

ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION

4th Floor, Singareni Bhavan, Red Hills, Hyderabad 500 004

Dated: 08-09-2016

Present

Sri Justice G. Bhavani Prasad, Chairman
Dr. P. Raghu, Member
Sri P. Rama Mohan, Member

O.P. No. 27 of 2015 & I.A. No. 35 of 2015

Between:

M/s. Sammera Paper Industry Ltd.,
932 / 2, Alamuru Road, Mandapeta – 533 308. E.G. District. Petitioner

And

Eastern Power Distribution Company of Andhra Pradesh Ltd (APEPDCL)
P & T Colony, Seethammadhara, Visakhapatnam – 530013. Respondent

O.P. No. 18 of 2016

Between:

Eastern Power Distribution Company of A.P. Ltd (APEPDCL)
P & T Colony, Seethammadhara, Visakhapatnam – 530 020. Petitioner

And

M/s. Vishnu Vidyut India Ltd.
Narasingabilli (Village), Kasimikota (Mandal),
Yelamanchili, Visakhapatnam District – 531 058. Respondent

The petitions have come up for hearing finally on 06-08-2016 in the presence of Sri Challa Gunaranjan, learned counsel for the petitioner and Sri P. Shiva Rao, learned Standing Counsel for the respondent in O.P. No.27 of 2015 & I.A.No.35 of 2015; Sri P. Shiva Rao, learned Standing Counsel for the petitioner and Sri Challa Gunaranjan, learned counsel for the respondent O.P.No.18 of 2016; Sri M. Venugopala Rao, Senior Journalist and Convener, Centre for Power Studies, learned objector in both the cases. After carefully considering the material available on record and after hearing the arguments of the persons present, the Commission passed the following:

COMMON ORDER

Both the Original Petitions under consideration herein involve the request for a direction to the distribution licensee to purchase the power generated by the petitioners from their respective biomass based Non-Conventional Energy generating plants and for consequential reliefs. As the core question in controversy is common, both the Original Petitions are being disposed of by this common order.

2. O.P.No.27 of 2015 filed by M/s. Sammera Paper Industry Limited is for a direction to the Eastern Power Distribution Company of Andhra Pradesh Limited to purchase the power generated from the 4.8 MW biomass based generating project of the petitioner and pay for the power to be supplied as per the generic tariff fixed by the State Commission totaling to `6.26 paise per unit under a Long Term Power Purchase Agreement.

3. While narrating the national and state scenario to promote Renewable Sources of Energy, the petitioner stated that it invested `30 crores for establishing the company and the power generating plant out of which `15.66 crores were taken on loan from Andhra Bank. The New and Renewable Energy Development Corporation provisionally sanctioned on 07-02-2011 captive use of power generated and a formal agreement was entered into on 11-01-2012. Later permission was obtained from NREDCAP also to supply the generated power to the other two group companies. The respondent approved synchronization of the plant with the grid which was done on 22-04-2013 and the Commercial Operation Date was declared on 17-05-2013 before the Paper and Solvent Oils group companies could be commissioned. The petitioner also obtained No Objection Certificate for sale of 2 MWs of power to third parties on 01-07-2013. Accordingly, the Chief Engineer, SLDC, AP Transco granted short term open access on 28-10-2013. However, the two group companies had to be closed due to bad market conditions and the management was changed through share transfer. The petitioner could not generate and consume power as there were no captive requirements and could not sell power through Open Access due to financial difficulties. Unless the petitioner enters into a Long Term Power Purchase Agreement as per the tariff and terms applicable to biomass based projects, it will turn into a Non Performing Asset. The respondent did not respond to several representations made. The APERC made Regulation 1 of 2012 and fixed the generic tariff including fixed cost and variable cost at `6.26 per unit for 2015-16. The respondent is an obligated entity under Regulation 1 of 2012 which is required to purchase power at the prescribed percentage from Renewable Energy Sources at generic tariff rates determined by the Commission. Hence, the petition.

