

ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION
Hyderabad

Dated: 02-06-2006

Present

Sri K. Swaminathan, Chairman
Sri. K.Sreerama Murthy, Member
Sri Surinder Pal, Member

O. P. No.12 of 2006

Between

1. Transmission Corporation of Andhra Pradesh Limited.
2. Central Power Distribution Company of A.P. Ltd.
3. Southern Power Distribution Company of A.P. Ltd.
4. Northern Power Distribution Company of A.P. Ltd.
5. Eastern Power Distribution Company of A.P. Ltd. ... Petitioners

and

M/s Biomass Energy Developers Association. ... Respondent

O. P. No. 20 of 2006

Between

- 1 Transmission Corporation of Andhra Pradesh Limited.
2. Northern Power Distribution Company of A.P. Ltd. ... Petitioners

and

M/s Indur Green Power Pvt. Ltd., ... Respondent

O. P. No. 21 of 2006

Between

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

and

M/s Perpetual Energy Systems. Ltd., ... Respondent

O. P. No. 22 of 2006

Between

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

and

B. Seenaiah & Company (Projects) Ltd., ... Respondent

O. P. No. 23 of 2006

Between

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

and

M/s. Rithwik Energy Systems Limited. ... Respondent

O. P. No. 24 of 2006

Between

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

and

M/s Sagar Sugar and Allied Products Limited. ... Respondent

O. P. No. 25 of 2006

Between

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

and

M/s Kakatiya Cements Sugar and Industries Limited. ... Respondent

O. P. No. 26 of 2006

Between

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

and

M/s GMR Industries Limited. ... Respondent

These petitions coming on for hearing on 22.05.2006 in the presence of Sri N. Jayasurya, Advocate, for the Petitioners in all the petitions; Sri B. Adinarayana Rao, Advocate for the Respondent in O.P. No. 12 of 2006; Sri K. Gopal Choudary, Advocate, for Respondents in O.P.Nos.20 to 23 of 2006; Sri D. Seshadri Naidu and Sri J.N.Bhushan, Advocates for Respondents in O.P.Nos.24 to 26 of 2006 and having stood over for consideration to this day, the Commission delivered the following common:

ORDER

1. Before dealing with the petitions filed under Sections 62 and 86(1)(f) of the Electricity Act, 2003, based on same set of facts and with similar prayer, it is necessary to mention in brief the history of the matter in controversy leading to filing of the said petitions, which is as follows:

(a). On 29.07.2003, the Transmission Corporation of Andhra Pradesh Limited (for short, 'APTRANSCO') submitted Lr.No.CE/IPC/122/F:Gen-PPA/D.No.142/2003, dated 29.07.2003 to the Commission seeking approval for modification to the Delivered Energy clause in Article 1.4 of the Power Purchase Agreements (in short, 'PPAs' or the 'Agreements') entered into by it with non-conventional energy (for short, 'NCE') project developers restricting their operation up to 100% Plant Load Factor (for short, 'PLF) only, on the plea that some of the NCE projects were delivering energy at more than 100% PLF. The modification proposed in Article 1.4 relating to delivered energy was the addition of Explanation 2 to the existing clause as follows:

“ The delivered energy shall be limited to the energy calculated monthly at 100% PLF with net Exportable capacity for sale to APTRANSCO after deducting capacities for Auxiliary consumption and Captive consumption from Installed Capacity and as mentioned in Preamble & Schedule-1 of Agreement. In case any excess energy delivered beyond 100% PLF no payment will be made for the same.”

(b). By letter dated 02.08.2003, the Commission communicated to APTRANSCO its approval for the incorporation of the Explanation-2 to Article 1.4, and later by letter dated:18.08.2003 partially amended the same as follows:

“Whenever generation exceeds the installed capacity, the energy delivered by the project above 100% PLF during such periods will not be accounting for the purpose of payment”.

Simultaneously, the Commission also directed APTRANSCO that the said Explanation may be incorporated in all existing PPAs already entered and to be entered into with NCE developers.

(c). Again on 14.10.2003, APTRANSCO sought approval of the Commission for specific amendments to Article 1.4 of the PPAs with various types of NCE projects. By its letter dated:15.11.2003, the Commission communicated to APTRANSCO two different amendments, one, for Mini Hydel & Wind Farms and the other in respect of NCE power projects other than the Mini Hydel & Wind Farms.

(d). Pursuant to the aforementioned letter dated:15.11.2003 issued by the Commission, APTRANSCO in June 2004 effected deduction of amounts for payments made to the NCE project developers in respect of the energy delivered by them in excess of the 100% PLF, with effect from November / December 2003 by issuing a communication dated:20.06.2004 to the developers. Several NCE project developers filed Writ Petitions before the Hon’ble High Court of Andhra Pradesh challenging the directions issued by the Commission in letters dated 18.08.2003 and 15.11.2003 and also the proceedings dated:26.06.2004 issued by APTRANSCO for deducting amounts as mentioned above. Finally, the Hon’ble High Court disposed off the matters by its order dated 23.01.2006 in W.P.Nos.3410 of 2005 and batch (seven in all) and set aside the proceedings of the Commission dated 15.11.2003 insofar as the respondents in O.P. Nos. 20 to 26 of 2006 herein are concerned. It further directed the Commission to consider the objections raised by them with regard to amendment to Article 1.4 as proposed by APTRANSCO in respect of PPAs and to pass appropriate orders afresh in accordance with law after hearing them.

(e). Meanwhile, on 29.03.2005, APTRANSCO filed separate petitions under Section 62 and 86 (1) (f) of the Electricity Act, 2003, against respondents in O.P. Nos. 20 to 23 of 2006 seeking amendment of the PPAs among other reliefs. However, in view of pendency of W.P. Nos. 3410 of 2005 and batch, the Commission returned the same. The said petitions were re-presented after final disposal of the writ petitions mentioned above. On 06.03.2006, the petitioners in O.P. Nos. 24 to 26 of 2006 filed separate petitions, also under Sections 62 and 86 (1) (f) of the Electricity Act, 2003, for more or less similar reliefs mentioned in the petitions filed earlier.

(f). The respondents in O.P.Nos. 20 to 23 of 2006 herein again approached the High Court for review of the Common Order dated:23.1.2006 earlier passed by it in W.P.No. 3410/2005 and batch. APTRANSCO in its counter affidavits brought to the notice of the High Court that the petitions filed by it, which were earlier returned by the Commission in view of the pendency of the writ petitions, had been re-presented before the Commission, after disposal of W.P. Nos. 3410 of 2005 and batch. The High Court while dismissing the Rev. W.P. M.P. Nos. 3432 of 2006 and batch, by its Order dated:10.03.2006 made it clear that the Commission will now proceed to consider the petitions filed by APTRANSCO following due procedure prescribed under the APERC (Conduct of Business) Regulations, 1999 and pass appropriate order.

2. In view of the order dated: 23.01.2006 of the High Court of Andhra Pradesh directing the Commission to consider the objections raised by the petitioners in the writ petitions therein with regard to amendment of the Article 1.4 as proposed by APTRANSCO in respect of the PPAs in favour of the respondent-developers herein, the Commission initially proposed to conduct combined proceedings, in O.P.No.12 of 2006, on the said proposal of APTRANSCO and other petitioners (collectively referred to hereinafter as the 'DISCOMs' or the 'Distribution Licensees') being APTRANSCO's successors-in-interest after the issue of the Third Transfer Scheme by Government of Andhra Pradesh (for short 'GoAP') vide G.O.Ms.No.58 dated:07.06.2005. Accordingly, notices were issued to the parties concerned. Consequent to the filing of separate petitions, however, by APTRANSCO / DISCOMs and for the sake of

convenience, the petitions filed against 7 respondent-developers were taken on record as individual petitions. In view of the same, O.P. No. 12 of 2006 is proceeded further along with O.P.Nos. 20 to 26 of 2006, for considering the objections filed by the Biomass Energy Developers Association in pursuance of the orders dated 23.1.2006 of the High Court of Andhra Pradesh.

