c) The plant can be treated as Bagasse based co-generation plant only after the Sugar plant is commissioned. In the present case, the Sugar Plant was commissioned only on 20.1.2004 and power was supplied. Therefore, that date alone could be taken as a commercial operation date under the Power Purchase Agreement.

(d) From 20.1.2004 to 1.4.2004, the tariff, paid has to be in terms of tariff derived from MNES guidelines applicable for this project. For deciding the issue of

what tariff needs to be paid for the power supplied prior to commercial operation date i.e. on 20.1.2004 only variable cost needs to be paid since the power supplied prior to commercial operation date has to be construed as infirm power. Therefore, only variable cost can be paid for the period from 13.1.2003 to 20.1.2004.

(e) In order to arrive at the possible variable cost applicable for the period from 13.1.2003 to 20.1.2004, the only way is to work backwards based on the principles laid down in the order dated 20.3.2004. So, as a result, the tariff i.e. payable for the energy supplied between the period 13.1.2003 and 20.1.2004 is as follows:

Period (FY)	***Tariff applicable***
13.01.2003 to 31.03.2003 (FY 2002-03)	*Variable cost of Rs.0.92 per unit*
01.04.2003 to 20.01.2004 (FY 2003-04)	*Variable cost of Rs.0.97 per unit*
21.01.2004 to 31.03.2004	*As per MNES Guidelines paid to similarly placed generators*

13. The perusal of the remand order passed by the Hon'ble Supreme Court as well as the impugned order passed by the State Commission would clearly indicate that the issue

to be decided as framed by the Hon'ble Supreme Court in the order dated 13.01.2011 had not been framed in the impugned order. The question framed by the Hon'ble Supreme Court to be decided by the State Commission is as follows:

> ***"Whether or not during the period 13.01.2003 to 21.01.2004, when the sugar plant of the Appellant had not commenced production of sugar, the unutilized power supplied by the Appellant to the Respondent No.1 will have the same price as the price of power supplied by non-conventional energy projects in the State of Andhra Pradesh determined by the APERC ?"***

14. The issue framed by the State Commission in the impugned order as referred to in Para 16 is as follows:

> **"Now the issue to be decided by the Commission is, what shall be the tariff payable for the power supplied during the period between 13.01.2003 to 20.01.2004 and thereafter ?"**

15. Thus, it is clear, that the State Commission did not go into the question whether the Appellant would be entitled to the same price as that of the price of the power supplied by the other non-conventional energy projects for the unutilised power supplied by it to the APTRANCO. In fact, the Hon'ble Supreme Court in the order dated 13.10.2011 took note of all prior judicial proceedings as well as the proceedings before the State Commission and thereafter

framed the question to be determined and remanded to the State Commission to fix the appropriate tariff in respect of unutilised power. The Hon'ble Supreme Court has specifically referred to Clause 2.2 of the PPA which provides the price payable for the energy supplied which is to be determined on the basis of MNES guidelines taking a base price of Rs.2.25 per unit with 1994-95 as the base year with 5% escalation up to 2003-04.

16. Even the State Commission without considering the relevant material factors which were referred to and discussed by the Hon'ble Supreme Court in the Remand Order for deciding the issue framed by the Hon'ble Supreme Court has simply determined the price or tariff of the power supplied by the Appellant for the said disputed period even without going into the question as to whether the price is to be fixed at par with other Non-Conventional energy projects. The State Commission ought to have framed two issues in the light of the directions given by the Hon'ble Supreme Court to decide the dispute in question. Those questions are as follows:

(a) Whether or not the Appellant is entitled for the tariff in disputed period at par with the tariff of

other non conventional energy projects as decided by the State Commission?

(b) What is the tariff payable to the Appellant in the disputed period?

17. Instead of framing these issues as obligated under law by the mandate of the Hon'ble Supreme Court, the State Commission has merely framed the issue as under:

> "What is the tariff payable to the Appellant between the disputed period between 13.1.2003 and 20.1.2004?

18. Thus, the vital issue which was directed to be decided by the Hon'ble Supreme Court was not framed and considered by the State Commission.

19. On the mere question as to what is the tariff payable during the disputed period, the State Commission has unnecessarily considered all the extraneous materials to come to the conclusion that the power supplied during the disputed period by the Appellant was to be treated as infirm power and consequently it is entitled for only variable cost i.e. the fuel cost.