4. I.A.No.35 of 2015 in O.P.No.27 of 2015 is for an interim relief to the same effect.

5. The respondent to O.P.No.27 of 2015 contested the petition firstly contending that the Commission has no jurisdiction to entertain any dispute arising prior to entering into a Power Purchase Agreement. It further contended that the order of the APERC dated 20-03-2004 directed that no fresh biomass plants be allowed. Again, by an order dated 27-09-2005 in O.P.No.9 of 2005, the Commission directed that no further biomass based power shall be purchased by the distribution licensees than that already committed through the Power Purchase Agreements already entered into and consented to by the Commission. Every year the Government is granting an additional tariff of ` 1.50 paise/kwH which is an unjustified burden on end consumers. The Commission advised in its order dated 21-06-2013 that the Discoms can allow the developers for third party sale through Open Access. The Discoms are not liable to purchase power from the biomass based plants through Long Term Power Purchase Agreements and there cannot be any direction to purchase power from a particular generator. The sanction by NREDCAP ceases to have effect once there is no captive consumption for which purpose the plant was set up. The Green Energy Corridor Project, Solar Policy of the State Government dated 12-02-2015, the direction by the Government to the Discoms to procure 1000 MW of solar power through competitive bidding, the target to set up 3500 MW solar capacity through solar parks in Kurnool and Ananthapur Districts, the Wind Power Policy, 2015 dated 13-02-2015, to achieve 4000 MW capacity, expected addition of 1016 MW capacity in 2015-16, approval for procurement of 130 MW power from Waste Energy Projects etc., make the petition liable to be dismissed. The permission by NREDCAP ceased to have effect once the plant is not used for captive consumption. Biomass fuel is not green energy and produces green house gases, harmful to environment. The petitioner cannot be permitted to enter into a Power Purchase Agreement with the respondent in view of the ban imposed by APERC and the respondent is not liable to purchase energy from the petitioner.

6. The petitioner in its rejoinder claimed that the Commission has jurisdiction under section 62 (1) (a) read with section 86 (1) (b). Any prohibition against biomass projects was not repeated in the orders of the Commission in O.P.No.16 of 2008. The order dated 20-03-2004 was set aside by the APTEL. Regulation 1 of 2012 contains the mandatory directions regarding purchase of Renewable Energy/Renewable Energy Certificates. The Commission can reconsider due to the

changed circumstances and long gap of time and the Commission has to act under section 86 (1) (e) to promote the Non-Conventional Energy projects. The petitioner was allowed to sell power to third parties under Short Term Open Access on 28-10-2013 and the Commission rejected the request of the respondent to reduce the Renewable Power Purchase Obligation.

7. O.P.No.18 of 2016 is a petition by the Eastern Power Distribution Company of Andhra Pradesh Limited to pass appropriate orders on the representation of the respondent for Long Term Power Purchase Agreement with the petitioner.

8. The petitioner stated that the respondent having a 7.5 MW biomass based power plant represented to the Secretary to Government, Department of Energy, Government of Andhra Pradesh, Hyderabad through a letter dated 09-02-2016 for a Power Purchase Agreement with the petitioner on Long Term basis. Earlier when the respondent approached the APPCC for amendment of PW & PA dated 23-06-1999, the Commission did not grant consent as the Power Wheeling Purchase Agreement dated 23-06-1999 had no consent of the Commission. Therefore the respondent was allowed Open Access and is supplying power to AP Discoms on Short Term basis since 2013, for which the tariff is `5.45 as against the higher tariff permitted by the Commission and the additional tariff granted by the State Government. The orders of the Commission dated 20-03-2004 and 27-09-2005 were referred to as imposing ban on biomass based projects and the correspondence of the Commission referring to such ban was also referred. The Discoms were stated to be not entitled to purchase power from biomass based plants through Long Term Power Purchase Agreements after 2004. The petitioner opposed O.P.No.27 of 2015 on the same ground and the same information was submitted to the Government by the Chairman, APPCC. While so, the Principal Secretary to Government, Energy, I & I Department, Hyderabad instructed the AP Discoms vide letter dated 13-04-2016 to file an application before the Commission for passing appropriate orders on the representation of the respondent. Hence the petition.

9. The respondent in its counter, apart from referring the need for incentivizing Non-Conventional Sources of Energy under the statute, claimed that the project was established for 6 MW and was granted an additional capacity of 1.5 MW by NEDCAP and the change of name was approved by the NEDCAP. When the

respondent was informed about the orders of the Commission declining to grant consent for PW & PA as amended, the respondent approached the State Government. Regulation 1 of 2012 subsequently issued by the Commission in exercise of its statutory powers defined Renewable Energy Sources which included biomass and any previous orders ceased to operate. The other orders referred to by the petitioner have no relevance and when there is no ban and the agreement was concluded long back, terms of the agreement can be approved on standard terms.

