



**ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION**  
**4<sup>th</sup> & 5<sup>th</sup> Floors, Singareni Bhavan, Red Hills, Hyderabad 500 004**

O.P. No.39 of 2006

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O.P. No.10 of 2008

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I.A. No.7 of 2008

Dated 18.01.2013

Present

Sri A.Raghotham Rao, Chairman

Sri C.R.Sekhar Reddy, Member

Sri R.Ashoka Chari, Member

Between

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

..... Petitioners

AND

M/s Spectrum Power Generation Limited

..... Respondent

This petition is coming up for hearing on 28.04.2012 in the presence of Sri P.Shiva Rao, Advocate for the petitioners and Sri S.Ravi, Advocate for the respondent. The Commission passed the following

**COMMON ORDER**

OP No.39/2006 is a petition filed by the petitioners to order refund of the insurance amount paid in excess. The respondent filed OP No.10/2008 not to make any recovery from the future bills on the ground that the petitioners have not made any excess payment. IA 7/2008 is filed to pass an interim order not to make any deductions in pursuance of the proceedings dated 11.05.2006 pending disposal of the main OP No. 10/2008. The relief sought for in all the matters is one and the same and the matters also inter connected. It is proper to pass a common order in all the above said proceedings.

**O.P.No.39 of 2006**

The petitioners filed this petition under section 62 and 86 (1) (f) of Electricity Act, 2003 r/w Regulations 8 & 9, A.P.E.R.C. Business Regulations 1999.

2. The case of the petitioner is briefly as follows:

a) The respondent "SPGL" had set up a 208 M.W. Gas based combined Cycle Power Plant at Kakinada, E.G. District for generating electrical energy. The respondent (SPGL) entered into an Amended and Restated Power Purchase Agreement (PPA) dated 23.01.1997 with the erstwhile Andhra Pradesh State Electricity Board.

b) As per the provisions of Power Purchase Agreement [Clause 3 (a) to (d)] the insurance coverage should be for (a) Workers Compensation and Employees liability (b) General Liability Insurance (c) Builders All Risk Insurance and (d) All Risk Property Comprehensive Boiler and Machinery Insurance. This coverage will include either Comprehensive General Liability or Commercial General Liability Insurance Coverage for all operations by or on behalf of the Company. Such coverage shall provide insurance for bodily injury and property damage liability for the limits of liability of not less than \$ 10 million and shall include coverage for:

- (i) Death and bodily injury;
- (ii) Property damage;
- (iii) Product Liability;
- (iv) Contractual liabilities (assumed by the Company) arising from
  - (A) the business of the Company; or
  - (B) the premises and operations within India.

c) "SGPL" obtained policies from M/s United India Insurance Company Limited and from ICICI Lombard for 2005-06 in two parts i.e. Section-I, Industrial All Risks Insurance Policy and Section-II Business Interruption Policy.

d) A.P. Transco was constituted under Reforms Act and under the provisions of the said Act, it took over this contract and received supplies of electricity from the respondent.

e) The Government issued G.O. Ms. No.35, dated 31.03.2000 setting up 4 Distribution Companies i.e., petitioner 2 to 4.

f) From 10.06.2005, AP Transco was forbidden from trading in Electricity Government also issued G.O. Ms. No.58, dated 07.06.2005 (ANNEXURE-3) providing for allotment of the power generated by the respondent to the petitioners 2 to 5. Accordingly, the following allotments were made in respect of the 4 Distribution Companies.

APEPDCL	:	16.89%
APSPDCL	:	22.83%
APCPDCL	:	43.42%
APNPDCL	:	16.86%

The above said ratios were subsequently amended vide G.O. Ms. No.101 dt. 31.10.05.

g) While so, the Government vide G.O. Ms. No. 59, dated 07.06.2005 constituted a committee namely, A.P. Power Coordination committee for effective coordination as well as building capacity in DISCOMs to handle the new functions. The said committee is reimbursing the insurance premium on behalf of the petitioners 2 to 5.

h) While things stood thus, on 19.01.2006 Sr. Dy. Accountant General (Commercial Audit Wing) vide their letter dated. 19.01.2006 issued a Factual note on "Excess payment due to ineligible insurance admitted and paid to M/s Spectrum Power Generation Ltd. – Rs. 5.71 crore" for proposed inclusion in the Report of the Comptroller and Auditor General of India for the ensuing year. "Excess payment was due to ineligible insurance admitted and paid to M/s Spectrum Power Generation Ltd. – Rs. 5.71 crore" for proposed inclusion in the Report of the Comptroller and Auditor General of India for the ensuing year.

i) As per the provisions of power purchase agreement, the insurance coverage should be (a) Workers compensation and employees liability, (b) General liability insurance (c) Builders all risk insurance and (d) All risk property / comprehensive boiler and the details of premia paid by them during the years 2002-03 to 2004-05, which covered the industrial all risk both under Section – i.e., Material Damage and under Section – II i.e., Business Interruptions. The insurance policy taken by M/s. SPGL interalia covered the consequential loss in terms of gross profit arising out of damage and destruction of project which was not in accordance with the provisions of PPA. The company however re-imbursed the insurance premia paid under

Section I and II by M/s. SPGL restricting to 20% of the O & M charges. The payment in excess of premium payable under Section – I is not admissible and is irregular. The insurance premia paid by M/s. SPGL is under Section- I and II of the Insurance Policy. The amount re-imbursed to M/s. SPGL and excess amount paid for the year 2002-03 to 2004-05 (July 2002 to June 2005) is shown in the following table.