20. As mentioned earlier, the limited direction through the limited remand order by the Hon'ble Supreme Court to the State Commission was to consider all relevant materials

and factors only with reference to the issue i.e. whether or not the Appellant is entitled for tariff at par with other non-conventional energy projects.

21. There cannot by any question with reference to the aspect of variable cost, infirm power and the definition of Commercial Operation Date. The question relating to the sanction of law to generate power was never raised before the Hon'ble Supreme Court.

22. As a matter of fact, earlier the State Commission directed the APTRANSCO to amend the PPA to provide for the receipt of the supply of surplus power. In the High Court also, both the single Bench as well as the Division Bench directed the APTRANSCO to receive the supply by fixing the ad hoc rate of Rs.2/- and then for Rs.2.69. Not only that, even the Hon'ble Supreme Court even during the pendency of the Civil Appeal permitted the Appellant to supply power to the APTRANSCO @ Rs.3.11 per unit.

23. These admitted facts would clearly indicate that there was never a question in relation to the authority of the Appellant to generate power and to supply to APTRANSCO. Neither the High Court nor the Hon'ble Supreme Court never found that the Appellant was not authorised to generate power to supply the same to APTRANSCO.

24. On the other hand, for the said supply to the APTRANSCO, ad hoc rates were fixed by both the High Court and Hon'ble Supreme Court. Therefore, there is no merit in the contention of APTRANSCO that there was no sanction of law to generate power and to supply power.

25. Further, the State Commission merely on the basis that the co-generation plant started functioning only from 20.1.2004, had decided that date alone could be taken as a Commercial Operation Date and consequently, the Appellant would be entitled to the variable cost for the period prior to the Commercial Operation Date namely 20.1.2004. This was not the issue directed to be decided by the Hon'ble Supreme Court.

26. On the other hand, the Supreme Court directed to decide whether the price for the power supply for the disputed period was to be at par with the tariff for other non-conventional energy projects as determined earlier by the State Commission. As mentioned earlier, this issue has neither been framed by the State Commission nor discussed in the impugned order. On the other hand, the Hon'ble Supreme Court referred to in the remand order various factors including the relevant clauses of PPA in order to direct the State Commission to decide whether the

price of the power supplied will be at par with other non-conventional energy projects. The State Commission neither considered the said issue by comparing with the price fixed for non-conventional energy projects nor gave reasons as to why the Appellant cannot be compared with other non-conventional energy projects.

27. The learned counsel for the Respondent fairly admitted that specific issue which has been referred to in the remand order by the Hon'ble Supreme Court had not been framed and discussed by the State Commission in the impugned order. However, he requested this Tribunal to remand the matter again to the State Commission directing the State Commission to frame the said issue and fix the price accordingly.

28. We are unable to accede to the request of the learned Counsel for the APTRANSCO.

29. As pointed out by the learned Senior Counsel appearing for the Appellant that the dispute is a decade old pertaining to 2003-04 and therefore, it would not be in the interest of justice to remand the matter once again to the State Commission to decide the same issue which the State Commission has omitted to consider and further it will take

further time and may give rise to the 3rd round of litigation. Therefore, we ourselves have to decide the said question.

30. Let us discuss the said issue now.

31. It cannot be debated that the Appellant would be able to supply its unutilised power only to APTRANSCO being the only consumer and not to any third party in view of the earlier order dated 20.6.2001 passed by the State Commission in OP No.1075 of 2000. The said order had attained finality as observed by the Hon'ble Supreme Court in the above remand order. The State Commission without deciding the issue has gone astray and dealt with the irrelevant issue as to what was the Commercial Operation Date.

32. The chronological events given in earlier paragraph would clearly indicate that APTRANSCO on the basis of the request made by the Appellant granted permission to the Appellant on 11.1.2003 to synchronize the plant with the grid and as such the Commercial Operation was started on 13.1.2003 itself. In all the subsequent correspondence between the APTRANSCO and the Appellant, APTRANSCO specifically indicated that the Commercial Operation date of the Appellant plant was 13.1.2003. APTRANSCO has never mentioned or pleaded that

21.1.2004 has to be considered to be the Commercial Operation date in the correspondence.