10. Sri M. Venugopala Rao, Senior Journalist & Convener, Centre for Power Studies in his objections referred to the tariff order for 2016-17 wherein the power purchase requirement and surplus availability were assessed. Still the State Government directed the Discoms to sign the Power Purchase Agreements for purchase of power of 4000 MW of solar wind hybrid power projects which is unwarranted. The reserve margin required to be maintained is met with the available surplus and the Renewable Power Purchase Obligation is less than Non-Conventional Energy approved to be purchased in 2016-17. The necessity to keep the power purchase cost at reasonable level should be kept in view and there is no Long Term load forecast plan or resource plan or power procurement plan for the Discoms and indiscriminate entering into the Power Purchase Agreements, Long Term or Short Term at high cost will adversely affect the orderly development of the power sector and larger consumer interest. Dangerous tendency of forcing the Discoms to enter into Long Term Power Purchase Agreements with no limitation of capacity for purchase of NCE at very high tariff without even seeking the consent of the Commission will subvert the regulatory process. Hence, the learned objector desired that appropriate directions be issued on all these aspects and requested the Commission to exercise its legitimate independence and authority within the limitations of law to protect the larger consumer interest. The Government or the petitioner did not specifically explain what appropriate orders they seek from the Commission and the Government without taking a decision on the representations of the generators passed the buck to the Commission and the petition is not maintainable. Biomass based power could have been sold at competitive prices if there is scope for competing in the market. Any fresh PPAs with biomass based developers will burden the Discoms and the consumers and the smaller capacity of the biomass power plants cannot be a justifiable basis. The Chairman, APPCC in

his letter dated 11-03-2016 referred to the comfortable position of the AP Discoms to meet the Renewable Power Purchase Obligation. The biomass based plants in the State had a controversial history and additional burden on the consumers should be avoided.

11. On such material, the point for consideration in both the petitions is the impact of the earlier directions of the erstwhile Andhra Pradesh Electricity Regulatory Commission concerning biomass based power projects and the question of purchase of power generated by the generating plants of the petitioners using biomass as fuel.

12. The erstwhile Andhra Pradesh Electricity Regulatory Commission in its order dated 20-03-2004 in R.P.No.84 of 2003 in O.P.No.1075 of 2000 was considering *suo motu* determination of tariff applicable to Non-Conventional Energy Projects and with reference to biomass plants, it was observed in Para 64 that as against the report of the Administrative Staff College of India in 2001 that the biomass potential in the State was adequate to support a generating capacity of only 225 MW on sustained basis, sanctions have been given for about 410 MW resulting in the fuel cost of biomass shooting up. The Commission therefore felt that it is not in consumers' interest to encourage setting up of additional biomass plants till the supply position improves. But, still the Commission appreciated the Government of Andhra Pradesh clearing eight biomass plants on the basis of additional plantations being raised towards the requirement of fuel on an experimental basis. Therefore, the Commission decided that it will not permit from that date the purchase of power from new biomass power projects other than those already sanctioned by NEDCAP/APTRANSCO, which decision will be reviewed after three years. Hence, it is evident that biomass power projects sanctioned prior to 20-03-2004 can lawfully sell power to the State utilities, even assuming that the Commission has jurisdiction and justification for issuing such a prohibitory order.

13. There is nothing on record to show that subsequent to the above order, there was any further study of biomass potential available in the undivided State of Andhra Pradesh or after division, the residual State of Andhra Pradesh or any material about assessment of performance of biomass projects existing by then or commencing commercial operation after that date or about any development of any additional sources of fuel by raising additional plantations etc., nor there appears to

be any review of the decision not to permit purchase of power from biomass plants sanctioned after 20-03-2004 after three years from that date or at any time later.

