



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

O.P. No.84 of 2012

Dated 17.04.2013

*Present*

Sri A.Raghotham Rao, Chairman  
Sri C.R.Sekhar Reddy, Member  
Sri R.Ashoka Chari, Member

Between:

M/s. Spectrum Power Generation Ltd  
Plot No. 231, 8-2-293 / 82 / A / 231,  
3<sup>rd</sup> Floor, Road No. 36, Jubilee Hills,  
Hyderabad – 500 033.

... Petitioner

AND

1. Transmission Corporation of Andhra Pradesh Ltd (APTRANSCO)  
Vidyut Soudha, Khairathabad, Hyderabad.
2. Central Power Distribution Company of A.P. Ltd  
Corp. Office, Mint Compound, Hyderabad
3. Southern Power Distribution Company of A.P. Ltd  
Back side Srinivasa Kalyana Mandapam,  
Kesavanayanagunta, Tirupati - 517 501.
4. Northern Power Distribution Company of A.P. Ltd  
H. No. 1-1-503 & 504, OPP : NIT Petrol Pump, Chatainyapuri,  
Hanamkonda, Warangal – 506 004.
5. Eastern Power Distribution Company of A.P. Ltd  
P & T Colony, Seethammadhara, Visakhapatnam
6. Andhra Pradesh Power Coordination Committee (APPCC)  
Vidyut Soudha, Khairathabad, Hyderabad.

... Respondents

This petition has come up for hearing on 02.03.2013 in the presence of Sri S.Ravi, Advocate for the petitioner and Sri P.Shiva Rao, Advocate for the respondents, the Commission passed the following:

**ORDER**

This is a petition filed by the petitioner u/s 86 (1) (f) of Electricity Act, 2003. The material averments of the petition are briefly as follows: -

- i) The petitioner is a Company registered under the Companies Act, 1956. The petitioner is a Generating Company within the meaning of Section 2 (28) of the Electricity Act, 2003 and has constructed, commissioned and is operating 208 MW power plant at Kakinada, Andhra Pradesh.
- ii) The Respondent No. 6 (A. P Power Coordination Committee) is Co-ordination Committee constituted by the Government of Andhra Pradesh for the purpose of, *inter-alia*, to coordinate payment of monthly bills to the petitioner.
- iii) The Respondent No. 1 is a company established under the provisions of the Companies Act, 1956 *inter-alia* engaged in the business of transmission and has also earlier engaged in the business of purchase and sale of electricity in the State of A.P being a licensee as contemplated u/s 15 of the Andhra Pradesh Electricity Reforms Act, 1998. The Respondents No. 2 to 5 are also companies incorporated under the provisions of Companies Act, 1956 and engaged in the business of purchase and distribution of the electricity, being a distribution licensees within their area of operation. The Respondent No. 6 is a Co-ordination Committee constituted by the Government of Andhra Pradesh for the purpose, *inter-alia*, to coordinate payment of monthly bills to the Petitioner and Respondent No. 6 is responsible for sending the payments by cheque on behalf of Respondent No. 2 to 5.
- iv) The Respondent No. 1 has succeeded to the transmission wing of the erstwhile APSEB and stepped into the shoes of the Board for the purpose of the Power Purchase Agreement (hereinafter referred to as "PPA") with the petitioner.
- v) For the purpose of selling the power generated by it, the petitioner company entered into a PPA with the then APSEB on 20.06.1993. The said PPA was revised from time to time and the final agreement was entered into by both the parties on 23.01.1997. The Respondent Nos. 2 to 5 succeeded the Respondent No. 1 with regard to the rights and obligations of the Respondent No. 1 and the erstwhile APSEB under the PPA with the petitioner. The Respondent Nos. 2 to 5 are thus

burdened by the same obligation to pay the monthly bills of the petitioner under the PPA.