3. As all the petitions in O.P. No. 20 to 26 of 2006 are filed on the same set of facts, with similar prayers, they are clubbed and decided by this common order. The following are the similar averments made in the petitions:

(a) The respondents are generating electricity with the aid of non-conventional fuels (Biomass and Bagasse). The respondents were given sanctions for such generation by Non-conventional Energy Development Corporation of A.P Limited (for short, 'NEDCAP'), the nodal agency of the GoAP for promotion of NCE in the State.

(b) As per the sanction orders issued by NEDCAP, respondents were required to obtain licenses under the A.P. Electricity Reform Act, 1998 (for short 'Reform Act') to enable them to carry on the business of selling electricity. They also require permission from the Commission for that purpose under Section 21 (4) of the Reform Act. Accordingly, the Commission was approached and it settled a format of an Agreement and the tariff. The respondents then entered into agreements for sale of electricity to APTRANSCO on different dates. The Agreement, inter-alia stipulated that APTRANSCO would purchase power, which the respondents would generate as per their respective declared installed capacities.

(c). As per state policy of encouraging the production of non-conventional energy, APTRANSCO was required to pay a rate in excess of that at which conventional energy was available. The Commission had fixed Rs.2.25 / kWh as the base price for 1994-95 with an escalation of 5% per annum. In 2003-04, it worked out to Rs.3.48 per unit as against the average purchase price from all sources of Rs.1.77 per unit paid by APTRANSCO. Thus, APTRANSCO was in effect subsidizing power generated from NCE sources. It was therefore, deemed necessary to stipulate that the energy purchasable by APTRANSCO was limited to that which could be generated normally with the approved installed capacity.

(d). Generation equals installed capacity when energy is delivered at 100% PLF. Therefore, in compliance with the provisions of the PPAs and orders of the Commission, the petitioners decided to restrict the power purchases from NCE developers up to 100% PLF only. The petitioners have an obligation to purchase power from the projects of the respondents as per their respective installed capacity less Auxiliary Consumption and Captive consumption i.e., “Delivered Energy” as agreed in the PPAs at any point of time. The petitioners are not bound to purchase beyond the 100% capacity or in other words, energy delivered above 100% PLF at any point of time i.e., even for a minute also. From the meters available at the interconnection point, the energy delivered by the projects in any 30-minute time block period can be extracted. The present facility available is not sufficient to extract the quantum of energy delivered by the projects in any period block of less than 30 minutes. In fact, Central Electricity Regulatory Commission (for short, ‘CERC’) has fixed 15-minute period block for declaring the availability by all the generating stations.

(e). The Commission is empowered to amend a PPA apart from its statutory powers also under Article 7 of the PPAs, the relevant portion of which is extracted hereunder:

“..... . Any and all incentives / conditions envisaged in the Articles of this Agreement are subject to modification from time to time as per the directions issued by the APERC, Government of Andhra Pradesh and APTRANSCO.”

(f). In view of the above, the petitioners herein prayed to declare that (i) the petitioners are obliged to purchase delivered energy at any point of time only up to the capacity agreed to in the PPAs i.e., Installed capacity less the Auxiliary Consumption as well as Captive consumption, (ii) the action taken by the petitioners in restricting the delivered energy from the respondents during any 30-minute time block is justifiable and correct, and that (iii) even in the absence of Commission’s directions dated:15.11.2003, the petitioners have no obligation to purchase excess delivered energy at any point of time in terms of provisions of the PPAs. They also seek amendment of the existing agreements with

respondents and include Explanation as mentioned in the petitions to Article 1.4 on delivered energy.

4. The respondents in O.P. Nos. 20 to 23 of 2006 filed separate counters to the said petitions and are all represented by their counsel, Sri K. Gopal Choudary. In brief, the identical replies submitted by them are as under:

(a) The respondents were not obliged to obtain permissions / licenses from the Commission. There was never any requirement for any generating company to obtain any license for generation of electricity under any previous or present law.

(b) It is also not correct to state that the respondents require permission of the Commission under Section 21 (4) of the Reform Act. The description of the plant in the Schedule to the agreements was not, and cannot be construed as, any limitation on the actual quantity of energy that would be purchased by the petitioners. That was only for the purpose of describing and identifying the power plants from which the power generated is to be purchased under the agreements. The agreements clearly contemplate, vide Articles 1.4, 2.1, 2.2 and 6.2 (ii), the purchase by APTRANSCO / relevant DISCOM of all the energy generated by the respondents and delivered to APTRANSCO / relevant DISCOM at the specified interconnecting point from the generating plant.

(c). The allegation that there is reason to believe that the respondents are actually generating more power utilising more than the agreed capacity thereby violating the provisions of the agreements is bereft of any details or particulars and is entirely distracted, surmise and conjecture.

(d). The provisions of Article 7 of the PPAs were only a recognition in respect of statutory powers, if any, enabling directions to be given, and cannot be construed as creating any new or different powers or jurisdiction. If the statute does not provide for such power or jurisdiction, that Article 7 is otiose. There is no provision whatsoever in the Act vesting the Commission with the power or jurisdiction over generating companies to make any order to modify any contract.

(e). The petitioners' action of seeking to restrict the power purchases from NCE developers up to 100% PLF only is neither in compliance with the provisions of the PPAs nor any valid orders of the Commission. It is not correct to say that APTRANSCO has an obligation to purchase power from the projects as per the installed capacity less auxiliary consumption i.e., "Delivered Energy" as agreed in the PPAs at any point of time. The term "Delivered Energy" is defined in the PPAs with respect to any billing month, as the kWh of electrical energy generated by the projects and delivered to APTRANSCO at the interconnection point as measured by the energy meters at the interconnection point during the billing month.

(f). Article 2.1 clearly provides that all the delivered energy at the interconnection point for sale to APTRANSCO will be purchased at the tariff from and after the date of commercial operation of the projects. Article 6.2 provides the petitioners' undertaking for purchase of the delivered energy from the projects. The PPAs make no condition or limitation whatsoever on the quantity of energy that may be delivered from the projects to be purchased by the petitioners. The specific provision in the agreements is that all the energy delivered from the projects at the interconnection point shall be purchased by the petitioners.

(g) The petitioners are not entitled to amend the existing agreements as proposed. Further, the proposal itself is unreasonable and irrational.

(h) There cannot be any limitation on the quantity of energy that may be delivered from the projects or for which the payment is to be made by the petitioners. Exigencies of operation and grid conditions do cause and impel variations from time to time in the rate at which energy is generated and in the quantity of energy delivered from the project.

(i). Thus the petitions are misconceived and the petitioners are not entitled to any declaration as prayed by them. Therefore, it is prayed that the Commission may dismiss the petitions.

5. The respondents in O.P. Nos. 24 to 26 of 2006 filed separate counter affidavits to the said petitions and are all represented by their counsel, Sri D. Seshadri Naidu. In brief, the identical replies submitted by them are as under:

(a) There is no gain in saying that generation equals installed capacity when energy is delivered at 100% PLF.