Year	Insurance premia paid by SPGL		Insurance paid to M/s SPGL	Insurance premia admissible	Excess payment
	Section - I	Section – II			
2002-03	2,83,90,705	3,17,38,082	4,47,92,292	2,83,90,705	1,64,01,587
2003-04	2,74,93,027	4,06,38,240	4,46,25,057	2,74,93,027	1,88,57,880
2004-05	2,65,81,747	3,98,99,191	4,84,39,627	2,65,81,747	2,18,57,880
Total					5,70,91,515

Thus, company made an avoidable payment of Rs. 5.71 crore to M/s. SPGL towards inadmissible insurance premia for coverage of loss of gross profit, which is beyond the provisions of PPA.

j) KPMG, insurance consultant opined that the respondent “SPGL” does not appear to be under an obligation to take out insurance policy to cover ‘Fire Loss of Profit’ and ‘Machinery Loss of Profit’ since Section 1 of the IAR Policy (Material Damage) adequately provide for the Mandatory Insurance Cover. Also further opined that in the absence of any documents regarding additional requirement of the lenders for ‘SPGL’ to take out and maintain Cover for ‘Fire Loss of Profit’ and machinery loss of Profit appears that Section II of the IAR policy has been taken out by SPGL in addition to the risks (Mandatory Insurance Cover) mandated to be covered by the PPA and hence the premia attributable to Section II of the IAR policy is not liable to be reimbursed to SPGL by the Purchaser under the PPA.

k) In view of the remarks of the Accountant General (C&RA), and the opinion of insurance experts, the petitioner No. 2 had worked out excess payment due to ineligible insurance admitted and paid to M/s. Spectrum Power Generation Ltd. from 1997-98 to 2005-06 for an amount of Rs. 13.834 crores. Further, the new tariff year in respect of the respondent company is commencing from 19.04.06, the annual fixed charges for the tariff year 2006-07 was worked out considering the views of Accountant General (C&RA) and the Andhra Pradesh Power Co-ordination

Committee (APPCC) provisionally approved an amount of Rs. 148.52 crores for the tariff year 19.04.2006 to 18.04.2007. The payments are made provisionally to respondent company based on the fixed charges approved.

- l) A show cause notice on 11.05.2006 was issued to SPGL stating that  
APTRANSCO made excess payment of Rs. 13.834 crore (for the period 1998-99 to 2005-06) to SPGL towards inadmissible insurance premia for coverage of loss of gross profit, which is beyond the provisions of PPA. They are informed that their liability in this respect will be confined to reimburse the premium paid by them under Section I only and also informed as to why it should not be bolted from initial tariff in their future bills
  
- m) The respondent submitted its reply through letters dated. 29.05.2006, 01.06.2006 and 12.06.2006. And also filed Writ Petition No. 11559/06 before the Hon'ble High Court. The Hon'ble High Court after hearing both parties disposed off the writ petition at the admission stage on 12.06.2006, by giving directions to the respondents to pass an order duly considering the explanation submitted by the petitioner-company on 29.05.06 and 01.06.06 and communicate the decision taken to the petitioner company by Registered Post Acknowledgment Due. It also ordered that if the decision is adverse, time shall be given for 15 days from the date of the order and after serving the same on the company.
  
- n) The petitioners have come to the conclusion that the respondent's views are not tenable. After obtaining the opinion of insurance experts, they are entitled to recover the excess payment.
  
- o) It is therefore prayed that the Commission may be pleased to
  - i) declare the insurance premia under Section II obtained by company is not eligible for reimbursement;
  - ii) direct respondent to limit their claim of fixed charges duly limiting it to Section I of insurance premia under IAR policy.
  - iii) direct the respondent to reimburse the excess paid insurance premia from 1997-98 to 2005-06.
  - iv) award costs of the petition.

- v) pass any other relief which the parties are entitled in the circumstance of the case.
- 3) The respondent submitted their counter refuting the averments mentioned in the petition. The case of the respondent is briefly as follows.
- i) The Article 15 of the PPA would evidence that any dispute, difference or question which may at any time arise between petitioner and Respondent is to be resolved under the provisions of PPA only, which lays down that the detailed mechanism for resolution of such disputes. The disputes raised by the Petitioners are squarely covered by Article 15 of the PPA and therefore the petitioners are contractually bound by the provisions of PPA to resolve the said disputes through the Dispute Resolution Mechanism as stated under Article 15 of the PPA. Once the parties agree to such mechanism they are debarred from approaching any other judicial authority to seek redressal of such disputes.
  - ii) Section 86(1)(f) of the Electricity Act, 2003 under which the instant petition has been filed by the Petitioner is not derogatory to the rights of the Parties as mentioned in Article 15 of PPA. In fact provisions of Article 15 of PPA would prevail over any entitlement that the petitioners would have to invoke Section 86(1) (f).
  - iii) The said PPA was revised from time to time and the final agreement was entered into by both the parties on 23.01.1997. Thus, Petitioner Nos. 2 to 5 succeeded the Petitioner No. 1 with regard to the rights and obligations of the Petitioner No. 1 and the erstwhile APSEB under the PPA with the Respondent. Petitioner Nos. 2 to 5 are thus burdened by the same obligation to pay the monthly bills of the Respondent under PPA. Similarly, in the event of any dispute clause 6.5 of the PPA would continue to operate as against Petitioner Nos. 2 to 5.
  - iv) The capital cost of the project etc. was appraised by the then APSEB, recommended for approval by Central Electricity Authority (hereinafter referred to as "CEA"), which, (i.e. CEA), is competent to approve the project cost under Sec. 30 (d) (g) of the Electricity (Supply) Act, 1948. Pursuant to the same, the CEA having considered all the relevant

aspects granted techno economic clearance with a provisional capital cost of Rs. 748.43 Crores.