- vi) The said PPA is a comprehensive document and covers the entire gamut of relations between the petitioner company and the respondents. The purchase price of electricity generated by the petitioner 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. The suppliers and erection contractors executed their work and the 208 MW capacity combined cycle gas based power station at Kakinada in E.G. District was commissioned on 18.04.1998 with the natural gas for the operation of plant.
- vii) The petitioner company commissioned the three gas turbines and declared the commercial operation of the units on 11.02.1997, 09.03.1997 and 11.07.1997 respectively and started supplying the Electricity in terms of the PPA from such dates onwards. The capacities of the three gas turbines are 44.852 MW, 44.240 MW and 44.184 MW. The steam turbine was commissioned and the commercial operations in respect thereof were declared on 19.04.1998. The Respondents deducted an amount of Rs. 2,21,10,000/- (Rupees Two twenty-one lakh and ten thousand only) from the bill for the month of July 1999 arbitrarily on account of liquidated damages ignoring the "Force Majeure" events which ought to be considered as per PPA.
- viii) In the year 1996 during the monsoon period both south - west and north – east, there were unprecedented heavy rains due to formation of unusually more number of low pressure formations and depressions in the Bay of Bengal which severely affected the progress of works. The road between the project site and Uppada which was the main access to the plant was extensively damaged due to erosion by wave action causing total disruption of transportation of construction materials and equipment resulting in considerable delay in the progress.
- ix) The severity of two cyclones one during November 1996 and the other in September 1997 which caused total destruction and devastation in the coastal plains was fully described in the news media and was well

known throughout the country. It needs no explanation to understand the hindrance such severe cyclones cause on the progress of works in the coastal regions.

- x) The first GT which was about to be commissioned during December 1996 got delayed on account of failure of generator transformer supplied by BHEL which was required to be transported to Bhopal for repairs and brought back to Kakinada due to which the above GT could be finally commissioned only on 11.07.1997 after a delay of about seven months.
- xi) The impact of the transporters strike from 1<sup>st</sup> to 9<sup>th</sup> April, 1997 was felt all over the country when the people suffered due to shortage of essential commodities of daily requirements. As the strike was total through out the country, it had effected the movement of imported equipment / materials from the ports to the site which resulted in delay in the progress of works.
- xii) There was a major fire accident to a generator of the GT (GT 2) on 18.04.1997 when it was under spin cooling. The generator was completely damaged and there was a total loss. A new generator had to be imported to replace the written off generator and the GT could be re-commissioned only on 20.11.1997 after a lapse of seven months. The fuel suppliers to the power plant namely Gas Authority of India Limited (GAIL) and Hindustan Power Corporation Limited (HPCL) accepted the above accident as a Force Majeure event for the purpose of minimum off-take guarantees (MGO) of fuels from them.
- xiii) The EPC Contractor notified all the above force majeure events and requested for extension of time for completion of the project. The combined cycle plant was finally synchronized with the APSEB grid on 31.03.1998 and went into commercial operation w.e.f 19.04.1998. As a result of all the above force majeure events there has been delay in completion of the project.
- xiv) The above Force Majeure events were clearly explained to the respondents.
- xv) The action of the respondent in deducting the amount of Rs.2,21,10,000/- from the bill submitted by the petitioner company for

the month of July 1999 without examining the material facts submitted by the petitioner company and acted against the provisions of the PPA by ignoring the provisions of Force Majeure event as stipulated in the PPA, the respondents have deducted the above said amount from the bills of the petitioner company merely on the basis of their conclusions is wholly irrational and arbitrary. The petitioner company had huge commitments which among other things include servicing the debts to the financial institutions, payment of amount to GAIL towards supply of natural gas etc. Unless these obligations are met, the petitioner company may not be able to operate its plant. If the respondents unauthorisedly deduct the said sum, the petitioner company, which is already in default to GAIL, would stop the supplies of natural gas. In such an event, the petitioner would be forced to stop the generation, which is not only detrimental to the interests of the petitioner company but also to the respondents as it would be facing a deficit of 208 MW power in the grid and the public would suffer irreparably.

2. In addition to the above, the petitioner projected the following grounds in support of their claim.

- i) The action of the respondents in not considering the Force Majeure events that lead to the delay in completion of the project of the petitioners is unilateral, arbitrary and against to the provisions of the PPA.
- ii) The action of the respondents in not adhering to the terms of the PPA in respect of payment of bills to the petitioner and making unauthorized deductions in the monthly bills without notice to the petitioner is nothing but irrational, arbitrary and violative of the statutory PPA and the respondents should be directed to adhere to the terms of the PPA.
- iii) When the PPA obligate the respondents to pay the bill amount without any deductions despite the existence of any dispute, the respondents have no authority in law to deduct any sum without specifically raising any claim and getting the same adjudicated in the manner provided by PPA. The said dispute, would instead of being resolved by the forum

of Arbitration Tribunal as stated in PPA, would be resolved by the forum of Commission, as per the decision of the Apex Court.