(b) It may be technologically possible, but not contractually permissible to allege that from the meters available at the interconnection point, the energy delivered by the projects in any 30-minute time block period can be extracted. The petitioners cannot stretch, rather shorten, the time blocks to absurd extremes.

(c) Article 1.4 of the PPAs defines "Delivered Energy" to mean, with respect to any billing month, the KWh of electrical energy generated by the projects and delivered at the interconnection point as measured by the energy meters at the interconnection point during the billing month. The Explanation to the said Article clarifies that the delivered energy excludes all energy consumed in the projects by the main plants and equipment, lighting and other loads of the projects.

(d) Article 2.1 of the said PPAs provides that all the delivered energy at the interconnection point for sale will be purchased at the tariff provided for from and after the date of commercial operation of the projects.

(e) Article 6.2 provides for purchase of the delivered energy from the projects. The PPAs make no condition or limitation whatsoever on the quantity of energy that may be delivered from the projects to be purchased by the petitioners. The specific provision in the PPAs is that all the energy delivered from the projects at the interconnection point shall be purchased.

(f) The petitioners have been purchasing all the energy delivered by the respondents at specified interconnection point at the rate of Rs.3.48 per unit, in accordance with PPAs, for all the units so delivered by the respondents to the petitioners.

(g) However, in respect of billing month of November 2003, the petitioners have made deductions and paid only a part of the respondents' bills without any basis and reason with regard to the deductions made from such bills. It is subsequently learnt that the petitioners have not made any payment for the energy delivered in excess of amount of energy corresponding to 100% PLF on monthly basis by taking recourse to an illegal and arbitrary calculation of the energy delivered.

(h) Acting on the communication of the petitioners dated: 5.8.2004, the respondents withdrew W.P.Nos. 12370, 12369 and 12371 of 2004. As a natural corollary to the said communication, the respondents requested the petitioners to release the amounts deducted on account of restricting the power supply to 100% PLF on half-hourly basis between December 2003 to June 2004. As the petitioners did not respond to the said requests to refund the amounts, the respondents filed W.P.Nos. 24075, 24074 and 24073 / 2004 which were disposed on 23.12.2004 by the Hon'ble High Court with a direction to the petitioners to dispose of the representations of the respondents. Therefore, the petitioners are bound by the principles of the doctrine of 'Promissory Estoppel', which has been evolved by equity to avoid injustice, and release the amounts deducted.

(i) It is therefore prayed that the Commission may be pleased to dismiss the petitions with costs.

6. The Biomass Energy Developers Association in its written representation dated:16.02.06 made the following submissions:

(a). Availability of biomass fuels is largely seasonal. The biomass fuels has a tendency of losing calorific value on storage. Therefore, it would be improper to restrict generation when biomass fuels are available in the season and try to generate during off-season (monsoon) when the availability is very poor. Further, if any of the generating companies have to generate during the monsoon they have to stock the fuels during the season which again contributes to heavy loss

of calorific value. Therefore, biomass power industry should be allowed to generate without any restriction when the fuel is available.

(b). In the order of the Commission dated:20.03.2004 Biomass Energy Developers are restricted to 80% PLF on annual basis for the availment of fixed cost. After the orders came into force i.e. from 01.04.2004 all the biomass power plants had voluntarily restricted their generation to 80% PLF. Petitioners' proposal had therefore, lost any relevance in the new regime.

(c). Petitioners are trying to get fresh order from the Commission as can be seen from APTRANSCO's letter dated:08.02.2006 addressed to the Association with retrospective effect which is not acceptable since any amendment to the PPA should be done with mutual consent and such amendment can be implemented only prospectively but not retrospectively.

7. On behalf of the petitioners, rejoinders are filed in O.P. Nos. 20 to 26/2006 with identical replies, which are as follows:

(a) The Commission has power to issue orders impleading any party who is necessary or proper for a just adjudication of the issues raised before it either on its own or on an application being filed in that regard, as per the Conduct of Business Regulations, 1999, and the Electricity Act, 2003.

(b) As APTRANSCO was party before the High Court and the matters partly pertain to the period prior to transfer of PPAs, it is a proper party and the initiation of the proceedings by it is valid and in accordance with law.

(c) Prior to enactment of the Electricity Act, 2003, the power generating sector was subjected to licensing. The respondents having obtained sanction orders from NEDCAP for establishing generating plants subject to the fulfillment of the conditions, they are estopped from contending that they were not required to obtain licences, much less under Sections 15 & 16 of the Reform Act, to enable them to carry on the business of selling energy. PPAs between the licensees and Generating companies still need the consent of the Commission.

(d) The expected generation from power projects is predetermined by the sanctioned capacities. The petitioners' obligation to purchase power from the project developers is limited in this fashion as agreed mutually under the PPAs. The interpretation sought to be made to the effect that the petitioners/DISCOMs are obligated to purchase all the energy generated by the respondents and delivered at the specified interconnecting point from the generating plants is untenable. The petitioners were agreeable to purchase power which could be produced normally with the approved installed capacities after excluding the auxiliary consumption and captive consumption. Their commitment was limited to that extent only. In its order dated 20.03.2004, in R.P.No.84 of 2003 in O.P. No. 1075 of 2000 to which Biomass Energy Developers Association is a party, the Commission fixed auxiliary consumption as 9%.

(e) Emphasis on the policy and statutory mandate of promotion and purchase of electricity from NCE sources of energy, under no stretch of imagination would mean to suggest that the end-consumer be mulcted with extra rate even though the power is available at a cheaper rate.

(f) In case of a power project whose installed capacity is 6 MW, generation at 100% PLF will be only 6 MW and excluding the auxiliary consumption, generation will be only 5.46 MW at any point of time at 100% PLF. It is only this quantity of power, which a licensee is liable to purchase. However, the generating companies were producing more power than the agreed capacities. The deliveries made by the respondents during December, 2003 to June, 2004 and also for the subsequent periods would clearly indicate that the respondents are generating more power utilizing more than the agreed capacity in violation of the provisions of the agreements.

(g) The power conferred on the Commission to regulate the electricity purchases through agreements includes the power to issue directions or orders to modify any agreement. The object of Sections 62 and 86 of the Electricity Act, 2003 is to bring all aspects of generation of electricity and sale within the regulatory jurisdiction of the Commission. The word regulation itself implies that the Regulatory Authority has the necessary power to control dealings in the

realm of electricity. The power to enter into contract is not a fundamental right and is amenable to statutory limitations. All contracts between generating companies and licensees are within the domain of regulatory power. The most important element in such contracts is the price. It therefore, follows that the Commission is entitled to modify the contracts including the price structure. Further, the respondents having accepted the conditions envisaged in the Articles of the agreements are subject to modification from time to time as per the directions of the Commission, GoAP and APTRANSCO are estopped from contending otherwise. Article 7 of the agreements enables the Commission to modify the conditions of the agreements, apart from the express powers vested in it under the Electricity Act, 2003.

(h) The settlement of energy transactions among various stakeholders in the electricity sector are being computed during every 15-minute time block, though billing is done on monthly basis even as per CERC orders. In most of the agreements, the auxiliary consumption and captive consumption are clearly mentioned and in those cases, the said consumption has to be excluded necessarily. In case the agreements are silent with regard to auxiliary consumption of generating companies, the auxiliary consumption of 9% as fixed by the Commission vide orders dated:20.03.2004 in R. P. No. 84 of 2003 in O.P. No. 1075 of 2000 has to be excluded.