- v) The said PPA is a comprehensive document and covers the entire gamut of relations between the Respondent company and the Petitioners. The purchase price of electricity generated by the Respondent i.e., tariff was determined in accordance with the norms laid down by the Ministry of Power, Government of India in the notification issued under Section 43-A (2) of the Act.
- vi) The tariff shall be the sum of the Fixed Charge, the Variable Charge Payment, the incentive or disincentive payment (if any) and taxes on income, each as set forth in Article 3 of the PPA. The PPA prescribes a procedure for arriving at the fixed costs payable to the Respondent - company on monthly basis. The fixed costs include O & M expenses, insurance, depreciation, return on equity, interest on debt and interest on working capital, which elements are based on the capital cost of the projects.
- vii) From perusal of Article 3.3 of the PPA, it is evident that the adjustments of the Provisional Tariff in calculation of the Fixed Charge does not provide for the realization / adjustments from the Insurance Proceeds of Fixed Charge component. Therefore, the Petitioners cannot realize any amount by deducting from the monthly bills of the Respondent regarding the Insurance Proceeds from the Fixed Charge component.
- viii) The Respondent had entered into Loan Agreement (s) with the Lenders (IDBI consortium) for availing various financial assistances for the Project. Clause No 7.3 (vii) of Article VII of General Conditions of the Loan Agreement(s) entered into with IDBI, states, that the insurance Policy which would cover the consequential loss in terms of gross profit arising out of damage and destruction of project, which is also known as "Business Interruption Risk". Under Special Conditions annexed to the Loan Agreement vide Paragraph 1 (z) (bb), which specifies that the Respondent Company shall obtain Comprehensive Insurance Cover for the Plant including flood and cyclone risks. In pursuance of this requirement and also a prudent business practice,

the Respondent obtained "All Industrial Risk Policy" for the project, which included the Business Interruption Insurance Cover. IDBI, ICICI Bank and some other lenders of the Respondent Company have assigned their debts to Asset Reconstruction Company (India) Limited (ARCIL) and the ARCIL is Lead Lender to the Company now and the said Lead Lender (i.e. ARCIL) vide its letter dated 09.06.2006 has reiterated the stand of the lenders that the Respondent should continue with its Insurance Policy to cover Business Interruption Loss apart from taking adequate coverage for material damage. Even IDBI also stated that same in its letter dated September 1, 1995.

- ix) Schedule B of the Power Purchase Agreement (PPA) entered into between the Parties casts an obligation on Spectrum Power Generation Limited (SPGL) to obtain and maintain from and after Financial Closure and throughout the term of PPA, the policies of Insurance as set forth in Article 3 of Schedule B. Article 3 of Schedule B, inter-alia states that General Liability Insurance (i.e. either Comprehensive General Liability or Commercial General Liability) should be acquired by SPGL, including:

- (i) .....
- (ii) .....
- (iii) .....
- (iv) Contractual Liability (assumed by the Company) arising from:
  - (A) the business of the Company, or
  - (B) the premises and operations within India.

SPGL had entered into Operation and Maintenance Agreement dated March 14, 1995 with Rolls Royce Industrial Power (India) Ltd. under which contractual obligations relating to insurance were assumed by SPGL.

- x) Clause no. 13 of the Operation and Maintenance Agreement dated March 14, 1995 entered between the Respondent and the Rolls Royce Industrial Power (India) Ltd., who were operating and maintaining the plant of the Petitioner Company. The said clause covers the type insurance required for requiring the plants the said agreement also



covers property insurance on a 100% replacement but not limited to fire, aircraft lighting explosion, smoke, impact, accidental damage, malicious damage, strikes, riots and civil commotion, storm tempest, cyclone, typhoon flood, earth quake, theft spontaneous combustion and full electrical and mechanical break down, derangement and a steam explosion of the plant.

**Cover shall also include Business Interruption and Extra Expense cover for loss of revenues and any additional or continuing expenses. (Operation and maintenance charges should be included as continuing expenses)."**

- xi) Thus, under O & M Agreement it is the obligation of the Respondent to obtain Insurance policy which would cover & include Business Interruption Risk arising as consequential loss to the damage to the Project.
- xii) The notice dated 11.05.2006 issued by Petitioners informing that the alleged excess amount will be recovered from the future bills was illegal, arbitrary and unsustainable, therefore, a Writ Petition (W.P.No: 11559/2006) was filed by the Respondent before the Hon'ble High Court of Andhra Pradesh. The Hon'ble High Court passed its order directing the respondents to pass an order duly considering the explanation submitted by the petitioner company on 29.05.2006 and 01.06.2006 and communicate the decision taken to the petitioner-company by Registered Post Acknowledgment Due. The respondents shall not effect any recoveries from the amounts payable to the petitioner-company, if the decision be adverse to the petitioner-company, for 15 days from the date the order of the respondents is served on the petitioner-company.
- xiii) The Respondent also filed a Original Petition No. 1192 of 2006 before 1<sup>st</sup> SCJ, City Court, Hyderabad in terms of Sec. 9 of the Arbitration & Conciliation Act, 1996 and obtained orders restraining Petitioners herein to not to deduct any amounts in respect of fixed charges which include the payment of insurance premia from future bills of the

Petitioner pending initiation and conclusion of Arbitral Proceedings in terms of Article 15 of the Power Purchase Agreement dated January 23,1997. The Hon'ble Court has already seized of the matter and has restrained the Petitioners from deducting any amount from the Bill of the Respondent on the instant issue, therefore, the instant Petition on the same facts, transaction and cause of action is not maintainable.

