



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

O.P.No.31 of 2015  
Dated: 07-04-2017

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

Between:

M/s Jocil Limited

...

Petitioner

AND

Southern Power Distribution Company  
of Andhra Pradesh Ltd

...

Respondent

The petition having come up for hearing finally on 31-12-2016, and the Commission after hearing Sri K.Gopal Choudary, Learned Counsel for the petitioner and Sri P.Shiva Rao, Learned Standing Counsel for the respondent, and considering the material available on record, passed the following:

**ORDER**

Per Dr P.Raghu:

The petitioner has filed the petition under section 86(1) (f) of the Electricity Act, 2003 essentially praying the Commission to declare that the petitioner is entitled for the differential variable cost payable on the basis of APERC's order dated 22-06-2013 in R.P.No. 84/03 in O.P.1075/2000, or such other amount as may be determined to be payable as variable cost in or consequent to pending appeals before the Honourable Supreme Court, for the surplus energy over and above 2.4MW supplied by the petitioner between May, 2003 and November, 2004 and also direct the respondent to pay the differential amount between such sum payable as aforesaid and the amount already paid together with such interest as is payable in respect of the arrears of tariff in terms of the orders mentioned in the petition.

2. The grounds underlying the above said prayer as mentioned in the petition are as hereunder:

- i) The orders of APERC dated: 21-04-2007 in O.P. 27 of 2004 and dated 14-09-2007 in O.P.No. 06 of 2007 directed payment of variable cost for the surplus energy over and above 2.4MW supplied by the petitioner between May, 2003 and November, 2004 as determined in the APERC Order dated 20-03-2004 in R.P.No. 84/03 in O.P. 1075/2000. The APTRANSCO has also submitted that it was prepared to pay the variable cost. The APERC order dated 20-03-2004 in R.P.No. 84/03 in O.P. 1075/2000 was then the subject of appeal before Hon'ble Appellate Tribunal for Electricity. The payments made by the APTRANSCO on 29-08-2007 and 18-10-2007 were on the basis of variable cost determined in the APERC order dated: 20-03-2004 in R.P.No. 84/03 in 1075/2000.
- ii) Subsequently, when the tariff was re-determined by the APERC by the order dated: 22-06-2013 in R.P.No. 84/03 in O.P.1075/2000 consequent to the judgement and review order of Appellate Tribunal for Electricity, the variable cost payable for surplus energy over and above 2.4MW supplied by the petitioner between May, 2003 and November, 2004 is to be determined on the basis of the variable cost determined in the said order dated 22-06-2013. Accordingly, the petitioner is entitled to the differential amount together with interest as per the said order.
- iii) In view of the interim order of the Hon'ble Supreme Court dated 23-04-2014, the petitioner is also entitled to receive 50% of the differential amount between the variable cost payable on the basis of the APERC order dated 22-6-2013 in R.P. No. 84/03 in O.P. 1075/2000 for the surplus energy over and above 2.4MW supplied by the petitioner between May 2003 and November, 2004 and the amounts already paid for such energy. It is therefore just and equitable that the respondent be directed to pay such differential amount for the time being.

3. Having extracted the grounds as above, the relevant facts of the case and the averments as stated in the petition are as hereunder:

- I. The petitioner entered into power purchase and wheeling agreement dated 12-04-2000 with the APTRANSCO providing for the wheeling of surplus energy sold to third parties and for purchase by the APTRANSCO

of the whole or part of the surplus electricity from their 6MW bio-mass cogeneration power plant which was commissioned on 26-03-2001.

- II. The Commission passed an order dated: 26-06-2001 in O.P. 1075/2000 directing, inter alia, that the power generated by non-conventional energy developers is not permitted for sale to third parties and that the developers of the non-conventional energy supply power generated to APTRANSCO and/or the Distribution licensees and accordingly they were compelled to enter into a Power Purchase Agreement dated 06-07-2002 with APTRANSCO valid upto 30-06-2003.
- III. In pursuance of the above said Power Purchase Agreement all the surplus electricity of the petitioner was duly exported to APTRANSCO grid and the same was duly purchased by the APTRANSCO, and the APTRANSCO was also making payments without any demur.
- IV. Upon representation to APERC, the Commission issued direction by letter dated 05-12-2003 that the APTRANSCO has to amend the Power Purchase Agreement entered into with the above developers and purchase additional/surplus power on account of reduction in captive consumption as per the standard Power Purchase Agreement approved by the Commission vide letter dated 03-04-2003 which provides that the proposed captive consumption can be reduced by the company and additional/surplus power can be sold to APTRANSCO in case of exigencies or otherwise. Such directions were reiterated by APERC's letter dated 28-01-2004 and 30-01-2004 stating that APTRANSCO has to purchase surplus delivered energy as mentioned above.
- V. Meanwhile, for the billing month of May, 2003, the petitioner was paid for only 1728000 units as against the actual export of 1756500 units and the petitioner was given to understand that the balance units were considered as exported in excess of capacity indicated in the agreement. The same reductions continued to be repeated in July, 2003 to August, 2003, October, 2003 to January, 2004 and April, 2004 also.
- VI. By letter dated 26-09-2003 addressed to the petitioner, the APTRANSCO stated, inter alia, that it is agreeable to purchase 2.4MW power from the petitioner's project upto 31-03-2004 and that the APTRANSCO is not willing to purchase additional capacity and that the auxiliary consumption is limited to 0.6MW, and that the purchase price as