14. In O.P.No.9 of 2005 decided by the erstwhile Andhra Pradesh Electricity Regulatory Commission on 27-09-2005, the Commission was considering specification for purchase of electricity from renewable sources of energy, a percentage of total consumption of electricity in the area of a distribution licensee. While recognizing biomass as a resource of Non-Conventional Energy for complying with the percentage of such energy procurement, the Commission again observed that in view of NEDCAP having already issued a large number of sanctions for setting up of biomass based power plants, no further biomass based power shall be purchased by the distribution licensees that that already committed through the Power Purchase Agreements already entered into and consented to by the Commission. It is clear from the said observation that what the Commission sought to prohibit was purchase of such power by the distribution licensees through any new Power Purchase Agreements but not the setting up or bringing into commercial operation such power plants, the power produced from which could have been otherwise sold to persons other than the distribution licensees operating in the State of Andhra Pradesh or utilized as captive generation. Significantly this order did not refer to the review contemplated by the earlier order dated 20-03-2004 or the other relevant factors referred to in that order.

15. The order of the erstwhile AP Electricity Regulatory Commission in R.P.No.84 of 2003 in O.P.No.1075 of 2000 dated 20-03-2004 as modified by the order dated 07-07-2004 in R.P. No. 05 of 2004 etc., was the subject of Appeal No.01 of 2005 and batch decided by Appellate Tribunal for Electricity on 02-06-2006 and the appeals were at the instance of both the developers and the Discoms and Transco. The Appellate Tribunal for Electricity in its detailed analysis clearly concluded that the regulatory Commission has no power to arrogate itself with absolute power ignoring the provisions of the Act.

16. The Appellate Tribunal for Electricity held that the only function of the Commission in respect of the generating companies is to regulate the purchase price of power when the licensee enters into an agreement with a generator for purchase of power. Such regulation of purchase of power by a licensee from a generator under sec 86(1)(b) could only be pursuant to terms of a bi-lateral agreement which the generators and licensees entered between themselves,

while also dealing with the principles of promissory estoppel and legitimate expectation.

17. The APERC was held bound to act within the four corners of the AP Electricity Reform Act, 1998 or the Electricity Act, 2003. Incidentally the Appellate Tribunal for Electricity also concluded the impact of payment of higher price to Non Conventional developers on retail tariff to be negligible in the context of cumulative benefits of energy from renewable sources. The Appellate Tribunal for Electricity categorically held that the State Electricity Regulatory Commission has no executive power or a plenary power and it has no authority or jurisdiction to compel the developer to sell power only to APTRANSCO or AP Distribution Companies.

18. This decision of the Appellate Tribunal for Electricity was the subject of CA 2926/2006 and batch before the Hon'ble Supreme Court of India decided on 08-07-2010. The Hon'ble Supreme Court noted that the order of the State Regulatory Commission dated 20-06-2001 read with the earlier order was implemented willingly by the parties which led to the order dated 20-03-2004 for determination of tariff. The Hon'ble Supreme Court set aside the order of the Appellate Tribunal for Electricity dated 02-06-2006 upholding the jurisdiction of the Commission for determination of tariff.

19. It should be noted that either before the Appellate Tribunal for Electricity or before the Hon'ble Supreme Court, the issues under consideration herein were not raised or considered or decided. However, the Appellate Tribunal for Electricity, as already referred to, clearly held that the Commission cannot travel beyond the language and content of the State Act or Central Act. The Hon'ble Supreme Court while disagreeing with the Appellate Tribunal for Electricity on its conclusion about the right of the Commission to fix the Tariff traced such power to the statutory functions under the Act, which was even construed to be a specific statutory obligation. The Hon'ble Supreme Court emphasized that it is necessary that the Regulatory Commission takes practical decisions which will help in ensuring existence of these units rather than their extinguishment. With respect to the case in APERC Vs RVK Energy Private Limited (2008) 17 SCC 769, the Hon'ble Supreme Court noted that the regulatory power does not ordinarily extend to prohibition or positive direction for entire supply to APTRANSCO alone and such prohibition may be resorted to in exceptional situations. It may be noted that the Hon'ble Supreme Court did not specifically disapprove/overrule the Appellate

Tribunal for Electricity which held that the function of the Commission in relation to a generator is only to regulate purchase price of power payable by the licensee under a bilateral agreement.