- xiv) The instant Petition is barred by Law of Limitation. The Petitioners have prayed for reimbursement by Respondent of the alleged excess paid Insurance premia to Respondent from 1997-98 to 2005-06 and the same is barred by limitation.
- xv) The Respondent state that based on the terms of PPA, the Petitioner No. 1 had paid the premium representing the premium rightly paid by the Respondent from time to time from 1998. After reorganization and formation of Respondents Nos. 2 to 5 the Claim made by the Respondent with regard to the Insurance premium is being paid by Petitioners. The Respondent is contractually bound to take the cover of Business Interruption Loss in the Insurance Policy, as has been laid down in the Lending Documents and the O & M Agreement executed by the Respondent.
- xvi) It is therefore respectfully prayed that this Hon'ble Commission may be pleased to decline to adjudicate upon the instant matter as the parties are open to refer their disputes to arbitration according to the provisions of Article 15 of the PPA dated 23.01.1997 and may pass such other order(s) as may be necessary in the facts of the case.

4) The petitioner submitted their reply to the counter filed by the respondent narrating briefly the following grounds: -

- i) The material averments in the Counter filed on behalf of the respondent are not true or correct and the same are hereby denied.
- ii) The preliminary objections raised on behalf of the respondent are not tenable and deserves to be rejected. It is well settled that provisions conferring jurisdiction shall be construed liberally. The Hon'ble Supreme Court in 2004 (1) SCC 195 held as follows: "The objects and

Reasons of the Act show that the main functions of the State Electricity Regulatory Commission shall be: (i) to determine the tariff for electricity - wholesale, bulk, grid and retail; (ii) to determine the tariff payable for use of the transmission facilities and (iii) to regulate power purchase and procurement processes of the transmission utilities etc.

- iii) So, the contractual clause providing for arbitration is no longer available to the respondent. Therefore, the Electricity Regulatory Commission alone is competent to decide the disputes. In view of the Electricity Act, 2003, the arbitration clause in the agreement ceases to be in operation. The Electricity Act, 2003 is a Special Law and Arbitration and Conciliation Act is a general law. It is settled law that the provisions of Special Law prevails over the general law. Therefore, the Commission has jurisdiction to entertain the present O.P.
- iv) The rights and obligations of the parties are subject to the provisions of the Act. The averment that it is evident that the adjustments of the provisional tariff in calculation of the fixed charge does not provide for realization / adjustments from the insurance proceeds of fixed charge component and therefore the petitioners cannot realize any amount by deducting from the monthly bills is not tenable. The Insurance coverage which the respondent is claiming for the loss of profit through the business Interruption coverage will provide double benefit to the respondent one from the Insurer and another from the petitioner.
- v) The Power Purchase Agreement (Clause 3 (a) to (d)), the Insurance covering should be for (a) Workers Compensation and Employees liability (b) General Liability Insurance (c) Builders All Risk Insurance and (d) All Risk Property Comprehensive Boiler and Machinery Insurance. This coverage will include either comprehensive General Liability or Commercial General Liability Insurance Coverage for all operations by or on behalf of the Company.
- vi) The petitioner obtained policies from M/s. United India Insurance Company Limited and from ICICI Lombard for 2005-06 in two parts i.e. section-I industrial All Risks Insurance Policy and Section-II Business Interruption Policy and permissa is reimbursed to it. However, in view of objections raised by the Audit, the opinion of insurance experts was

obtained and the steps to recover the amounts paid in excess were taken.

- vii) Section I of the I.A.R. Policy adequately provide for the mandatory insurance cover and as per the opinion of the experts, the respondent does not appear to be under an obligation to take out insurance policy to cover. 'Fire Loss of Profit and Machinery Loss of Profit'. The petitioners filed appropriate counter, *interlia* contending that the said O.P. filed by the respondent is not maintainable in view of the provisions of A.P. Electricity Reform Act and Electricity Act, 2003 and contesting the matter.
- viii) The averment that the petition is barred by limitation is not tenable. As submitted above, pursuant to the objection raised by Audit, dated 19.01.2006, the petitioner obtained the opinion of the Insurance experts and filed the present petition within 3 years. The Power Purchase Agreement (PPA) between the parties is for a period of 18 years and is in force. The reimbursement of insurance premia through fixed charges is continuous process as per the provisions of PPA. Further, the relief sought for in the present petition is for future payments also. No material particulars are submitted by the respondent in support of plea of limitation. The plea of limitation is therefore is unsustainable.

The provisions of P.P.A. does not require the respondent to obtain separate insurance coverage in respect of risks which were comprehensively covered under Section I of the I.A.R. Policy.

The Insurance premium component which is to be paid was not paid along with the bill of April, 2006 only. But, later on in view of the interim orders of Civil court, the bills are being paid including the amounts towards Insurance premium. The contentions in para 6 that the APERC have jurisdiction to try the matters pertaining to P.P.A which were executed on or after 1998 and no jurisdiction to try any matter pertaining to the PPA entered and executed in 1997 is not tenable. In view of the provisions of the Electricity Act, 2003, this Commission has jurisdiction to entertain the present petition. In this connection reference may be made to Section

174 of the Electricity Act, 2003 which provides overriding effect for the provisions of the Act over the provision of any contract between the parties. This section reads as follows:

“174. Act to have overriding effect. Save as otherwise provided in Section 168, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.”

In view of the above express provision r/w. Sec.86 (1) (f) this Hon'ble Commission has jurisdiction to resolve the disputes between the parties.