- iv) If the respondents have any claim, the respondents shall have to notify the same to the petitioner and the respondents would have to get the same adjudicated by the Commission and only if the Judgment of the Commission is in its favour, the respondents are at liberty to deduct the amount, till then it constitutes only the claim, but not enforceable demand.
- v) The petitioner company bonafidely filed a Writ Petition No. 8955 of 2004 before the Hon'ble High Court of Andhra Pradesh, on the above said grounds, the Hon'ble High Court was pleased to issue notice and the matter was awaiting final disposal. During the pendency of the above said writ petition, the Hon'ble Supreme Court on 13.03.2008 pronounced its judgment in Appeal (Civil) No. 1940 of 2008 Gujarat Urja Vikas Nigam Ltd Vs. Essar Power Ltd., holding that after the advent of Electricity Act, 2003 the disputes between the Generating Company and Licensee are to be adjudicated by the concerned Regulatory Commission and are not to be resolved through the Arbitration Mechanism as provided in Power Purchase Agreements. In view of the said judgment of Hon'ble Supreme Court of India, the Hon'ble High Court of Andhra Pradesh, in the above said Writ Petition No. 8955 of 2004 passed an order on 10<sup>th</sup> November, 2008 stating that "Learned Counsel for the petitioner, having regard to the decision of the Supreme Court in Gujarat Urja Vikas Nigam Ltd Vs. Essar Power Ltd., seeks leave of this Court to withdraw the writ petition with a liberty to approach the Andhra Pradesh Electricity Regulatory Commission u/s 86 (1) (f) of the Electricity Act, 2003. Granting leave and liberty to do so and without expressing any opinion on merits of the case, the writ petition is dismissed as withdrawn.
- vi) In view of the said order, the petitioner has filed instant petition before the Commission for redressal of the above said dispute between the parties.

3. The petitioner prays that the Commission may be pleased to:

Issue an order or direction, declaring that the action of the respondents in unilaterally and unauthorizedly deducting an amount of Rs. 2,21,10,000/- from monthly bills payable to the petitioner for the month of July 1999 is in violation of the terms of the Power Purchase Agreement dated 23.01.1997, is arbitrary, illegal and in breach of the provisions of Statutory Contract i.e., PPA and consequently direct the respondents to refund the said amount of Rs. 2,21,10,000/- so deducted, as mentioned above, together with interest in terms of PPA.

4. The respondents filed preliminary objections on the maintainability of the petition as it is barred by law. The material objections are briefly as follows:

- i) The claim of the petitioner in the present petition pertains to the years 1996 & 1997, much earlier period, but the petitioner filed claim petition before this Commission on 04.06.2009, which according to law of limitation, is obviously barred by limitation. The same is liable to be rejected at the threshold without going into merits of the case. Even otherwise also, the petition has no merits for consideration.
- ii) The main contention of the petitioner is that the delay in commissioning of the project was caused by certain force majeure events as claimed below.
  - a) Unprecedented heavy rains in the year 1996 severely affected the progress of the construction works, by disrupting the transportation of construction equipment.
  - b) Two cyclones, during November, 1996 & September, 1997 caused hindrance to the progress of works in coastal regions.
  - c) Failure of Generator Transformer while commissioning during December 1996, caused delay of seven months.
  - d) Transporters strike from 1<sup>st</sup> to 9<sup>th</sup> April, 1997 caused delay in progress of works.
  - e) Major fire accident in Generator Transformer – 2.