20. On remand the Hon'ble Chairman and the then Hon'ble Members of the erstwhile APERC delivered three different orders in which the issue under consideration here was neither referred to nor considered. All the three orders were confined to the question of tariff and in view of the total divergence between the three orders, the matters had to again go to the Appellate Tribunal for Electricity in Appeal No. 150 of 2011 and batch in which the Appellate Tribunal for Electricity in its judgment dated 20-12-2012 gave detailed directions for determination of tariff for various NCE projects by the State Commission.

21. In R.P.No.03 of 2013 and batch decided on 30-04-2013, the Appellate Tribunal for Electricity gave further clarifications or directions and the learned counsel for the parties stated that the matters were again carried to the Hon'ble Supreme Court and are pending.

22. Thus the order of the erstwhile APERC dated 20-03-2004 as modified by its subsequent orders on various review petitions was set aside by the Appellate Tribunal for Electricity and the Hon'ble Supreme Court while setting aside the orders of the Appellate Tribunal did not restore the orders appealed against but remanded the matters to the erstwhile Andhra Pradesh Electricity Regulatory Commission for hearing and determination afresh except concerning jurisdiction, plea of estoppel, legitimate expectation and PPAs being under duress. The orders of the Commission after remand or the orders of the Appellate Tribunal for Electricity in appeals against the said orders have not become final and conclusive in view of the matters being subjudice before the Hon'ble Supreme Court.

23. At any rate, the issue under consideration herein regarding prohibiting the public utilities from purchasing power from generators using biomass as fuel, if not already sanctioned by NEDCAP or APTRANSCO was not raised or considered in any of the proceedings. If the order dated 20-03-2004 was set aside by the Appellate Tribunal for Electricity and was not restored while ordering remand by the Hon'ble Supreme Court, this direction that the Commission would not permit purchase of power from such generators can probably be justifiably claimed to be deemed to have been set aside, not restored and hence not in existence. In three

separate orders of the Commission or the appellate order of the Appellate Tribunal for Electricity after remand by the Hon'ble Supreme Court, this aspect was not even remotely dealt with and hence may not be capable of being construed to have been brought back into existence in any manner. If such an interpretation of the effect of the various legal proceedings were to be adopted, this prohibition against biomass generators subsequently sanctioned has to be deemed to be non-existent, if not non-est.

24. Even otherwise, the erstwhile APERC itself noted in the order dated 20-03-2004 that the potential of biomass for power generation was estimated differently by an expert committee appointed by the Government of Andhra Pradesh in 1997 and in the report of the ASCII in 2001. The expert committee studied district wise resources and estimated the available biomass to support a generation of 448.5 MW but the ASCII report estimated it to be 224.43 MW. The Commission also noted that NEDCAP in consultation with Forest officials confirmed that there were only stray incidents of resorting to dubious means by cutting trees in the forests. The Commission in giving the direction in question straight away relied on the ASCII report and did not assign any reason for not relying on the expert committee report. Even according to the Commission, sanctions given for biomass plants were for about 410 MW as against 448.5MW estimated capacity by the expert committee. The statement that the fuel cost of biomass had shot up was not supported by any reference to any data and in a contradictory stance the Government of Andhra Pradesh was appreciated by the Commission for starting 8 biomass plants on the basis of additional plantations being raised on experimental basis. The Commission felt that it was necessary to watch the performance of these eight projects but such watching of their performance did not appear to have ever taken place.

25. While deciding not to permit purchasing of power from new biomass power projects other than those already sanctioned by NEDCAP/ APTRANSCO from the date of the orders, the Commission also decided to review it after three years. In file No.E-488 (Engineering), the Commission was reminded of its directions. But as it was opined that the order dated 20-03-2004 stood set aside by the Appellate Tribunal for Electricity by then, it was decided not to review. Up-to-date, no review had been undertaken and the decision continues to be cited as has been in force irrespective of any changes in all or any of relevant circumstances in between.