(i) Neither APTRANSCO nor the DISCOMs are under any obligation to purchase the entire energy delivered beyond the agreed capacity mentioned in Schedule 1 of the PPAs. The delivered energy at any point of time shall be limited to energy calculated at 100% PLF with net exportable capacity after deducting auxiliary and captive consumption. Seller cannot insist upon the buyer to purchase more energy than the agreed capacity by generating more energy utilizing more than the agreed capacity.

(j) For all these reasons, it is prayed that the petitions in O.P. Nos. 20 to 26 of 2006 may be allowed and orders as prayed therein may be passed.

8. During the hearing, the counsel for the petitioners pointed out that while the relief sought in respect to all the respondents in O.P.Nos. 20 to 26 of 2006 is for a direction to the respondents to execute the amended PPAs of the respective respondents, there is difference in the condition to be included. It is to the effect that the petitioners are obliged to purchase delivered energy from the respective respondents at any point of time only up to the capacity (i) agreed in the PPAs i.e., Installed capacity less the Auxiliary Consumption in respect of the respondents in O.P.Nos. 20 to 23 of 2006, (ii) agreed in the PPAs i.e., Installed capacity less the Auxiliary Consumption as well as captive consumption in respect of the respondents in O.P.Nos. 24 and 25 of 2006 and (iii) indicated in the NEDCAP's letter No.NEDCAP /PD/3358/99/3077 dated:29.11.2003 in respect of the respondent in O.P.No. 26 of 2006, on the basis of the reports submitted by the respondent to NEDCAP. The other reliefs, including declaration sought with regard to 30-minute time block as justifiable and correct is common in respect of all the respondents in O.P.Nos. 20 to 26 of 2006. With that clarification, the counsel for the petitioners submitted oral arguments reiterating the identical averments made in the petitions in O.P. Nos. 20 to 26 of 2006 and stated that

(a) The term 'Delivered Energy' is defined under Article 1.4 of all the PPAs of the respondents in O.P. Nos. 20 to 26 of 2006 herein and the Explanation provided therein is important. 'Explanation' to Article 1.4 is provided for the purpose of clarification, to specifically exclude all energy consumed in the project by the main plant and equipment, lighting and other loads of the project from the energy generated and as recorded by energy meters at interconnection point in respect of the PPAs in O.P.Nos. 20 to 23 and 26 of 2006. In respect of the PPAs in O.P.Nos. 24 and 25 of 2006 such 'Explanation' to 'Delivered Energy' in Article 1.4 in addition to excluding all energy consumed in the projects by the main plant and equipment, lighting and other loads of the projects, the captive consumption also, from the energy generated and as recorded by energy meters at Interconnection Points.

(b) The respondents are producing more energy and compelling petitioners to purchase the entire energy produced by them without excluding the energy

required by them for their main plants and equipments, lighting and other loads, and the captive consumption. In some of the agreements pertaining to the respondents in Schedule 1 of their respective PPAs, the auxiliary consumption is clearly mentioned. However, in some other agreements, it is not mentioned specifically. In such cases, auxiliary consumption of 9% as determined by the Commission in its order dated 20.03.2004 in R.P.No.84 of 2003 in O.P.No.1075 of 2000 has to be taken into consideration for arriving at delivered energy. Thus, the main point for consideration by this Commission is whether auxiliary and captive consumption have to be deducted for computation of delivered energy.

(c) Schedule 1 appended to the PPAs contains particulars of the projects viz., name of the projects, location, No. of units, capacity of each generator and capacity of the station in a tabular form. In the PPA in respect of the respondent in O.P.No. 22 of 2006, quantity of Auxiliary Consumption and the balance remaining for export to the grid for sale to APTRANSCO are mentioned and in the PPAs in respect of the respondents in O.P.No.24 and 25 of 2006, the quantities for Auxiliary Consumption, captive consumption and for export to the grid for sale to APTRANSCO during season as well as during off-season are mentioned.

(d) Along with the rejoinder, the petitioners have filed statements showing generation particulars at 100% PLF, excess energy delivered from December, 2003 to June, 2004, including additional burden of crores of rupees in respect of the respondents in O.P.Nos. 20 to 26 of 2006. As seen from the statements, all the respondents are delivering more energy than their respective installed capacities, without deducting auxiliary consumption and captive consumption (wherever applicable).

(e) The next issue is with regard to duration of readings. As per the 'Explanation' to Article 1.4 of all the PPAs, 'Delivered Energy' as recorded by energy meters at inter-connection point, is the clarification provided. The present facility available for recording energy at inter-connection point is of 30-minute time block periods and the petitioners are justified in restricting the delivered energy from the respondents during any 30-minute time block. CERC has gone

further ahead and fixed 15-minute block period for declaring the availability by all the generating stations.

(f) The argument of the respondents that the PPAs are bilateral contracts and the Commission cannot interfere is not correct. In view of their nature and the fact that they affect the end-consumers, the PPAs cannot be termed as bilateral in nature. The power to regulate vested in the Commission is omnipotent. The Commission has a duty to take into consideration the interests of consumers at large and viewed from that angle, interference by the Commission and directing the respondents to execute amended PPAs is permitted under law.

(g) In the case of BSES Ltd. v Tata Power Company Limited and others reported in 2004 (1) SCC 195, the Supreme Court of India, while examining the provisions of the Electricity Regulatory Commissions Act, 1998, discussed the power sector scenario, Government of India plans for future development of the sector and observed that it will be proper to interpret the said Act in a broad manner and not in a narrow or restrictive sense insofar as the jurisdiction of the Commission is concerned, so that the purpose for which the Act has been enacted may be achieved. The said observation of the Supreme Court, contained in paragraph 12 of its aforesaid order is equally applicable with regard to interpretation of the Electricity Act, 2003.

(h) In case of O.P.No.22 of 2006, the respondent by its letter dated:15.9.2003 had given an undertaking to APTRANSCO to cap its generation at 6 MW mentioned in the PPA, even though for certain reasons of its own, it had to purchase a turbo generator of 7.5 MW capacity. Still the respondent has been generating more power.

(i) As the respondents in O.P.No.20 to 26 of 2006 are generating more power than the installed capacity and not excluding auxiliary and captive consumption (where applicable), the respondents may be directed to execute amended PPAs with the conditions on delivered energy and 30-minute time block as prayed for.

9. The counsel for the respondents in O.P.Nos.20 to 23 of 2006 submitted oral arguments reiterating the identical averments made in the counters filed and stated that:

(a) The role of NEDCAP is to identify NCE projects and matter connected thereto. If licence is not required to be taken under law, simply because NEDCAP stipulated in its proceedings sanctioning power projects that such developers should obtain a licence or exemption u/s 15 or 16 of the Reform Act, 1998, does not require them to obtain licenses. NEDCAP is neither empowered to exercise statutory powers of a licensing authority, nor empowered to issue licenses.

(b) As seen from the PPAs, Schedule 1 is used for identification of the projects to which the PPAs apply. If entire power generated by the respondents is not to be purchased, it should be specifically mentioned so in the PPAs. In the absence of such specific provision in the PPAs, the petitioners cannot be permitted to infer or deduce from the various provisions with regard to limitations on the power to be purchased by them. In its order dated 20.06.2001 passed in O.P.No.1075 of 2000, the Commission ordered that all generators of NCE shall supply power to APTRANSCO only as per the terms mentioned therein, including that the power generated by NCE developers is not permitted for sale to third parties and developers of NCE energy shall supply power generated to APTRANSCO/DISCOMs in Andhra Pradesh only.