- iii) The respondents did not consider the claims of the petitioner and rejected the claim vide letter No. 312 / 97, Dt. 01.07.1997 and further vide letter No. CE (Comml) / DE (IPC) / SPGL / D.No. 130 / 1999, Dt. 01.09.1999 for the following reasons:
- a) Cyclone during November, 1996:- The then APSEB Engineers physically inspected the project site after the cyclone and reported that no disruption was caused by cyclone to the ongoing works as claimed by the petitioner. Further it is to submit that the petitioner had signed the amended and restated PPA on 23.01.1997 containing the original dates of scheduled completion i.e., after the cyclonic event and therefore the company must have factored the post effects of cyclone. Further, the monsoon rains are common occurrence and cannot be treated as Force Majeure event.
  - b) Cyclone during September, 1997:- The Cyclone storm on September, 1997 was not severe as claimed by the petitioner and therefore could not be considered as a force majeure event.
  - c) Failure of Generator Transformer on 21.12.1996:- Malfunctioning of new equipment is a foreseeable event. The equipments are susceptible for failure at the time of commissioning and testing for various reasons and such events cannot be treated as Force Majeure. More important is that this transformer failure occurred on 21.12.1996, which was prior to the signing of PPA on 23.01.1997 and hence these events should have been considered by the petitioner while committing the scheduled date of completion of the project, stipulated in the Amended and Restated PPA.
  - d) Transporters Strike 1<sup>st</sup> to 9<sup>th</sup> April, 1997:- Transporters strike occurred only for a period of 9 days from 1<sup>st</sup> April, 1997 to 9<sup>th</sup> April, 1997 i.e., one year prior to the Combined Cycle COD. Therefore the claim of petitioner that this strike period of 9 days had caused 183 days of delay for completion of project is not plausible.



As per Article 11.1 (b) (i) (6) of PPA, delays of transportation that were not reasonably foreseeable constitute non-political events. But in this case the transporters strike was pre-decided and the Company and its EPC contractor could have avoided its adverse impact by suitably programming the transportation works and hence does not qualify as force majeure event as claimed by the company under Article 11.1 (b) (ii) (2) (D).

- e) Generator Transformer – 2 fire accident on 18.04.1997:- The definition of Force Majeure event at Article 11.1 (a) of PPA specifically stipulates that any incident that can be prevented through prudent utility practices does not come under Force Majeure.

The Generator Transformer – 2 fire accident was reported to have occurred due to inadvertently activating the generator circuit breaker while attempting an isolation procedure. Therefore, the accident was caused due to failure to carry out the project operation in accordance with the manufacturer's recommendation / prudent utility practices and does not qualify under non-political force majeure event, as per the provisions of Article – 11 of the PPA.

- iv) In view of the aforesaid reasons, Liquidated Damages for Rs. 2.211 crs was levied on the petitioner in terms of Article 1.1 (lxxvii), Article 2.5 and first notice was issued to the petitioner on 01.07.1997 & subsequently on 03.11.1998 seeking to pay the Liquidated Damages amount within 10 days of the date of the notice. It was categorically informed that upon failing to pay the Liquidated Damages amount within the stipulated period, the amount would be deducted from the pending bills or monthly power bills. As the company did not pay the Liquidated Damages amount, the said amount was recovered by deducting the same from July, 1999 bill. Therefore the action of the respondents in recovering the Liquidated Damages amount is in accordance with the terms and conditions of PPA.

- v) The respondents scrupulously followed the procedure for recovery of Liquidated Damages and the said action cannot be termed as arbitrary & unilateral. The events cited do not come under Force Majeure.
- vi) The Liquidated Damages clause was incorporated in the PPA to ensure scrupulous adherence to the time schedules of project commissioning, which ultimately results in additional capacity addition to the grid. In case of delay in commissioning the project, the respondents would have no other alternative to meet the grid demand except to purchase the additional required power from open market under short term basis at higher price, which entails incurring of additional expenditure.
- vii) The respondents are entitled to recover the Liquidated Damages amount in terms of PPA and further, the deduction of Liquidated Damages amount is in terms of PPA and further, the deduction of Liquidated Damages is not a billing dispute (not energy billing) and therefore cannot invoke the provisions of Article 6.5.
- viii) The petitioner filed Writ Petition (W.P.No. 8955 of 2004) in Hon'ble A.P. High Court in the year 2004 seeking certain reliefs but ultimately withdrew the said Writ Petition in view of the judgment of the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Limited Vs. Essar Power Limited that APERC alone is empowered to adjudicate the disputes between Generating Company & Licensees. The Hon'ble High Court granted leave to withdraw the Writ Petition on 10.11.2008, but did not pass any directions to the respondents. As such, the petitioner cannot claim any right / exemption for the time spent in pursuing the Writ Petition in the High Court. Even after declaration of Law by Hon'ble Supreme Court on 13.03.2008 in Gujarat Urja Vikas Nigam case, the petitioner failed to file proceedings before this Hon'ble commission. Further even after 10.11.2008 when the Writ Petition was withdrawn in the Hon'ble High Court, the petitioner failed to file petition before this

Commission within three years from the said date. As such the petition is barred by limitation.