approved by the APERC is Rs.3.48/unit for 2003-2004, and that the limited purchase does not confer any rights to the petitioner for further purchase or otherwise and that the petitioner's request for release of amounts towards excess energy over and above 2.4MW cannot be considered.

- VII. Despite the repeated orders and directions of the Commission and repeated pleadings of the petitioner the APTRANSCO insisted that it is agreeable for renewal of Power Purchase Agreement limited to 2.4MW for a period of 20 years from the commercial operation of the project.
- VIII. In the above background and as the APTRANSCO had made deductions aggregating to Rs.81,62,688 from the amounts due to the petitioner for the energy exported to them for the months of May, 2003, July, 2003 to August, 2003, October, 2003 to January, 2004 and April, 2004 which remain unpaid with wilful violation and defiance of the directions of APERC dated 28-01-2004. The petitioner was left with no other alternative except to file O.P.No. 27 before the APERC.
- IX. The APTRANSCO sent a letter dated 09-06-2004 to the APERC stating that the APTRANSCO has decided to purchase the surplus energy due to reduction in captive use by all non-conventional energy projects thereby conveying that it has accepted the directions of APERC dated 05-12-2003, 28-01-2004 and 30-01-2004 pursuant to the order dated 20-06-2001 in O.P.1075/2000. However, the APTRANSCO is proposed to pay only the variable cost as determined in the order dated 20-03-2004 in R:P.No.84/2003 in O.P.1075/2000 which is effective from 2004-2005 onwards.
- X. APERC in its letter dated 09-08-2004 to APTRANSCO while recording the latter willingness to purchase such surplus energy as mentioned above has stated that the payments for delivered energy will have to be as per approvals given by the Commission from time to time. Thereafter, the APTRANSCO filed a review petition before the Commission which was dismissed. After approaching the High Court which has disposed with liberty to the petitioner to approach the Appellate Tribunal for Electricity, appeals were filed against the APERC's letter dated 09-08-2004 and order dated 17-11-2004. By an order dated 28-09-2006 the Appellate Tribunal for Electricity dismissed the appeals 4&6 of 2006 with significant observations and also directions that the APERC hold

proceedings in O.P.No.27 of 2004 and decide the same in accordance with law.

- XI. Pursuant to the aforesaid order of the Hon'ble Tribunal, the Commission took up hearing and passed an order on 21-04-2007 which, inter alia, stated that the direction cannot be given to the respondent to enter into Power Purchase Agreement with the petitioner as the respondent has not come forward to enter into Power Purchase Agreement with the petitioner herein, and that the petitioner is entitled to payment for the surplus energy received by the respondents to the extent of variable cost.
- XII. The petitioner filed appeal No. 92 of 2007 before the Hon'ble Appellate Tribunal against the order of the Commission dated 21-04-2007 in O.P.No.27 of 2004, in respect of the deductions made from May, 2003 to April, 2004 towards the energy supplied in excess of capacity of 2.4MW. Even for subsequent periods since the amounts remained unpaid, the petitioner filed O.P.No.6 of 2007 before APERC with a plea to enforce orders and directions and direct the respondent to make payment of the amount of Rs.1.47 Cr, remaining unpaid in respect of the energy supplied together with interest during the months of May, 2004 to March 2006 and to take penal action for non-compliance of directions of the Commission.
- XIII. By an order of the APERC dated 14-09-2007 in O.P.No.6 of 2007 the Commission directed the respondents therein to pay an amount of Rs.28,81,573/-within four weeks of receipt of the order without interest and thereafter with interest at 10% /annum, in respect of excess energy supplied from May, 2004 to November, 2004.
- XIV. The petitioner filed appeal No.138 of 2007 before the Hon'ble Appellate Tribunal against the order of the Commission dated 14-09-2007 in O.P.No.6 of 2007. By a common judgement dated 19-12-2008, the Hon'ble Tribunal dismissed the appeal Nos.92 of 2007 and 138 of 2007. Subsequently, the petitioner filed civil appeals C.A.3891-3892 before the Hon'ble Supreme Court which are pending, having been admitted.
- XV. The petitioner was paid an amount of Rs.28,81,573/-on 29-08-2007 in terms of the Commission order dated 21-04-2007 in O.P.No.27 of 2004 towards variable cost of the energy supplied beyond 2.4MW during the period from May, 2003 to April, 2004. This amount was based on the