33. As a matter of fact, the explanation to Article 1.3 of the PPA makes it clear that in respect of non-conventional based power projects, the date of synchronization of the first unit will be treated as the Commercial Operation Date of the project since Ministry of Non-conventional Energy Sources has not specified any guidelines for declaration of the Commercial Operation Date.

34. Therefore, there is no justification on the part of the State Commission to give a finding as to the date of commencement of Commercial Operation Date for invoking the concept of infirm power to the power which has been duly supplied after permission of synchronization.

35. It is strenuously contended by the Respondent that the supply was made without any sanction of law. This contention is quite strange and misconceived.

36. As pointed out by the learned Senior Counsel for the Appellant, there is no cancellation either of NEDCAP permission or of the PPA. As a matter of fact, the MOU has provided that NEDCAP has accorded permission to the

Appellant to set-up 20 MW capacity Power Plant based on bagasse. Admittedly, in the present case, the Appellant has used only bagasse for production of electricity which is one of the non-conventional energy sources for production of power being a biomass. Therefore, even during the period when the Sugar Plant was not operational, the energy generated by the Appellant using bagasse will be considered as non-conventional source of energy. According to the PPA entered into between the parties, during the off-season when the sugar plant was not operational, the Appellant's power plant had to supply entire power output(16.94 MW) from its generating station to APTRANSCO and the same is also paid at the same rate as applicable to power supplied(9.99 MW) during the season when the sugar plant is operational i.e. Rs.2.25 per unit with escalation at 5% per annum with 1994-95 as base year upto FY 2003-04. Therefore, the Appellant is entitled to claim for the tariff as decided by the State Commission

for non-conventional energy sources during the disputed period by the order dated 20.6.2001.

37. In this context, the relevant portion of the observations made by the Hon'ble Supreme Court in judgment dated 8.7.2010 in the matter of APTRANSCO Vs Sai Renewable Power Pvt Ltd. & batch, is quite significant. The relevant observations are as follows:

> **"We make it clear that the order dated 20.6.2001 passed by the APERC has attained finality and was not challenged in any proceedings so far. This judgment shall not, therefore, be any detriment to that order which will operate independently and in accordance with the law"**

38. Admittedly, the prohibition of 3rd party sale was imposed on the said order dated 20.6.2001. In view of the said prohibition, the Appellant had no other option except to supply power to APTRANSCO. Otherwise, the energy produced would have gone waste if the Appellant had to wait for the commissioning of the Sugar Plant. The APTRANSCO, admittedly received the power supplied by the Appellant and consumed the same. That apart, the

APTRANSCO itself fixed the date of synchronization of the power plant of the Appellant as 13.1.2003. Such being the case, the APTRANSCO cannot deny the tariff which was given to other non-conventional energy plants applicable on the said date. The State Commission has applied the norms fixed by its order dated 20.3.2004 for determination of the tariff applicable to non-conventional energy projects to take effect from 1.4.2004. This tariff fixed for the period from 1.4.2004 cannot be the basis for fixing the tariff for the power supplied during the prior period i.e. from 13.1.2003 to 20.01.2004, especially when MNES guidelines holds the field upto 31.3.2004.

39. The State Commission wrongly fixed the tariff by decreasing the fuel price by 5% every year by going backwards on the price of bagasse fixed for the tariff year 2004-05 as the tariff order prescribed only increase of price by 5% every year from 1.4.2004 onwards.

40. We notice that the tariff for all non-conventional energy sources as decided by the State Commission for the period under dispute was based on MNES guidelines taking a base price of Rs.2.25 per unit with 1994-95 as the base year with escalation at 5% per annual upto Financial Year 2003-04. The same tariff was applicable to all types of non-conventional energy sources including biomass based

project and co-generation projects using bagasse fuel. The same tariff of Rs.2.25 per unit with 1994-95 as the base year with escalation at 5% per annum has been agreed to in the PPA between the Appellant and APTRANSCO. It is not disputed that the generation from the Appellant's power plant was done using bagasse as fuel which as biomass fuel is also a non-conventional source of energy. Therefore, the Appellant is entitled to tariff as applicable to other non-conventional energy projects during the period 13.1.2003 to 21.1.2004.

41. The tariff for the Financial Year 2002-03 and Financial Year 2003-04 as per the tariff approved by the State Commission for non-conventional energy projects adopting the MNES guidelines of Rs.2.25 per unit as base price with escalation at 5% per annum works out to be Rs.3.32 per unit and Rs.3.48 per unit respectively.