Hence the petitioner pray that the Commission may be pleased to allow the above O.P. and grant the reliefs sought for and pass such other order or orders as this Hon'ble Court may deem fit and proper in the circumstances of the case.

**I.A.No. 7 / 2008 in O.P.No. 10 of 2008**

5) (A) The respondent in O.P. 39 / 2006 filed the above said petition to pass an interim direction not to make deductions in the future bill in pursuance of the proceeding dated 11.05.2006 of the petitioner in the above said O.P. 10 / 2008 pending disposal of the said O.P.

(B)The above said O.P. is filed by the petitioner (respondent in O.P. 39 / 2008) against the respondents (petitioner in O.P. 39 / 2006) not to deduct any amount by reducing the fixed charges component relating to insurance premium from any future monthly bills raised by the petitioner under the PPA 23.01.1997. Pending the conclusion of the proceedings before the Commission.

(C)The averments made in the petition are similar to the averments in the counter filed by the respondent in O.P. 39 / 2006. The averments made in the counter filed by the respondents are similar to the averments made in the petition in O.P. 39 / 2006. So, also with regard to the averments in the replies. Hence, they are not extracted once again to avoid repetition.

- 6) The learned advocate for the petitioners projected mainly the following points:
- (a) The Sr. Dy. Accountant General (Commercial Audit wing) issued a factual note on excess payment made to the respondent on 19.01.2006. In that note it is mentioned that an amount of Rs.5.71 cr was paid in excess and the same was also incorporated in the report of the Comptroller and Auditor General of India for the ensuing year which was due to ineligible insurance admitted and paid to the respondent.
  - (b) The insurance coverage should be for Workers compensation and employees liability, general liability insurance, Builders all risk insurance and All risk property/comprehensive boiler and the details of premia paid by them during the years 2002-03 to 2004-05 which have been clearly mentioned in the table mentioned in the petition.
  - (c) The insurance premium taken by the respondent covered consequential loss in terms of gross profit arising out of the damage and destruction of project which was not in accordance with the provisions of PPA.
  - (d) The petitioners have reimbursed the insurance premium paid u/s - I and II to the respondent by restricting to 20% of the O&M charges. The payment in excess of premium payable u/s - I is not admissible and is irregular.
  - (e) The petitioners obtained the opinion of KPMG an insurance consultant. They opined, that the respondent is not under an obligation to take out insurance policy to cover 'Fire loss of profit' and Machinery loss of profit, since section 1 of the IAR policy (Material Damage) adequately provide for the Mandatory Insurance Cover. It also opined that in the absence of any documents regarding additional requirement of the lenders for the respondent to take out and maintain cover for 'Fire loss of profit' and 'Machinery loss of profit' appears that section II of IAR policy has been taken out by the respondent in addition to the risks (Mandatory Insurance Cover) mandated to be covered by the PPA and the premia attributable section II of IAR policy is not liable to be reimbursed to the respondent.
  - (f) In view of the above said remarks of the experts, the petitioners have worked out the excess amounts paid from 1997-98 to 2005-06 to a tune of Rs.13.834crs and the same is liable to be refunded and a show cause notice was also given on 11.05.2006. The respondent filed WP No.11559/2006 before the Hon'ble High Court.

(g) The Hon'ble High Court directed to conduct an enquiry by giving an opportunity to the respondent by considering the explanation submitted by the respondent. Accordingly, it is declared that they are liable to refund the same. In the meanwhile, the respondent filed OP No. 1192/2006 before the City Civil Court and obtained interim orders. Thereupon, the petitioner filed this petition before this authority for recovery of the said excess amounts paid by the petitioners.

7) The learned senior advocate representing the respondent submitted the following points in support of his contention.

- i) Art.15 of the PPA clearly evidences that any dispute, difference or question has to be resolved by an arbitrator and the same cannot be raised before this authority as the parties are barred from approaching any other judicial authority to seek redressal of such dispute.
- ii) The petitioners 2-5 succeeded the petitioner-1 with regard to rights and obligations of the petitioner-1. Therefore, the petitioners 2-5 are burdened to pay monthly bills of the respondent in accordance with the terms and conditions of the PPA entered with the erstwhile APSEB.
- iii) The PPA is a comprehensive document and covers the entire gamut of relations between the respondent and the petitioners. From the perusal of the Art.3.3 of the PPA, it is clear that the adjustments of the provisional tariff in calculation of the fixed charge does not provide for the realization / adjustments and the insurance proceeds of fixed charge component. Hence, they cannot realize any amounts by deducting from the monthly bills of the respondents regarding insurance proceeds from the fixed charge component.
- iv) The respondents entered into a loan agreement with lenders (IDBI consortium) for availing various financial assistances for the project. Clause No.7.3(vii) of Article VII of General Conditions of the Loan agreement entered into with IDBI states that the insurance policy which would cover the consequential loss in terms of gross profit arising out of damage and destruction of project, which is also known as "Business Interruption Risk". The special conditions annexed to the loan agreement

vide paragraph 1(z)(bb) specifies that the respondent company shall obtain Comprehensive Insurance Cover for the plant including flood and cyclone risks. Therefore, the respondent has obtained “All Industrial Risk Policy” for the project which included Business Interruption Insurance cover.