- ix) The cause of action arose in the year July / august 1999 (liquidated Damages amount recovered) but the petitioner filed the W.P. No. 8955 of 2004 in High Court on 10.05.2004. Even according to the W.P. filing date, the petitioner's claim was already barred by limitation, since the petitioner filed Writ Petition after 5 years of L.D recovery.
- x) In the light of the above submissions, the petition is not maintainable, devoid of merits and deserves no consideration.
- xi) The Commission is prayed that the O.P.No. 84 of 2012 filed by the petitioner may be dismissed with costs.

5. The learned advocate for the petitioner argued that there was a delay of 183 days in completing the plant and that the delay was caused due to Force Majeure event occurred at the time of attending the works of the plant. He has narrated the Force Majeure events as hereunder:

(i) In the year 1996 during the monsoon period both south - west and north – east, there were unprecedented heavy rains due to formation of unusually more number of low pressure formations and depressions in the Bay of Bengal which severely affected the progress of works. The road between the project site and Uppada which was the main access to the plant was extensively damaged due to erosion by wave action causing total disruption of transportation of construction materials and equipment resulting in considerable delay in the progress.

(ii) There were two cyclones one during November 1996 and the other in September 1997 which caused total destruction and devastation in the coastal plains the same was also published in the news media and it was also known throughout the country.

(iii) The first gas turbine was about to be commissioned during December 1996 got delayed on account of failure of generator transformer supplied by BHEL which was required to be transported to Bhopal for repairs and brought back to Kakinada and it was finally commissioned on 11.07.1997 after a delay of about seven months.

(iv) The impact of the transporters strike from 1<sup>st</sup> to 9<sup>th</sup> April, 1997 was felt all over the country when the people suffered due to shortage of essential commodities of daily requirements.

(v) There was a major fire accident to a generator of the GT (GT 2) on 18.04.1997 when it was under spin cooling. It was completely damaged and there was a total loss. A new generator had to be imported to replace the written off generator and the GT could be re-commissioned only on 20.11.1997 after a lapse of seven months. This has been also accepted by GAIL and HPCL as a Force Majeure event for the purpose of minimum off-take guarantees of fuels from them.

(vi) The respondents were clearly informed about the said Force Majeure events but the respondents refused to accept the same and deducted an amount of Rs.2,21,10,000/- from the bills submitted by the petitioner company for the month of July 1999 without examining the material facts and the respondents may be directed not to unilaterally and unauthorisedly deducted an amount of Rs.2,21,10,000/- in the monthly bills and also further direct the respondents to refund the said amount together with interest in terms of PPA.

6. The learned advocate for the respondents argued mainly on the ground of limitation, secondly on the ground that the events narrated by the petitioner are not within the purview of Force Majeure events and the deduction made by them are in accordance with the procedure. So far as the limitation aspect is concerned, the learned advocate for the respondent vehemently argued projecting mainly on the following grounds;

(i) The cause of action arose in the month of July 1999 but the petitioner filed the Writ Petition No. 8955/2004 in the High Court on 10.05.2004. The claim ought to have been filed within 3 years even if the Writ Petition No.8955/2004 is sustainable under law. The claim was barred by time as the Writ Petition was filed after 5 years of LD recovery.

(ii) The Writ Petition was withdrawn on 10.11.2008 but the petitioner filed the said petition before this Commission in the year 2012, beyond 3 years. Even on this ground, it is barred by limitation. On the aspect of Force Majeure event, the respondent has narrated the following grounds:

The Generator Transformer failure on 21.12.1996.

The malfunctioning of new equipment is a foreseeable event. The equipments are susceptible for failure at the time of commissioning and testing for various reasons and such events cannot be treated as Force Majeure events.

Cyclone during November 1996

The Board engineers inspected the project site after the cyclone and reported that there were no damages caused by cyclone to the ongoing works at site. Unprecedented rains and monsoon rains cannot be treated as Force Majeure events.

Transporters Strike 1<sup>st</sup> to 9<sup>th</sup> April 1997.

Transporters strike occurred only for a period of 9 days from 01.04.1997 to 09.04.1997 i.e., one year prior to the COD. It is not plausible that this strike period of 9 days caused 183 days of delay for completion of project.