42. Accordingly, as per the tariff decided by the State Commission for non-conventional energy sources during the period under dispute, the APTRANSCO has to pay Rs.3.32 per unit for the energy supplied by the Appellant Company during the period from 13.1.2003 to 31.3.2003 and at Rs.3.48 per unit for the energy supplied during the period from 1.4.2003 to 21.1.2004. In view of the above, the Appellant is entitled to get from APTRANSCO the

amount on account of difference between the above tariff and the tariff at which payment has already been made, along with simple interest for which we decide the rate as 10% per annum.

43. **Summary of Our Findings:**

i) According to the remand order of the Hon'ble Supreme Court, the State Commission had to consider whether or not during the period 13.1.2003 to 21.1.2004 when the Sugar Plant of the Appellant had not commenced production of sugar, the un-utilised power supplied by the Appellant to APTRANSCO (R-1) will have the same price as the price of power supplied by the other non-conventional energy projects in the State and to decide the price of power supplied by the Appellant to the Respondent No.1 during the period under dispute and thereafter. However, the State Commission has not considered the issue remanded by the Hon'ble Supreme Court and has gone into extraneous materials to come to the conclusion that the power supplied during the disputed period by the Appellant was to

be treated as infirm power and consequently it is entitled for only variable cost i.e fuel cost.

ii) The admitted facts would indicate that there was never a question in relation to the authority of the Appellant to generate power and to supply to APTRANSCO. Neither the High Court nor the Hon'ble Supreme Court found that the Appellant was not authorised to generate power to supply the same to APTRANSCO. In fact for the said supply of power to APTRANSCO, adhoc rates were fixed by both the High Court and Hon'ble Supreme Court. Therefore, there is no merit in the contention of APTRANSCO that there was no sanction of law to generate power and to supply power.

iii) We have examined the issue remanded by the Hon'ble Supreme Court and have decided as under:

a) In view of permission granted by APTRANSCO on 11.1.2003 to the Appellant to synchronize the plant and

explanation to Article 1.3 of the PPA stating that the date of synchronisation will be commercial operation date for non-conventional energy projects, the date of synchronization of the first generating unit of the Appellant i.e. 13.1.2003 will be the Commercial Operation Date.

b) Further, in view of the order of the State Commission dated 20.6.2001, prohibiting third party sale, there was no other option for the Appellant except to supply power to APTRANCO. The Appellant has used only bagasse as fuel for production of electricity which being a biomass should be considered as non-conventional source of energy.

c) For the period under dispute, the tariff decided by the State Commission for all types of non-conventional energy sources was based on MNES guidelines taking base price of Rs.2.25 per unit with 1994-95 as the base year

with escalation at 5% per annum up to FY 2003-04. The Appellant is, therefore, entitled to the same tariff as applicable to non-conventional source of energy in the State.

d) Accordingly, the Appellant is entitled to a tariff of Rs.3.32 per unit for the period 13.1.2003 to 31.3.2003 and at Rs.3.48 per unit for the period 1.4.2003 to 21.1.2004. Accordingly, APTRANSCO is directed to make the payment to the Appellant on account of difference between the above tariff and the tariff at which the payment has already been made along with simple interest at the rate of 10% per annum.

44. Before parting with this case, we shall record our disapproval over the impugned order, which reflects non application of mind and the violation of the direction issued by the Hon'ble Supreme Court. We hope, the State Commission will correct this sort of serious mistakes at least in the future. Accordingly, the Appeal is allowed and the impugned order dated 27.8.2012 passed by the State Commission is set aside. APTRANSCO is directed to pay

for the energy supplied by the Appellant from 13.1.2003 to 21.4.2004 at the rates directed in this judgment. APTRANSCO shall pay the balance amount due to the Appellant along with simple interest calculated at the rate of 10% per annum within one month of receipt of a copy of this judgment. Registry is directed to send a copy of the Judgment to Andhra Pradesh State Commission forthwith.

45. Pronounced in the open court on the **04th day of February, 2013.**

(Rakesh Nath) ***(Justice M. Karpaga Vinayagam)***
Technical Member ***Chairperson***

Dated: 04th February, 2013
√REPORTABLE/~~NON-REPORTABALE~~