26. The Commission in the meanwhile made Renewable Power Purchase Obligation (Compliance by purchase of Renewable Energy/Renewable Energy Certificates) Regulations, 1 of 2012 with effect from 01-04-2012. In Regulation 2 (m), the definition of renewable energy sources was defined to mean, among other things, biomass also and the Renewable Power Purchase Obligation was made obligatory under the regulation which purchase should be from Renewable Energy sources. The contention that biomass having been made a renewable energy source which shall also be the source of purchase under the regulation with effect from 01-04-2012, any administrative or Quasi Judicial decision of the Commission cannot over ride a Statutory Regulation has sufficient force and the Commission cannot be considered to be ignorant of its order dated 20-03-2004 when it subsequently made Regulation 1 of 2012. If so, it may have to be presumed in law that by virtue of the statutory regulation made by the Commission subsequently, the earlier order dated 20-03-2004 must be deemed to have been reviewed and modified. That apart, in *Tata Power Vs Reliance Energy* (2009) 16 SCC 659, the Hon'ble Supreme Court not only held that the activities of a generating company are beyond the purview of the licensing provisions but also laid down that generating companies have the freedom to enter into contract with Distribution companies subject to the regulatory provisions of the Electricity Act, 2003. If generating energy using biomass as a fuel is a lawful activity, any prohibition against purchase of such power by the Discoms without any provision in any statute or rule or regulation expressly or by necessary implication, may not be open to be construed as within the jurisdiction of the State Commission as strongly contended by the learned counsel for the petitioners. Even assuming without admitting that the State Commission has the competence to make such an order, such a prohibition extinguishing a lawful activity could not have been eternal as noted by the Commission itself when it decided to have a review after three years. In that view of the matter, in the interests of justice, this Commission has directed both the parties to present a comprehensive picture of the biomass power projects in the State of Andhra Pradesh and the existing and possible state of affairs. Both the parties, placed the information before the Commission which shows that the total number of biomass power plants sanctioned by NREDCAP are sixty with a total capacity of 240 .41 MW. Out of them, 53 projects with a capacity of 224.62 MW were commissioned, while 7 more projects are yet to be commissioned. Out of them, 27 projects are stated to be having PPAs/PWPAs with power utilities. Out of

the total plants, only 14 plants each out of standalone biomass plants and captive biomass units are operating.

27. As per the detailed information thus placed before the Commission, only 28 out of 60 biomass plants in the State appear to be in operation and any data about the likelihood of the remaining plants being commissioned or revived is not available. At any rate, the total capacity of all the 60 plants being only 240.41 MW and even the lower estimate of the ASCII even in 2001 estimated biomass potential in the state to be adequate for a capacity of 225 MW, there appears no need or justification to continue any prohibition against purchase of power from biomass sources. Of course, the estimate of ASCII was for undivided State of Andhra Pradesh but the expert committee report of 1997 estimated such support to be for 448.5 MW for the entire state.

28. The Electricity Act, 2003 in its long title specifically referred to promotion of environmentally benign policies and the statement of objects and reasons proposed the Act to be a self contained comprehensive legislation. Section 3 of the Electricity Act, 2003 mandates that the National Electricity Policy and Tariff Policy shall be prepared for development of the power system based on, among other things, renewable sources of energy also. A National Electricity plan has to be accordingly prepared and under section 4, a National Policy permitting standalone systems (including those based on Renewable Sources of Energy and other Non-Conventional Sources of Energy) for rural areas has to be prepared. The Tariff Regulations and Tariff determination shall be guided under section 61 (h) by the promotion of Co-generation and generation of electricity from renewable sources of energy. Section 86 (1) (e) mandates that by providing suitable measures for connectivity with the grid and sale of electricity to any person and also specifying, for purchase of electricity from such sources, a percentage of total consumption of electricity in the area of a distribution licensee, promotion of co-generation and generation of electricity from renewable sources of energy shall be ensured. Regulation 1 of 2012 made by this Commission accordingly has already been referred to, which specifically defined biomass also as a renewable source of energy. In this statutory backdrop, the prohibition, if any, on either new biomass generating plants or on purchase of power generated by such plants does not appear to be a legitimate or permitted or reasonable or valid exercise of any power

or jurisdiction vested in the State Commission. Even otherwise, there is no reason or justification to continue any such prohibition or restriction indefinitely.

29. That apart, if 27 such generating plants have valid power purchase agreements with public utilities, discriminating against the other such plants based only on the date of permission or the date of commissioning does not appear to be a reasonable classification permissible within the constitutional parameters and offends the fundamental right of equality before law and equal protection of the laws under Article 14 of the Constitution of India.