Generator Transformer – 2 Fire Accident on 18.04.1997

Generator Transformer – 2 Fire Accident on 18.04.1997 is reported to have occurred due to inadvertently activating the generator circuit breaker while attempting an isolation procedure. Therefore, the accident is caused due to failure to carry out the project operation in

accordance with the manufacturers' recommendation / prudent utility practices and it does not qualify under non-political Force Majeure event as per the provisions of Art.11 of the PPA.

Cyclone Storm during September 1997

Cyclone Storm during September 1997 was not severe and cannot be taken into for the purpose of Force Majeure events of the PPA.

Delay in extension of 33kV supply for the make-up water pump house at Samalkot.

The power to the pumping station at Samalkot was released in the month of November 1997, whereas the water was required only at the time of commissioning of the 4<sup>th</sup> unit. The said unit was only commissioned on 31.03.1998. So it cannot be said that no supply of water to the pump house at Samalkot. Moreover, it does not provide in the PPA for any schedule in the matter of extension of supply by the Board to the pumping station situated in Samalkot.

(iii) It is therefore prayed that the Commission may be pleased to dismiss the petition as it is not only barred by time and it is not on account of event of Force Majeure.

7. Now, the points for consideration are:

- (i) Whether the petitioner is entitled for the refund of an amount of Rs.2,21,10,000/- as prayed for?
- (ii) Whether the petition is barred by limitation?

**Point No.1**

8. It is an admitted fact that the CCOD has to be completed by 18.07.1997 as per Article 11 of PPA and that the COD was actually achieved on 19.04.1998. Thus, there was a delay of 183 days and the respondents have estimated liquidated damages at Rs.2,21,10,000/- and deducted the same in the month of July 1999 from the monthly bills payable to the petitioner after issuing a notice for such deduction.

9. The petitioner has stated that the delay is not wilful and it is only on account of Force Majeure event. The petitioner claimed that there were un-precedented heavy rains in the year 1996 during the monsoon period and unusually more number of low pressure formations and depressions in the Bay of Bengal which severely affected the civil works of the project.

10. The respondents have stated that the then APSEB Engineers physically inspected the project site after the cyclone that occurred during November 1996 and reported that no disruption was caused by cyclone to the ongoing works as claimed by the petitioner. Further, the respondent has also submitted that the petitioner had signed the amended and restated PPA on 23.01.1997 containing the original dates of scheduled completion i.e., after the cyclonic event and therefore the company must have factored the post affects of cyclone. The respondents have also stated that the monsoon rains are common occurrence and therefore, cannot be treated as Force Majeure event. Against the above stand of the respondent, the petitioner could not bring about any co-gent evidence to prove contra and as such the Commission is convinced with the views of the respondents.

11. Further coming to the issue of the Cyclone that occurred during September, 1997 and its impact on the project schedules and any consequential benefit that can accrue in favour of the petitioner on the ground of force majeure, the respondents have stated that the said cyclone was not severe as claimed by the petitioner and therefore could not be considered as a force majeure event. The petitioner either by way of their submissions in the petition or by way of their arguments could not convince the Commission of an occurrence of the force majeure event and the consequential benefits they are actually entitled under the PPA. As such, the Commission agrees with the views of the respondents.

12. The other point urged by the petitioner is with regard to the first gas turbine which was about to be commissioned during December 1996, got delayed on account of failure of generator transformer supplied by BHEL which was required to be transported to Bhopal for repairs and brought-back to the Kakinada and it was finally commissioned on 11.07.1997 after a delay of 7 months. In response to the

above views of the petitioner, the respondents stated that malfunction of new equipment is a foreseeable event and the equipments are susceptible for failure at the time of commissioning and testing for various reasons and such events cannot be treated as Force Majeure. The respondent further submitted that more importantly this transformer failure occurred on 21.12.1996, which was prior to the signing of PPA on 23.01.1997 and hence these events should have been considered by the petitioner while committing the scheduled date of completion of the project, stipulated in the Amended and Restated PPA. The Commission, having considered the rivals contentions of the parties, is of the view that, it is quite natural to expect that such an eventuality would have been already factored while committing the schedules in the signing of the PPA on 23.01.1997 since, the failure of the generator transformer was an event that is prior to the signing of the PPA and further more, the Commission is of the view that failure of generator transformer cannot be termed as a force majeure event by any stretch of logic.