(c) Under Article 2.1 of the PPAs, APTRANSCO undertook to purchase all the delivered energy at interconnection point. There are no restrictions whatsoever in that regard. Similarly under Article 6.2, it is mentioned that APTRANSCO agrees “for purchase of Delivered Energy from the project”. Throughout the word used is ‘project’, and there is no mention that anything beyond a certain capacity will not be purchased.

(d) With regard to billing period, Articles 1.2 and 4.10 clearly reveal that the agreements provide for monthly readings. All the respondents understood that billing will be for a month. In interpretation of the agreements, the practice being followed by the parties has to be taken into consideration and all along it is

understood that billing will be for a month. Thus, such position cannot be altered now by the petitioners. Even in the letters written by the petitioners with regard to withdrawal of writ petitions, APTRANSCO mentioned that it decided to calculate PLF on monthly basis to arrive at the purchasable energy limiting it to 100% PLF as it was doing earlier and it establishes the practice being followed.

(e) Thus all along the respondents are given to understand that all power will be purchased and billing will be done monthly. In this context, the doctrine of '*contra proferentum*' which states that the construction least favourable to the person putting forward an instrument should be adopted against him, applies. Section 70 of the Indian Contract Act, 1872, states that where a person delivers anything for another person, not intending to do so gratuitously, the other person enjoying such benefit is bound to compensate to the former in respect of the thing so delivered.

(f) In respect of calculation of auxiliary consumption, where it is not specifically mentioned in the PPAs, 9% as mentioned in the order dated 20.03.2004 cannot be relied upon as the said percentage was arrived at by the Commission for a different purpose.

(g) The Commission is a creature of statute and it has to source the powers vested in it under the statute. Jurisdiction cannot be conferred on the Commission by an agreement. Therefore, the contention of the counsel for the petitioners that Article 7 of the PPAs confers power on the Commission to direct the respondents to amend the PPAs is incorrect. Similarly the power under 86(1)(b) of the Electricity Act has to be read as the power to regulate the licensees. It does not provide any power to the Commission to pass an order directing a generating company to sign an amendment in a particular manner. In other words, the Commission cannot force a developer to amend an agreement, otherwise the developers become regulated entities which is not contemplated by the Electricity Act, 2003. If a contract is to be amended, it can be done by mutual agreement only.

10. The counsel of the respondents in O.P.Nos.24 to 26 of 2006 submitted oral arguments reiterating the identical averments made in the counters filed and stated that:

(a) Even this Commission in its directions dated:18.08.2003 and 15.11.2003 had not given its approval to computation of PLF in 30-minute time blocks, as done by the petitioners.

(b) In its letter dated 19.08.2004 addressed to the Commission, the CE (Comml & IT), APTRANSCO categorically stated that “APTRANSCO proposes to continue the earlier procedure i.e., to purchase energy duly taking the net capacity and number of hours in billing month up to 100% PLF for billing with retrospective effect from December 2003 and to refund all the amounts recovered for the period December 2003 to May 2004 on this account”. Now it cannot resile from that stand and seek amendment to the PPAs. For the said reason, the PPAs cannot be modified and withholding amounts due to the respondents is bad in law.

11. On behalf of Biomass Energy Developers Association, its counsel stated that;

(a) The petitions under Sections 62 and 86 of the Electricity Act, 2003, were filed to force amendments on the respondent-developers. Commission cannot issue a direction to incorporate a condition in the agreements already approved by it. Thus, direction to amend and to incorporate ‘Explanation 2’ to Article 1.4 of the PPAs is not permissible. Moreover, the reliefs claimed in the petitions are mutually inconsistent and cannot be granted.

(b) A cursory reading of the provisions contained under ‘Part II’ of the Electricity Act, 2003, clearly reveals that licence is not required for setting up a generating station or for supplying electricity to licensees.

(c) The role of the Commission as a regulator envisaged under Section 86(1)(b) is with relation to distribution licensees, and not in relation to generating companies. As generating companies are outside the jurisdiction of the

Commission, it cannot exercise any power over them. Therefore, the Commission cannot direct the respondents to amend their respective PPAs, much less with retrospective effect. In the absence of specific power conferred on it, an authority can issue any direction with prospective effect only.

(d) Unlike Courts which are *sui generis*, i.e. can determine their own jurisdiction and the Courts of Record, the Commission cannot assume jurisdiction and direct the respondents herein to amend the PPAs. Thus the proceedings before the Commission are totally without jurisdiction.

12. The issues that arise for consideration of the Commission are:

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

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

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

Issue No.4 Whether the petitioners are justified to settle the claims of the respondent-developers for electricity supplied by them on the basis of PLF computed on the basis of meter readings for 30-minute time blocks.

13. Before adverting to the various rival contentions, it may be mentioned that the Reform Act came into force on 01.02.1999 and in pursuance of the said Act, this Commission was constituted on 03.04.1999.

14. It is not in dispute that the respondents in O.P.Nos.20 to 26 of 2006 obtained sanctions from NEDCAP for setting up power projects of different capacities. Subsequently, they all entered into PPAs with APTRANSCO the respondent in O.P.No.26 of 2006 during the year 2001 and the others in the

year 2002. Thereafter, all the PPAs were submitted before the Commission for consent as required under Section 21 (4) of the Reform Act which reads as follows:

Restrictions on licensees and generating companies-

21 (1) xxxxxxxxxxxx

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

(b) the holder of a supply licence which permits the holder of such licence to supply energy to other licensees for distribution by them; and

(c) any person or Generating Company with the consent of the Commission.

Exercising power vested in it as mentioned above, the Commission granted consent to all the PPAs and the said fact also is not in dispute.

15. By the order dated 20.06.2001 passed by the Commission in O.P.No.1075 of 2000, the Commission issued directions that from the billing month of August, 2001, all generators of NCE shall supply power to APTRANSCO as per certain terms and conditions which include price applicable for the purchase by the supply licensee (APTRANSCO) at Rs.2.25 per unit with 5% escalation per annum with 1994-95 as the base year. Further, by the order dated 20.03.2004, the Commission also determined tariffs applicable to NCE projects to take effect from 01.04.2004.

16. Meanwhile, the Parliament enacted the Electricity Act, 2003, which is an Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, protecting interest of consumers, etc. Even though the Electricity Act, 2003, repealed all other Central Acts relating to electricity, it saved certain Acts enacted by States, including the Reform Act, as per Section 185 of the Electricity Act, 2003. Thus the provisions of the Reform Act, including the provisions of Section 21(4) thereof, which are not inconsistent

with the provisions of the Electricity Act, 2003, continue to apply in the State of Andhra Pradesh.

17. It is also seen from the material papers submitted by the petitioners that the respondents in O.P.Nos.24 and 25 of 2006 signed along with the petitions, amendments dated 28.07.2004 and 14.10.2004 to the PPAs dated 10.07.2002 and 19.02.2003 respectively, amending, with effect from the dates of the original Agreements certain Articles contained in the original PPAs and incorporating certain new Articles, including Explanation 2 to Article 1.4 reading as follows:

“The delivered energy shall be limited to the energy calculated at 100% PLF with net exportable capacity i.e., after deducting capacities for Auxiliary Consumption and Captive Consumption from Installed Capacity and as mentioned in Preamble & Schedule 1 of Agreement of sale to APTRANSCO. Whenever generation exceeds the installed capacity, the energy delivered by the project above 100% PLF during such periods will not be accounted for the purpose of payment”

18. In the light of above backdrop, the rival contentions are examined in the paragraphs that follow.

Issue No.1

19. One of the functions of the Commission is regulation of electricity purchase including the price at which electricity shall be procured from generating companies through agreements for purchase of power for distribution and supply within the State. The relevant provision of Section 86 of the Act is as follows:

“86. Functions of State Commission – (1) The State Commission shall discharge the following functions, namely:-

(a) x x x x x x x x

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

(k) xxxxxxxxxxxxxxxxxxxxxxxx”

20. Further, Section 62 of the Electricity Act, 2003, deals with power of the Commission to determine tariff and the relevant provision with regard to supply of electricity by a generating company to a distribution licensee is extracted hereunder:

“62. Determination of Tariff.