- v) Clause 13 of O&M agreement with Rolls Royce Industrial Power (India) Ltd for O&M covers the type of insurance required for plants and the said agreement also covers property insurance on a 100% replacement but not limited to fire, aircraft lighting explosion, smoke, impact, accidental damage, malicious damage, strikes, riots and civil commotion, storm tempest, etc.
  - vi) As per O&M agreement, it is the obligation of the respondent to obtain insurance policy which would cover Business Interruption Risk arising as consequential loss of damage to the project.
  - vii) When a notice was issued for deduction from the future payments, they filed WP No. 11559 of 2006.
  - viii) The respondents also filed OP No.1192/2006 before 1<sup>st</sup> SCJ, City Court, Hyderabad in terms of Sec.9 of the Arbitration & Conciliation Act and obtained orders restraining the petitioners herein not to deduct the amounts in respect of fixed charges which include payment of insurance premia from future bills from the petitioner pending initiation and conclusion of Arbitral Proceedings in terms of Article 15 of the PPA.
  - ix) The petition filed by the petitioner is barred by limitation as the claim is made beyond 3 years period and the petition filed by the petitioner is liable to be dismissed.
- 8) Now, the following points are coming up for consideration by the Commission
- (a) Whether the petitioner is entitled for recovery of the entire amount? if not to what amount ?
  - (b) Whether the claim made by the petitioner is barred by limitation?



**Point No.2**

9) It is proper at this stage to answer this point at the first instance instead of answering point 2, since it deals with the aspect of limitation.

The contention of the respondent is that the claim made by the petitioners is barred by limitation as they have not made the claim well within 3 years.

The contention of the petitioners is that in pursuance of the objection raised by the audit department dated 19.01.2006, the petitioners obtained opinion of the insurance experts and filed the petition within 3 years. The PPA between the parties is for a period of 18 years and is in force. The realization of insurance premium through fixed charges is a continuous process as per the provisions of PPA. The relief sought for in the present petition is for future periods also.

10) It is evident from the claim of the petitioners that it is a continuous process as per the provisions of the PPA and that the cause of action has arisen only after the opinion obtained from the experts. The claim made by the petitioner is for refund of the excess amount already paid and it deals with Article 137 of Limitation Act, 1963. Article 137 reads as follows: -

<b>Description of suit</b>	<b>Period of limitation</b>	<b>Time from which period begins to run</b>
137. Any other application for which no period of limitation is provided elsewhere in this Division.	Three years	When the right to apply accrues.

11) When a claim is made for refund of excess amount paid by them to the respondents by mistake such obligation will be covered by the residuary article and the right to apply would accrue on the date when the mistake is discovered. The mistake is discovered only on the objection raised by the audit department on 19.01.2006. The period of limitation prescribed is three years and the same is to be recovered only with effect from 20.01.2003. Prior to that the claim made by the petitioner is barred by limitation. Hence, the petitioner can ask for refund of the amount in between 20.01.2003 and 19.01.2006 but not prior to that provided the

petitioners are entitled to the same and this has to be decided basing on the conclusion arrived on point no. 1, by the Commission.

**Point No.1**

12) The respondent has raised an objection that the petitioners have to file the above said petition under section 11 of Arbitration Act as per clause 15 of PPA, as it is an arbitral dispute and the very petition is not maintainable under law. The petitioners have claimed that the Hon'ble Supreme Court held in 2004 (1) SCC 195 that the ERC shall determine the tariff for electricity – wholesale, bulk, grid and retail and also to determine the tariff payable for use of the transmission facilities and to regulate power purchase and procurement process of the transmission utilities, etc and also claimed that the contractual clause providing for arbitration is no longer available to the respondent.

13) Further, by virtue of the judgment delivered by the Apex court in Gujarat Urja Vikas Nigam Ltd vs. Essar Power Ltd in Civil Appeal No. 1940 of 2008, the issue of arbitration is set at rest by holding that the ERC is competent to decide the dispute which can adjudicate or arbitrate disputes u/s 86 of EA 2003 and which will prevail over S.11 of Arbitration and Conciliation Act, 1996.

14) The above said discussion clearly discloses that ERC is not precluded from entertaining the petition and the Commission itself is having jurisdiction to entertain the same.

15) The contention of the petitioners is that the insurance coverage should be for workers compensation and employees liability, general liability insurance, etc but not consequential loss in terms of gross profit arising out of damage and destruction of project which was not in accordance with the provisions of PPA.

16) Whereas, the respondents are claiming that they are asked to take a policy as per the directions given by the bankers. They have taken comprehensive policy as directed by the bankers. The comprehensive insurance covers the Business Interruption Insurance cover. Art. 3 Art 3.2.1(vii) reads as follows:-

*“Insurance premia for such tariff year at actuals based on the most recent invoices prior to fixed charge computation date (including with respect to insurance required by the parties providing financing to the project), at such rates, coverage and conditions as determined by the Company and on commercially reasonable terms, subject to the requirements of the lenders.”*

17) Schedule B of PPA describes the insurance procedure for obtaining the insurance policies and maintenance of insurance policies mentioned. Clause 3 reads as follows:

**“3. Required Coverage:** The company shall, at its own expense, acquire and maintain, or cause to be maintained, from the date of financial closing and throughout the term of this agreement as applicable, the following minimum coverages so long as such coverages are available to the company on reasonable commercial terms.

(a) **Workers Compensation and Employers Liability:** This coverage will include workers compensation, temporary disability and other similar insurance required by the laws of GoAP and GOI. Additionally, coverage under this clause(a) shall include a voluntary compensation and employers’ liability endorsement for employees not subject to the workers compensation laws. Employers liability coverage limits should be no less than those provided for under the Workers’ Compensation Act.

(b) **General Liability Insurance:** This coverage will include either Comprehensive General Liability or Commercial General Liability Insurance coverage for all operations by or on behalf of the company. Such coverage shall provide insurance for bodily injury and property damage liability for the limits of liability of not less than \$10 million and shall include coverage for:

- (i) Death and bodily injury
- (ii) Property damage
- (iii) Product liability
- (iv) Contractual liabilities (assumed by the company) arising from:
  - a. The business of the company, or
  - b. The premises and operations within India.”