variable cost determined by the Commission in the order dated 20-03-2004 in R.P.No.84/03 in O.P.No.1075/2000 for the period from 01-04-2004 to 31-03-2009. For the period prior to 01-04-2004, the variable cost was taken by the licensee on the basis of negative application of an escalation factor of 6.09%/annum which was applied for the periods after 2004 to 2009.

- XVI. The petitioner was paid an amount of Rs.28,81,573/- on 18-10-2007 as directed by the APERC in the order dated 14-09-2007 in O.P.No.6 of 2007 towards the variable cost of the energy supplied beyond 2.4MW during the period from May 2004 to November 2004. The said amount was based on the variable cost determined by the APERC in the order dated 20-03-2004 in R.P.No.84/03 in O.P.No.1075/2000 for the period from 01-04-2004 to 31-03-2009.
- XVII. During the period of May 2003 to March 2004 the tariff was a single part tariff at Rs.3.48/unit in terms of the APERC order dated 20-06-2001 in O.P.No.1075/2000. The Commission order dated 20-03-2004 as revised by the order dated 05-07-2004 in R.P.Nos.3 & 4 of 2004, revised tariff for non-conventional projects applicable from 01-04-2004 on a two part tariff basis wherein a fixed cost was determined for the first 10 years of operation and a variable cost for each of the financial years between 2004-05 to 2008-09.
- XVIII. The APERC order dated 20-03-2004 in R.P.No.84/03 in O.P.No.1075/2000 was matter of challenge initially with Hon'ble High Court and thereafter, after several rounds of litigation culminated in a final judgement dated 20-12-2012 by the Hon'ble Appellate Tribunal determining the operational parameters for determination of fixed cost components of the tariff for the first 10 years of operation and variable cost components for the financial years 2004-05 to 2008-09 and remanded the matter back to the Commission for determination of tariff and consequential issues. The said order was also matter of review which was disposed by a common order dated 30-04-2013.
- XIX. Pursuant to the judgement dated 20-12-2012 in Appeal No.166 of 2011 and batch and the order dated 30-04-2013 in R.P.No.4 of 2013 and batch, the Commission passed the consequential order dated 22-06-2013 in R.P.No.84/03 in O.P.No.1075/2000 determining the tariff comprising of fixed cost component for the first 10 years of operation based on the

year of operation with effect from 01-04-2004 and the variable cost component for the financial years 2004-05 to 2008-09.

- XX. Subsequently, the licensees have filed civil appeals C.A.Nos.1376-1385 of 2013 before the Hon'ble Supreme Court against the order dated 20-12-2012 of the Hon'ble ATE. The petitioners and others filed civil appeals C.A.Nos.7860-61 of 2013 and CAD 2208 of 2013 before the Hon'ble Supreme Court against the Hon'ble Tribunals judgement dated 20-12-2012 and order dated 30-04-2014. The said civil appeals along with others connected civil appeals are pending before the Hon'ble Supreme Court.
- XXI. By an order dated 23-04-2014, the Hon'ble Supreme Court directed the licensees to pay 50% of the differential amounts between the tariff as determined by the APERC order dated 22-06-2013 and the amounts already paid for the time being.
- XXII. The respondent has paid to the petitioner the amount as per the above said interim orders of the Hon'ble Supreme Court in respect of the surplus energy supplied upto 2.4MW. In so far as the energy supplied by the petitioner upto 2.4MW the licensees have paid the differential amounts as per the interim orders of the Appellant Tribunal and also the interim orders of the Hon'ble Supreme Court. However, in respect of surplus energy supplied beyond 2.4MW during the period from May, 2003 to November, 2004, the licensees have not paid any further amounts considering the variable costs as re-determined.
- XXIII. The petitioner addressed a letter dated 30-10-2014 to the respondent calling upon on them to release the differential amount of Rs.31,22,107/-. However, there was no reply from the respondent.
- XXIV. The petitioner has addressed a further letter dated 01-09-2015 to the respondent, with reference to the earlier letter dated 13-10-2014, and drawing attention to the order dated 23-04-2014 of the Hon'ble Supreme Court, and requesting payment within 15 days of Rs.15,61,053/- being 50% of the differential amount subject to any further orders of the Hon'ble Supreme Court. However, there was no reply from the respondent.
- XXV. In the circumstances, the petitioner is constrained to approach this Commission for appropriate relief including interim relief.