- (1) The Appropriate Commission shall determine the tariff in accordance with provisions of this Act for --
 - (a) supply of electricity by a generating company to a distribution licensee:

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

- (b) x x x x x x x
- (c) x x x x x x x
- (d) x x x x x x x”

21. Thus, even though a generating company may establish, operate and maintain a generating station without obtaining a licence under the Electricity Act, 2003 (provided it complies with the technical standards relating to connectivity with the grid), it is clear from Section 62 of the Act that whenever it supplies electricity to a distribution licensee, its tariff will be determined by the Commission. Further, a plain reading of Section 86(1)(b) of the Electricity Act, 2003, makes it clear that the regulatory jurisdiction of the Commission extends not only to electricity purchase, but also to the procurement process of distribution licensees, including the price at which such electricity shall be procured from the generating companies through agreements. The language of the said provision of law is very clear and unambiguous, and the very usage of the word ‘including’ implies that the jurisdiction covers not only the price but also the ‘agreements’ through which electricity is procured. The electricity being procured earlier by APTRANSCO and now by the distribution licensees after the issue of the 3rd Transfer Scheme, is admittedly through agreements (PPAs) and for distribution and supply. For the said reason alone, the contention of the respondent-developers that they are outside the regulatory jurisdiction of the

Commission, at least insofar as their dealings with the distribution licensees are concerned, has no legs to stand and is liable to be rejected.

22. The Commission likes to clarify here that it is not indulging in a roving discussion on its functions and jurisdiction but is dealing with the limited question of whether or not it has the jurisdiction to issue directions to the petitioners and the respondents herein to amend the PPAs entered into by them if deemed just and proper to clarify the actual intent of the various provisions thereof and for their proper implementation.

23. Petitions herein inter-alia u/s 86(1)(f) are not filed before the Commission directly without any prior knowledge whatsoever to the respondent-developers. Initially, the petitions against respondents in O.P.Nos.20 to 23 of 2006 were filed by APTRANSCO before the Commission on 29.03.2005. By the time the petitions could be finally taken up for consideration by the Commission, the subject matter of proceedings was well known to the respondent-developers and they filed W.P. Nos.11566 of 2004 and batch before the High Court, in view of the pendency of which, the Commission returned the petitions filed by APTRANSCO. It was only after final disposal of another round of litigation viz., W.P.Nos.3410 of 2005 and batch, that the Commission decided to take the representations of the petitioners on record, along with three more petitions against respondents in O.P.Nos.24 to 26 of 2006. Thus all along the respondent-developers were well aware of the matter in controversy and it cannot be said that they are prejudiced in any way by the Commission taking up the petitions. The rules of natural justice are duly satisfied as notices are given before deciding on the petitions, parties are given adequate opportunity of being heard and their counsel have dealt with all the issues during the hearing.

24. The Commission is unable to accept that the PPAs are outside the regulatory jurisdiction of the Commission. If such a proposition were to be accepted, it would lead to the startling conclusion of sanctifying even the collusive agreements arrived at between the generating companies and the distribution licensees to the detriment of the interests of the consumers at large.

25. In the case of K.Ramanathan v State of Tamil Nadu (AIR 1985 SC 660), the Supreme Court interpreted the word 'regulation' as follows:

“18. The word 'regulation' cannot have any rigid or inflexible meaning as to exclude 'prohibition. The word 'regulate' is difficult to define as having any precise meaning. It is a word of broad import, having a broad meaning, and is very comprehensive in scope.....”

“19. It has been said that the power to regulate does not necessarily include the power to prohibit and ordinarily the word regulate is not synonymous with the word prohibit. This is true in a general sense and in the sense that mere regulation is not the same as absolute prohibition. At the same time, the power to regulate carries with it full power over the things, subject to regulation and in absence of restrictive words, the power must be regarded as plenary over the entire subject. It implies the power to rule, direct and control and involves the adoption of a rule or guiding principle to be followed, or the making of a rule with respect to the subject to be regulated. The power to regulate implies the power to check and may imply the power to prohibit under certain circumstances, as where the best or only efficacious regulation consists of suppression. It would therefore appear that the word regulation cannot have any inflexible meaning as to exclude prohibition. It has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the legislation, and the court must necessarily keep in view the mischief which the legislature seeks to remedy”.

It is thus clear that the word 'regulate' is a word of broad import having wide meaning comprehending all facets not only specifically enumerated in the Act but also embracing within its fold the powers incidental to the regulation envisaged in good faith with an eye single to the public welfare. It could be seen that the assumption that the power to regulate does not include power to vary the terms and conditions of the contract even when warranted by the facts and circumstances in a given situation, is not correct.

26. Thus there is force in the contention of the counsel for the petitioners in O.P.Nos. 20 to 26 of 2006 that the power conferred on the Commission to regulate the electricity purchases through agreements includes the power to issue directions or orders to modify any such agreement. The object of Sections 62 and 86 of the Electricity Act, 2003 is to bring all aspects of electricity supply by generating companies to distribution licensee for distribution and supply within the State of Andhra Pradesh, including the PPAs entered into between them, under the regulatory jurisdiction of the Commission. The Commission is, therefore, entitled to issue directions to the parties concerned to modify these PPAs if found just and necessary, and that is what is the intent of Article 7 of the PPAs as referred to in paragraph 3 (e). For the said reason, the contention of the counsel for the respondents in O.P.Nos. 20 to 23 of 2006 that there is no provision whatsoever in the Act vesting the Commission with power or jurisdiction over generating companies to make any order to modify any contract is not correct insofar as contracts for supply of electricity by them to the distribution licensees are concerned. In view of the above discussion, the Commission is of the opinion that the submissions of counsel for the respondents that the Commission has no jurisdiction to decide the matters in issue cannot be accepted as correct and is rejected. The issue No. 1 is answered accordingly.

Issue No.2

27. It has been pleaded forcefully by and on behalf of the respondents that the description of the power generating plants in the Schedule 1 to the PPAs cannot be construed as constituting any limitation on the actual quantity of energy that would be purchased by the petitioners. The Commission is not persuaded to accept this argument. If the argument were to be correct, the description of the projects mentioned in the preamble of the PPAs is sufficient to identify the projects and there would have been no necessity of Schedule 1 at all.