13. The petitioner further stated that the impact of the transporters strike from 1<sup>st</sup> to 9<sup>th</sup> April, 1997 was felt all over the country when the people suffered due to shortage of essential commodities of daily requirements and as the strike was total through out the country, it had effected the movement of imported equipment / materials from the ports to the site which resulted in delay in the progress of works. In response to the above, the respondents have stated that, the Transporters strike occurred only for a period of 9 days from 1<sup>st</sup> April, 1997 to 9<sup>th</sup> April, 1997 i.e., one year prior to the Combined Cycle COD. Therefore the claim of petitioner that this strike period of 9 days had caused 183 days of delay for completion of project is not plausible. Further, as per Article 11.1 (b) (i) (6) of PPA, delays of transportation that were not reasonably foreseeable constitute non-political events. But in this case the transporters strike was pre-decided and the Company and its EPC contractor could have avoided its adverse impact by suitably programming the transportation works and hence does not qualify as force majeure event as claimed by the company under Article 11.1 (b) (ii) (2) (D). The Commission, having considered the rivals contentions of the parties, is of the view that, the petitioner's claim is general and vague and it is also not convincing as to how the transporters' strike which lasted only for 9 days can account for the delay of 183 days caused in achieving the COD and further more also cannot be termed as force majeure in view of the fact that the



strike was pre-decided and the company EPC contractors could have avoided, its adverse impact, if any, by suitably programming the transportation work.

14. The petitioner stated that, there was a major fire accident to a generator of the GT (GT 2) on 18.04.1997 when it was under spin cooling and consequently, the generator was completely damaged and there was a total loss. The petitioner further stated that, a new generator had to be imported to replace the written-off generator and the GT could be re-commissioned only on 20.11.1997 after a lapse of seven months. The petitioner also stated that, the fuel suppliers to the power plant namely Gas Authority of India Limited (GAIL) and Hindustan Power Corporation Limited (HPCL) accepted the above accident as a Force Majeure event for the purpose of minimum off-take guarantees (MGO) of fuels from them.

In response to the above, the respondents stated that, the definition of Force Majeure event at Article 11.1 (a) of PPA specifically stipulates that any incident that can be prevented through prudent utility practices does not come under Force Majeure. The Generator Transformer - 2 fire accident was reported to have occurred due to inadvertently activating the generator circuit breaker while attempting an isolation procedure. Therefore, the accident was caused due to failure to carry out the project operation in accordance with the manufacturer's recommendation / prudent utility practices and does not qualify under non-political force majeure event, as per the provisions of Article – 11 of the PPA.

The Commission has examined the rival contentions of the parties. Except for stating that, this event has been also accepted by the GAIL and HPCL as a force majeure for the purpose of minimum off-take guarantees of fuels from them, the petitioner could not independently substantiate that, the fire accident was not on account of inadvertently activating generator circuit breaker while attempting an isolation procedure. Further, the fact that some other agencies have allowed this event to be treated as force majeure is of no avail unless it is demonstrated from the PPA and with due regard to the events surrounding the fire accident. In view of the above, the Commission cannot treat this event as force majeure event, contemplated in the PPA and allow any consequent benefit.

15. The respondent stated that, the power to the pumping station at Samalkot was released in the month of November 1997, whereas the water was required only at the time of commissioning of the 4<sup>th</sup> unit. The said unit was only commissioned on 31.03.1998. So it cannot be said that no supply of water to the pump house at Samalkot. Moreover, no schedule is provided in the PPA for extension of supply by the Board to the pumping station situated in Samalkot.

The Commission has examined the matter. It is a fact that, water was required only at the time of commissioning of 4<sup>th</sup> unit, which is 31.03.1998. The power to the pumping station at Samalkot was released in the month of November 1997 much ahead of the commissioning of 4<sup>th</sup> unit. Further, the PPA does not provide for any time schedule before which the supply is to be given. In view of the circumstances above, no delay can be attributed to the respondent in terms of the PPA entitling the petitioner for any extension of time to the schedule date of completion committed in the PPA on this ground. It cannot attract the ingredients of the Force Majeure event.

For all the reasons stated above, this point is answered in favour of the respondent and against the petitioner.