(c) **Builders All Risk Insurance:** This insurance shall include coverage for fire, earthquakes and flood perils including transit, testing, incidental storage, delay costs, structures, equipment, buildings, improvements and temporary structures used in the construction of or as part of the permanent project, from the start of construction through the commercial operation date of the final generating unit to come on line under this project. The coverage shall be no less than the

maximum probable loss of property items covered, subject to a reasonable deductible, which is commercially available at similar rates for projects of similar size and similar location. The limits for earthquake and flood perils shall be no less than 40 percent of the full replacement values. Sublimits deemed to reasonably protect the value of the property will be in effect, and the company will provide written notification as to these sublimits and any changes to these sublimits.

(d) **All Risk Property/Comprehensive Boiler and Machinery Insurance (Upon Completion of Construction):** This insurance shall provide All Risk property coverage (including the perils of earthquake and flood) and comprehensive Boiler and Machinery coverage against damage to the project in amounts not less than the maximum probable loss amount for the project and subject to a reasonable deductible. Such policies shall be endorsed to require that the coverage afforded shall not be cancelled (except for non-payment of premiums) or reduced without at least 30 days prior notice to be Board, provided, however, that such endorsement shall provide that the Board shall thereupon have the right to pay such premium directly to the insurer.”

Clause 5 reads as follows:

“5. **Cost of Insurance:** The cost to the company of all insurance coverage set forth in Article 3 and reasonable amount of any premium paid on the insurance of any plant equipment, work or facility (including any reasonable amount of any premium for any insurance required by the parties providing financing for the project) during the transit, transport, storage or erection thereof for periods prior to the Acceptance date of each generating unit and all additional insurance coverage which lenders to the project may require the company to purchase shall be borne by and then reimburse to the company to the extent provided in Article 3.”

“Art VII clause 7.3(vii) of General Conditions of Loan Agreement entered into with IDBI reads as follows:

*(vii) Insurance:*

*(a) Keep insured upto the replacement value thereof as approved by the Lead Institution (including surveyor's and architect's fee) the properties charged/to be charged to the Lenders and such of its other properties as are of an insurable nature against fire, theft, lightning, explosion, earthquake, riot, strike, civil commotion, storm, tempest, flood, marine risks, erection risks, war risks, and such other risks as may be*

*specified by the Lead Institution and shall duly pay all premia and their sums payable for that purpose. The insurance in respect of properties charged/to be charged to the Lenders shall be taken in the joint names of the borrower and the Lenders and any other person or institution having an insurable interest in the properties of the Borrower and acceptable to the Lead institution. The Borrower shall keep deposited with the Lead Institution the insurance policies and renewals thereof.”*

18) It is not claimed by the petitioners that it has acceded 20% of O&M charges computed under clause 5 under 3.2(a) and sub-clause 3 of Art.3.2. The petitioner has claimed that they have obtained opinion from the Excellent Insurance Broking Services Ltd they have mentioned BII as hereunder:

*“As per Force Majeure (Article 11) of PPA, AP Transco is not obligated to reimburse the premium for Business Interruption. Since Article 11 is appearing later to Article 3 even legally interpreting Article 11 automatically supersedes Article 3 apart from the grounds available in Force Majeure Article 11 as already mentioned.”*

19) In the loan agreement between SPGL vs IDBI at clause 1(bb) it is clearly mentioned that they have to obtain comprehensive insurance cover for the plant including flood and cyclone risks. It is nowhere mentioned about the definition of comprehensive insurance either in the agreement itself or in the opinions of the experts.

20) In the opinion expressed by the Excellent Insurance Broking Services Ltd it is mentioned that the AP Transco is not obligated to reimburse the premium for Business Interruption. Since Article 11 is appearing later to Article 3 even legally interpreting Article 11 automatically supersedes Article 3 apart from the grounds available in Force Majeure Article 11 of PPA. In the legal opinion of Johri & Associates, it is mentioned that the Business Interruption insurance coverage is required as per O&M agreement between respondents and Rollys Royce Industrial Power (India) Ltd and as such is reimbursable considering it as contractual liability within the scope of Schedule B item 3(b)(iv). Schedule B Insurance item 3(b) deals with General Liability Insurance which reads as follows:-

*“General Liability Insurance: This coverage will include either Comprehensive General Liability or Commercial General Liability Insurance coverage for all operations by or on behalf of the company. Such coverage shall provide insurance*

*for bodily injury and property damage liability for the limits of liability of not less than \$10 million and shall include coverage for:*

- (v) Death and bodily injury*
- (vi) Property damage*
- (vii) Product liability*
- (viii) Contractual liabilities (assumed by the company) arising from:
  - a. The business of the company, or*
  - b. The premises and operations within India.”**

It is conferred on behalf of the petitioners that contractual liability referred above is part of General Liability Insurance and has to be read in the context of Liability Insurances which has nothing to do with Property/Business Interruption Insurances.

21) As per the opinion expressed by the experts on behalf of the petitioners, there is no need for the respondent to take insurance for Business Interruption amounts paid by them in excess is liable to be refunded. Whereas, Art.3.2.1 sub-clause(vii) clearly envisages that Insurance premia for such tariff year at actuals based on the most recent invoices prior to fixed charge computation date (including with respect to insurance required by the parties providing financing to the project), at such rates, coverage and conditions as determined by the Company and on commercially reasonable terms, subject to the requirements of the lenders.