28. If Schedule 1 were appended for identification purposes alone, some details like generator-wise capacity and the total capacity of the station / project as a whole would not have been given therein. However, that is what is specifically mentioned in Schedule 1, and in the case of some of the plants

(O.P.Nos.22, 24 and 25) even the quantum of auxiliary consumption and captive consumption are also mentioned. For better appreciation, two representative samples of this Schedule, from PPAs relating to O.P.Nos.21 and 24 are reproduced below:

O.P.No.21 of 2006

“ SCHEDULE 1
Particulars of the Project
(referred to in the Preamble to the Agreement)

Name of the project	Location	No. of units	Capacity of each generator	Capacity of the station
Biomass based power project by M/s.Perpetual Energy Systems Ltd.,	Appayyapet (V), Seethanagaram (M), Vizianagar district, Andhra Pradesh	1	6 MW	6 MW

”

O.P.No.24 of 2006

“ SCHEDULE 1
Particulars of the Project
(referred to in the Preamble to the Agreement)

Name of the project	Location	No. of units	Capacity of each generator	Capacity of the station
Bagasse based co-generation project by M/s. Sagar Sugars & Allied Products Ltd.,	Nelavoy Village, Srirangarajapuram Mandal, Chittoor District, Andhra Pradesh	1	20 MW	20 MW (*)

- (*) (a). *During Season: 1.80 MW for Auxiliary Consumption, 3.20 MW for Captive Consumption and 9.84 MW for export to grid for sale to APTRANSCO;*
- (b). *During off-Season: 2.05 MW for Auxiliary Consumption, 0.20 MW for Captive Consumption and 16.94 MW for export to grid for sale to APTRANSCO”.*

29. As can be seen, the Schedules contain details of the capacity of the each generator and the total generating capacity of the station / project. In the case of Schedule extracted from the PPA relating to O.P.No.24 of 2006, even the quantum of auxiliary consumption and captive consumption and the balance left for export to grid for sale to APTRANSCO, are also mentioned. The details mentioned in Schedule 1 signify the generating capacity of each of the generators installed at the station / project, with the total generating capacity of the station constituting the Installed Capacity, defined in Article 1.6 of the PPAs as to mean “the total rated capacity in mega-watts of all the generators installed” and mentioned in the Preamble and Schedule 1. All this goes to show that the particulars are not merely for identification purposes, but also for determination of, rights and obligations of each party against the other in regard to quantum of electricity that the petitioners would be under obligation to purchase from the respondent-developers.

30. In this connection, it is also necessary to appreciate the fact that all the respondents have generating units, which use non-conventional sources of fuel, which entitle them to certain concessions/subsidies. The non-conventional sources of fuel in the State are of limited availability. The NEDCAP, after assessing the availability of fuel has fixed the generation capacity of the plants of the respondents using such fuel, and this is the capacity that has been indicated in Schedule 1 of the PPAs. Thus it is only to the extent of the NEDCAP-sanctioned capacity as specified in the PPAs that would form the basis to determine the quantum of electricity which the respondents would be obligated to purchase, and as mentioned in the paragraphs 8(h) and 33, even though the respondent-developer in O.P.No.22 of 2006 has actually installed a generator of 7.5 MW, the obligation of the respondents to purchase electricity from that project is limited to 6 MW, as sanctioned by NEDCAP. Allowing the NCE project developers to exceed the sanctioned and agreed generating capacity is, inter-alia, fraught with the risk of their resorting to using the conventional fuels in excess of the quantum permitted under the guidelines issued by the Ministry of Non-conventional Sources, Government of India, as also the usage of the prohibited species of woody biomass resulting in deforestation.

31. Thus the details mentioned in the Schedule 1 to the PPAs have definite and essential bearing on the quantum of 'Delivered Energy' at the interconnection point for sale to the petitioners and the maximum generation of electricity is pre-determined (full generation per MW capacity i.e. at 100% PLF per hour being 1,000 KW x one hour = 1,000 kwh or units, and per annum being 1,000 kWh x 365 [days] x 24 [hours] = 8.76 MU) by the capacity of each project as sanctioned by NEDCAP and mentioned in the PPAs. Accordingly, the electrical energy delivered at the interconnection point cannot exceed 100% PLF of the project concerned as per its capacity mentioned in the respective PPAs minus the auxiliary consumption and captive consumption, if any. Therefore, there is force in the contention of the petitioners that whenever generation exceeds the installed capacity, the energy delivered by the projects concerned of the respondent-developers above 100%

PLF will not be taken into consideration for the purpose of payment and the same is upheld. In other words the petitioners are justified in restricting the power purchases from the respondents herein with relation to 100% PLF only and they are obligated to purchase from the respondent developers the generation at PLF not exceeding 100%, from their respective capacities, as specified in Schedule 1 to the PPAs, less the auxiliary consumption and the captive consumption (wherever applicable).

32. It is further contended by the respondents that the agreements contemplate that all the energy generated by them and delivered to the petitioners at the interconnecting point shall be purchased by the petitioners. The argument is fallacious on the face of it. Article 1 of the PPAs contains definition of various terms used in the PPAs, including the term “Delivered Energy”. For the purpose of clarification ‘Explanation’ is added to the said definition of Delivered Energy so as to exclude “all energy consumed by the main plant and equipment, lighting and other loads of the Project from the energy generated”, all of which is commonly referred to as ‘Auxiliary Consumption’. In some of the agreements viz., those relating to O.P.Nos.24 and 25, quantity of electricity used for ‘captive consumption’ is also excluded from the definition of ‘Delivered Energy’, as can also be seen from the Schedule 1 to the PPA relating to O.P.No.24 of 2006 as illustrated in paragraph 28 above. So it is very clear that wherever the term “Delivered Energy” is used in the PPAs, electrical energy generated by the projects, less the Auxiliary Consumption and Captive Consumption (wherever applicable) has to be taken as the energy delivered at the interconnection point for sale to the petitioners. In other words, the petitioners are obligated to purchase not whole of the electrical energy generated but only the energy generated, not exceeding the installed capacity, minus the energy consumed by the respondents towards auxiliary Consumption and Captive Consumption. Simply because it is mentioned in Article 2.1 that “all the delivered energy at the interconnection point for sale to APTRANSCO will be purchased”, does not mean that all the electrical energy that is being generated by the projects of the respondent-developers in excess of agreed capacity has to be purchased by the petitioners and without deducting the Auxiliary Consumption

and the Captive Consumption as explained in the Article 1.4. As explained above, the term 'Delivered Energy' excludes the energy required for auxiliary consumption and captive consumption. Article 2.1 cannot be read in isolation, but has necessarily to be read in conjunction with other clauses of the PPAs. Thus, wherever the term 'Delivered Energy' appears in the PPAs, it has to be construed as meaning the electrical energy generated at agreed capacity and after deducting such energy as is consumed for auxiliary consumption and captive consumption (wherever applicable).

33. In the light of the above discussion, the contention of the respondents that the description of the power plants in the Schedule 1 to the PPAs cannot be construed as limitation on the actual quantity of energy that would be purchased by the petitioners cannot be accepted and is rejected. This conclusion is further fortified by the fact that while, as mentioned in paragraph 8(h) of this Order, the actual capacity of the generator of the respondent-developer in O.P.22 of 2006 is 7.5 MW, the capacity mentioned in Schedule 1 is 6 MW, clearly indicating thereby that the obligation of the respondents to purchase electricity generated at that project is limited to the capacity indicated in Schedule 1 only, as also confirmed by the respondent-developer therein to APTRANSCO by letter dated:15.09.2003 enclosing therewith a copy of an understanding to this effect to NEDCAP executed on a stamp paper.

34. Issue No.2 is answered accordingly. The quantum of delivered energy that has to be paid for by the petitioners depends on the computations of PLF that are discussed in the subsequent paragraph 37 – 43 under Issue No.4.