### **Point No.2**

16. The second point to be answered by the Commission is Whether the petition is barred by limitation?

17. It is clear that the amount was deducted in the monthly bill of July 1999. The petitioner filed a W.P No.8955/2004 in the Hon'ble High Court on 10.05.2004. As per Art.14 of Limitation Act, the claim for recovery of the amount is to be made within 3 years from the date of withholding the amount. The petitioner has not filed the above said Writ Petition well within the period of limitation. The petitioner has filed the above said Writ Petition only on 10.05.2004.

18. As can be seen from the above, the petitioner filed the above said Writ Petition on 10.05.2004. Whereas the recovery / with held of the amount was made from the monthly bill of July 1999. So, the cause of action for recovery of the amount arose in the month of July 1999 and the claim for recovery has to be made well within 3 years as per Art.14 of the Limitation Act. Had the petitioner filed the above

said Writ Petition by June 2002, the claim would have been well within 3 years. Whereas, this Writ Petition was filed on 10.05.2004, which is long after expiry of the limitation. Article 14 of the Indian Limitation Act, 1963 reads as follows:

<b>Article</b>	<b>Description of suits</b>	<b>Period of limitation</b>	<b>Time from which period begins to run</b>
<b>(Part – II suits relating to contacts)  Art.14</b>	<b>For the price of goods sold and delivered where no fixed period of credit is agreed upon.</b>	<b>Three years</b>	<b>The date of delivery of goods.</b>

19. In the light of the above said facts and Art.14 of the Limitation Act, the claim for refund of the amount is barred by limitation as the said Writ Petition is not filed well within 3 years.

20. The above said Writ Petition was withdrawn by virtue of the judgment of the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Ltd vs. Essar Power Limited with a liberty to approach APERC u/s 86(1)(f) of the EA 2003. The respondents claimed that the said order was withdrawn on 10.11.2008 but filed this petition before the Commission in the year 2012 beyond 3 years reckoning from 10.11.2008 and on that ground the claim is barred by limitation. It is incorrect to state that the petitioner filed this petition in the year 2012 being beyond 3 years period. The fact of the matter is that, the petitioner filed this petition in June 2009 itself, which was numbered as O.P.(SR) No.37/2009. Later it was numbered in the year 2012 by assigning O.P.No.84/2012, so it cannot be said that the said petition was filed three (3) years after the withdrawal of the said writ petition before the Hon'ble High Court.

21. So far as the prosecution of the petition before the Hon'ble High Court is concerned, it is a bona-fide prosecution as it is not a claim made under Arbitration Act. It is filed only for recovery of the amount and for refund of the said amount on the ground that the amount was withheld arbitrarily and the same is liable to be refunded. On the issue of whether the time of prosecution before the Hon'ble High Court of A.P. should be treated as bona-fide prosecution being eligible for the benefits of S.14(2) of the Limitation Act, the Hon'ble APTEL in Appeal No. 90/2011

held that the petitioner is entitled for the benefits of S.14(2) of the Limitation Act. The said order became final since no appeal is filed against that order. The Hon'ble ATE held as:

***“We are of the view that the findings rendered by the State Commission on the limitation point is not legally sustainable and on the other hand it has to be held that the petition filed by the Appellant before the Commission, was filed within a period of limitation in the light of the fact that Appellant is entitled to the benefit as available under section 14 (2) of the Limitation Act.”***

In conclusion, inspite of the fact that, the petitioner filed the petition before the Commission with in the period of 3 years after withdrawing of the case from the Hon'ble High Court of A.P. and even though the period of prosecution before the Hon'ble High Court of A.P. can be treated as bona-fide prosecution being entitled for the benefits under S.14(2) of the Limitation Act, when seen, in isolation. The claim for recovery of the amount is barred by limitation, in view of the fact that, the very filing of the Writ Petition before the Hon'ble High Court of A.P. is after a period of 3 years reckoned from the date of recovery of the amount from the monthly bills of July 1999. Hence, this point is answered in favour of the respondent and against the petitioner.

22. The above said discussion clearly discloses that the claim made by the petitioner is barred by limitation and the petition filed by the petitioner is not sustainable both under merits and under law and the same is liable to be dismissed.

23. In the result, the above said petition is dismissed.

**This order is corrected and signed on this 17<sup>th</sup> day of April, 2013.**

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

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

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