22) It is evident from the record that the respondent has taken policy in accordance with the Terms & conditions imposed by the lender i.e, IDBI. The policy taken by them is All Industrial Risk Policy. It is also governed by clause 3(d). The loan document executed by the respondents with various lenders including IDBI contains contractual commitments on the part of the respondents to obtain Comprehensive Insurance cover for the plant including flood and cyclones risks. In compliance with the above said requirements of the lenders the respondent has obtained All Industrial Risk policy governing risk of the business. Obtaining such insurance policy is in accordance with contracted commitment in between the respondents and the IDBI and other lenders. The coverage of business industrial risk in the policy ensures the protection of the rights of the lenders regarding debt

approved by them. It also further ensures that the fuel surcharge payments, O&M payments, payment of salary, wages and other statutory payments are also safeguarded.

23) So, the primary obligation on the part of the respondents is to satisfy the condition imposed by the lenders. In the very agreement in between the parties, it is clearly mentioned that they have to obtain comprehensive policy including flood and cyclone. The policy which they have to take is to the satisfaction of the lender i.e, IDBI and ICICI Lombard. When respondent comes with the policy so obtained in satisfaction of the condition imposed of the lender, the petitioners are precluded from saying that the respondent has to obtain a particular type of policy excluding / some items at the time of obtaining the insurance policy. Therefore, it cannot be said that the petitioners have paid excess amounts than the amount paid by the respondent. They have reimbursed the amount paid towards insurance policy by the respondent that too in accordance with the terms and conditions imposed in the PPA. Hence, they are not entitled for refund of the amount as claimed.

24) Schedule-B is not in derogation to Art.3. Since Art.3.2.1 (vii) clearly ensures the satisfaction of the lender at the time of lending money to the project. This is also once again reiterated in schedule-B clause 5. It clearly says that “any reasonable amount of premium for any insurance required by the parties providing financing for the project.” Even schedule B is in derogation to Art.3.2.1 (vii). Article prevails over the conditions incorporated otherwise in the schedule. If at all the petitioners feel that the amount covered by Business Interruption risk is not necessary, it can negotiate with the parties and get the PPA suitably amended or otherwise approach the Commission for such amendment. They cannot take a stand unilaterally or on the report of the Sr. Dy. Accountant General (Commercial Audit wing) contrary to the terms & conditions incorporated in the PPA.

25) So far as the recovery of fixed charge is concerned, there is no need to discuss the same as there is no point in ordering refund of the amount. If at all any order of refund is ordered, where from it has to be recovered or deducted has to be pointed out by the Commission. So, this aspect need not be considered by the

Commission. In view of the above said observation this point is answered in the negative.

**OP No. 10 of 2008**

26) This is a petition filed not to make any deductions in the future bills in pursuance of the proceedings dated 11.05.2006.

In view of the above said observation in OP No.39/2006, there is no need to pass any order in this petition as this petition is infructuous, since the very main petition filed by the petitioner for recovery of the amount is ordered in the negative.

Hence, this petition is dismissed as infructuous.

**IA No. 7 of 2008**

27) It is a petition filed seeking interim directions not to make any deduction in the future bills in pursuance of the proceedings dated 11.05.2006. This petition is also infructuous. The claim made by the petitioner for refund is already negated.

28) So far as the CMA No. 926 of 2007 is concerned, there is no need to answer in view of the decision delivered by the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Ltd as there is no question of appointing any arbitrator as sought for in the above said OP 1192/2006 as well as in the CMA No. 926 of 2007. Hence, there is no need to discuss on this issue, since the Commission itself is possessed with power to pass an order.

29) In the light of the above said discussion, we are of the considered opinion that OP No. 39/2006 is hereby dismissed. OP 10/2008 and IA 7/2008 are also dismissed as they are infructuous.

***This order is corrected and signed on this 18<sup>th</sup> day of January, 2013***

Sd/-  
(R.Ashoka Chari)  
Member

Sd/-  
(C.R.Sekhar Reddy)  
Member

Sd/-  
(A.Raghotham Rao)  
Chairman





**ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION**  
**4<sup>th</sup> & 5<sup>th</sup> Floors, Singareni Bhavan, Red Hills, Hyderabad 500 004**

O.P. No.39 of 2006

&

O.P. No.10 of 2008

&

I.A. No.7 of 2008

Dated 29.01.2013

**Present**

Sri A.Raghotham Rao, Chairman

Sri C.R.Sekhar Reddy, Member

Sri R.Ashoka Chari, Member

Between

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

..... Petitioners

AND

M/s Spectrum Power Generation Limited

..... Respondent

**ERRATA ORDER**

It has come to notice that in the Order issued on 18.01.2013 in O.P. No.39 of 2006 & O.P. No.10 of 2008 & I.A. No.7 of 2008, an error has inadvertently crept in, resulting in the Order being issued in the name of all the three serving Members of the Commission, instead of being issued in the name of the two Members who heard the case and reserved the same for Orders on 28.04.2012.

- 2) The following corrections are therefore issued to the Order dated 18.01.2013.
- i. In the title page of the Order, in the list of Members mentioned as '**Present**' at the beginning of the Order dated 18.01.2013, the name of Sri R.Ashoka Chari, Member shall be deleted.
  - ii. The attestation as '**Sd/-**' in the name of Sri R.Ashoka Chari, Member, at the end of the Order dated 18.01.2013, together with his name and designation shall be deleted.

This order is corrected and signed on this 29<sup>th</sup> day of January, 2013

**Sd/-**  
**(R.Ashoka Chari)**  
Member

**Sd/-**  
**(C.R.Sekhar Reddy)**  
Member

**Sd/-**  
**(A.Raghotham Rao)**  
Chairman