Issue No.3

35. The next issue that arises for consideration is the quantum of auxiliary consumption to be taken into consideration for computation of 'Delivered Energy' with regard to the PPAs wherein it is not quantified specifically. In this regard, the petitioners suggest that it be taken as 9% as specified on normative basis by the Commission in its Order dated 20.03.2004 in R.P.No.84 of 2003 in O.P.No.1075 of 2000. No doubt, the said percentage was arrived at by the

Commission in connection with determination of normative parameters for setting tariffs for NCE projects (including those of the respondents herein) to take effect from 01.04.2004, but the fact that such a parameter was determined after conducting proper proceedings as contemplated under law and after conducting public hearings wherein as many as 30 NCE project developers including some of their Associations had participated, should not be lost sight of. The petitioners are justified in taking note of the decision arrived at by the Commission in that matter in arriving at the generation cost of NCE projects. The apprehensions of the respondents could be justifiable if such percentage was with regard to project developers other than NCE project developers. For the said reasons, the petitioners are justified in taking 9% as the auxiliary consumption with regard to the PPAs of those respondent-developers wherein it is not specifically mentioned i.e., in O.P.Nos.20, 21 and 23 of 2006. In the case of the PPA in O.P.No.26 of 2006, the auxiliary consumption shall be taken at 1.33 MW (8.31%) during season and 1.70 MW (10.62%) during off-season, as intimated by NEDCAP in their communication dated:29.11.2003 referred to in paragraph 8. In case, however, the respondent-developer disputes the data provided by the NEDCAP, the auxiliary consumption be taken provisionally as 9% on normative basis and the matter brought up before the Commission, if considered necessary, for further appropriate orders. It is pertinent here that the levels of auxiliary consumption mentioned in Schedule 1 to the PPAs relating to O.P.Nos.22, 24 and 25 are respectively 8%; 9% during season and 10.25% during off-season; and 11.37% during season and 11.19% during off-season, the average not being less than 9%.

36. The Issue No.3 is answered accordingly.

Issue No.4

37. The next contention of the respondents is that the various provisions in the PPAs provide for calculation of PLF on monthly basis to arrive at the purchasable energy while applying the PLF limit of 100%. It has been contended that it has been understood by the parties all along that billing will be for a month and such position cannot be altered now. On the other hand, the petitioners contend that

the meters presently available and in place for measuring energy delivered at the interconnection points are capable of extracting reading for every 30-minute time block and they are therefore justified in computing the delivered energy by the respondents by reckoning the level of PLF for each time block of 30-minutes.

38. The rated capacity of a power plant remains constant throughout, unless it comes down due to wear and tear, obsolescence, etc., or is enhanced by means of renovations, etc., which is not the case in respect of any of the respondents herein. The maximum generation of electricity by the plant (at 100% PLF) also, therefore, remains constant. Theoretically, it should be possible to measure the quantum of electricity generated and the PLF achieved, even on a minute-to-minute basis. If the generation at any point of time exceeds 100% PLF, it is fair to conclude that the plant is working at more than its rated capacity as declared in the PPA, indicating thereby that either the capacity has been understated or the margin kept by some of the manufacturers while indicating the rated capacity, is also being operated.

39. In this connection, it has also been contended by some of the respondents that due to exigencies of operation and grid conditions, it is not always possible to maintain the rate of generation continuously within 100% PLF. While the contention may be correct in the case of mini-hydel and wind-based power projects, it cannot be accepted in the case of bagasse-based cogeneration and biomass-based power projects, which are the subject matter of the petitions herein, since in their case, the output can be regulated by the mechanical feed arrangement and it is not beyond the control of the project developers to promptly bring back the generation to its rated capacity in the event of any excursion of the output either way.

40. Since, as concluded earlier, the liability of petitioners to purchase energy from the respondents is limited to the maximum energy that can be generated by a plant on the basis of its capacity (at 100% PLF) as mentioned in the PPAs, minus the auxiliary consumption and the captive consumption (wherever applicable and) since, as also observed earlier, the end-consumer has to pay something extra for purchase by the petitioners of non-conventional energy, it

was and continues to be incumbent on the petitioners to ensure that such purchases do not exceed the quantum which they are legitimately liable to purchase with reference to the capacity of each plant as specified in the relevant PPA. This is all the more important considering the fact that the respondents have been paying on behalf of the end-consumers, a price much higher for the non-conventional energy, including that generated by the respondents herein, than what they pay for conventional energy. For example, during 2003-04, the price paid to NCE developers was Rs.3.48/kWh as against the average power purchase price of Rs.1.77 / kWh from all sources, notwithstanding the protestations of some of the respondents about the claim of the petitioners that they are subsidizing the power generated by the respondents.

41. The Commission appreciates that the petitioners are unable to exercise such a check on a minute-to-minute basis in view of the non-availability/non-installation of meters having such facility. Accordingly, therefore, the Commission finds nothing wrong in the petitioners settling the power supply claims of the respondents with respect to a billing month on the basis of PLF as computed from the meter readings for 30-minute time blocks for which the metering facility is available and is in place.

42. In this regard, the Commission also takes note of the plea advanced by the respondents that they are not aware of the past data relating to readings as per 30-minute time blocks which has been submitted by the petitioners with their Reply/Rejoinder to the counter filed by the Respondents and its authentication. The Commission accordingly directs the petitioners to make available all this data as per the billing cycle of the respective respondents.

43. The Issue No.4 is answered accordingly.

44. Another argument of respondents is that the Commission cannot issue an order now with retrospective effect, and that any orders of the Commission must per force have only prospective operation. As mentioned earlier, the issue remitted by the Hon'ble High Court to the Commission for consideration, after giving an opportunity to the respondent-developers to make their representation, arose out of the setting aside by the Hon'ble High Court of the directions of this

Commission dated:15.11.2003 to APTRANSCO and relates to payments by the latter in regard to the electricity supplied by the respondent-developers from billing month of November / December 2003 onwards. It, therefore, necessarily follows that any orders of the Commission also cover this specific period. Considering all aspects, however, the Commission directs that its present Order will not apply to any period prior to November / December 2003, the date from which the APTRANSCO started settling the bills of the respondent-developers on the basis of half-hourly PLF.

45. The respondents in O.P.Nos.24 to 26 have, in their counters as well as at the time of oral arguments, have made the point that under the Doctrine of Promissory Estoppel, the petitioners are bound to release the amounts deducted for the period December 2003 to June 2004. It is contended that the Chief Engineer (Comml. & IT), APTRANSCO, wrote a letter dated:05.08.2004 intimating all the developers who had filed writ petitions in the High Court on the issue of half-hourly PLF, that the amounts deducted for the period between December 2003 to June 2004 would be released if they withdraw their writ petitions. However, even after the respondents had withdrawn their writ petitions, payment have not been released to them. It is therefore, argued that, under the above Doctrine, the petitioners are duty-bound to release the above-mentioned amounts. The Commission, hererin is performing the statutory duty of regulating the procurement of power by the petitioners. The Doctrine of Promissory Estoppel does not cover such discharge of a statutory duty. Further, the Supreme Court in its judgement in re Easter Industries Ltd., Vs U.P.State Electricity Board and others, reported in (1996) 11 SCC 199 has laid down that the Doctrine of Promissory Estoppel does not apply where there is a duly executed contract between the parties. The Commission is not therefore, inclined to accept the above submission of the respondents.

46. Conclusion

For all the reasons stated in the preceding paragraphs, the Commission holds that:

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

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

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

(d). The present order of the Commission will not cover any period prior to November / December 2003 i.e. the date with effect from which the APTRANSCO actually put the system of 30-minute PLF computation into operation.

47. In the result, the petitions are allowed accordingly.

The order is corrected and signed on this 2nd day of June, 2006.

Sd/-
(SURINDER PAL)
MEMBER

Sd/-
(K.SREERAMA MURTHY)
MEMBER

Sd/-
(K.SWAMINATHAN)
CHAIRMAN