30. Thus any prohibition against setting up any biomass based power plants or purchasing the power generated by such plants must be deemed to be non-existent at any time. Even otherwise, any such prohibition has to be reviewed for the reasons and circumstances stated above and has to be declared as inoperative, notwithstanding any earlier orders of the erstwhile APERC. Setting up of biomass based power plants or sale of power generated by them have to be considered legitimate lawful activities and consequently, there is no legal or factual bar for any transmission licensee or Distribution licensee of this Commission from purchasing such power on mutually agreed terms and conditions translated into a valid and legal agreement.

31. However, the request of the petitioner in O.P.No.27 of 2015 to direct the respondent therein to purchase the power generated by it under a long term power purchase agreement at the generic tariff determined or to be determined by this Commission cannot be considered. Similarly, the request of the petitioner in O.P.No.18 of 2016 also cannot be considered as taking an appropriate decision on the representation of the respondent therein is the prerogative of the petitioner itself.

32. In this regard, useful reference can be made to the order in O.P.No.27 of 2004 dated 21-04-2007 of the erstwhile Andhra Pradesh Electricity Regulatory Commission, which was confirmed by the Appellate Tribunal for Electricity in Appeal Nos. 92 of 2007 and 138 of 2007 by the judgment dated 19-12-2008. The principle laid down by the Appellate Tribunal for Electricity is that the parties being commercial entities have to take their decisions with regard to purchase of power depending upon their requirements and availability of power at competitive rates, which cannot be influenced by a third party as the consequences of the agreement

have to be borne by the parties to the agreement. Therefore, they concluded that unless the generator and the transmission utility/distribution utility agree to enter into a Power Purchase Agreement, the Commission cannot influence or enforce the signing of the agreement between the parties.

33. The petition in O.P.No.18 of 2016 discloses that the petitioner took the stand not to purchase any more power from biomass projects in view of the orders issued by the State Commission and cases pending before it. Similarly, the respondent in O.P.No.27 of 2015 also based its defence mainly on the earlier orders of the State Commission, apart from the company already meeting the renewable power purchase obligation the initiatives taken in which regard were also specified. Of course, it is also contended the biomass energy is not green energy and the generating plant permitted for captive use cannot claim any right of sale.

34. The objections/suggestions of Sri M. Venugopala Rao in support of the stand taken by distribution companies also referred to the implications of considering the representations of the two generators like the higher cost of such power, the probable imposition of heavy burden on the consumers, the renewable power purchase obligation having been otherwise met by the Discoms, the availability of surplus power in 2016-17 as per the ARRs etc. All these factors may be relevant factors which the Distribution Companies may take into consideration while taking an appropriate decision but as it is the licencees who have to take a decision one way or the other, any expression of opinion by the Commission in this order on such aspects may prematurely prejudice the rights and interests of the parties. It is for the parties to consider the merits and demerits of these aspects and come to an appropriate decision. The factual background leading to these petitions needs no further probe, as the question of any prohibition against purchase of bio mass generated power is being clarified here in and as it is for the parties to decide to sell or purchase power and on what terms and conditions. It is only at the stage of any power purchase agreement coming up before the Commission, either for consent under section 21 (4) of A.P. Electricity Reform Act, 1998 and / or section 86 (1) (b) of the Electricity Act, 2003 that this Commission will have to take an appropriate decision on merits within the scope of its jurisdiction.

35. Therefore, the direction not to purchase power from new biomass power projects other than those already sanctioned by NEDCAP/APTRANSCO by 20.03.2004 and the further direction dated 27.09.2005 that no further bio mass based power shall be purchased by the distribution licensees than that already committed through the power purchase agreements already entered into and consented to by the Commission and any other orders or directions to a similar effect or believed or understood to be of a similar effect are declared to be henceforth of no effect. It is perfectly legitimate and open to any generator and /or licensee to take a decision on merits in accordance with law regarding sale/purchase of power generated by generating plants using biomass as fuel and the terms and conditions thereof. The parties to both the original petitions are therefore at liberty to take an appropriate decision in this regard accordingly.

The Petitions are ordered accordingly. No costs.

This order is corrected and signed on this the 08th day of September, 2016.

Sd-
P. Rama Mohan
Member

Sd/-
Dr. P. Raghu
Member

Sd/-
Justice G. Bhavani Prasad
Chairman