4. The respondent herein had filed a counter affidavit essentially praying the Commission that the petition may be dismissed with costs. The important averments as in the counter are as hereunder:

- a) The petitioner is claiming the differential variable cost in respect of surplus power that was pumped into the grid by it during the period from May, 2003 to November, 2004 and the said claim without going into the merits of the case is barred by the law of limitation besides hit by delay and laches. As the petitioner requires to make claim before expiry of 3 years period from the date of its entitlement of the price in respect of goods supplied by it. Even according to the petition they did not raise this issue in any proceedings more particularly after orders of Appellate Tribunal for Electricity dated 20-12-2012, in respect of surplus power. Therefore, the petition is liable to be dismissed at threshold on the ground that the same is barred by the law of limitation, besides delay of laches.
- b) Without prejudice to the above contention, the respondent also submitted the following on merits:
  - i) APERC vide letter dated: 02-01-2002 approved draft Power Purchase Agreement format applicable to NCE co-generation projects. Accordingly, the petitioner entered into Power Purchase Agreement with APTRANSCO on 06-07-2002 for sale of 2.4MW power after meeting 0.6MW auxiliary and 3MW captive consumption from their 6MW bio-mass co-generation project at Dokkiparru, Guntur District and the project was commissioned on 26-03-2001. The Power Purchase Agreement was valid upto 30-06-2003 and thereafter renewed beyond the said date.
  - ii) In the year 2003 the petitioner represented for sale of 1MW additional power on account of reduction in captive use and APTRANSCO decided to limit power purchase and agreed to purchase 2.4MW capacity under Power Purchase Agreement.
  - iii) Meanwhile, APERC vide letter dated 15-11-2003 approved modification to the delivered energy clause in draft PPA format to the effect that "the delivered energy shall be limited to the energy calculated at 100% PLF with net exportable capacity i.e. after deducting capacities for auxiliary consumption and captive consumption from the installed capacity. Whenever the generation exceeds the installed capacity, the energy delivered



by the project above 100% PLF during such periods will not be accounted for the purpose of the payment.

- iv) However, on the request of the petitioner and other similar NCE generators, Commission directed APTRANSCO to amend the PPA entered into with certain developers, and purchase surplus power on account of reduction in captive consumption as per the standard PPA approved by the Commission vide letter dated 03-04-2003. The said letter provides that the proposed captive consumption can be reduced by the company and additional surplus power can be sold to APTRANSCO in case of exigencies or otherwise. Though the Commission directed to amend the PPA, the decision to enter into PPA, with the developer depends on the requirement of power to the licensee, and as such APTRANSCO did not consider the request of the petitioner for amending the Power Purchase Agreement to enable it to purchase the surplus power. The said decision was taken particularly in view of the modification to the delivered energy clause by the Commission vide letter dated 15-11-2003 and the Commission was apprised accordingly.
- v) As the situation stands, the petitioner filed O.P.No.27 of 2004 seeking direction to a) make payment having been deducted by APTRANSCO for the energy exported for the months of May 2003, July 2003, August 2003, October 2003 to January 2004 and April 2004. b) enter into a Power Purchase Agreement to purchase the entire surplus energy after meeting its auxiliary and captive consumption without any limitations.
- vi) The Commission vide order dated 21-04-2007 while disposing the above petition held that "the Commission is of the view that ..... and direction cannot be given to the respondents (licensees) to enter into Power Purchase Agreement with the petitioner as prayed in the petition since the respondents have not come forward to enter into Power Purchase Agreement with the petitioner. So far as the relief of payment of the amount as claimed by the petitioner in this petition, the petitioner is entitled to payment to the extent indicated in paragraph-22 above, for the reasons mentioned in the foregoing paragraphs.

The petition is allowed to the extent indicated above with regard to payment”.

- vii) The paragraph - 22 inter alia states “..... the petitioner is a captive power plant and therefore not entitled to compensation for fixed costs. The fact that the petitioner uses a non-conventional source of fuel is relevant to the issue in the present petition, because the aforementioned directions of the Commission refer only to the reduction in captive consumption, and the sale of surplus power consequently becoming available with the petitioner. There is therefore merit in the contention of the respondents that the petitioner needs to be compensated only to the extent of variable cost incurred by it.
- viii) The Commission held the issue regarding the payment of amounts towards the energy exported by the petitioner to the respondent from May 2003 to April 2004 is distinct from the issue with regard to entering into PPA between them incorporating the condition therein to purchase the entire surplus energy exported by the petitioner without any limitation. The very fact that the respondent received power from the power plant of the petitioner with or without a valid Power Purchase Agreement casts duty upon the respondents to compensate the petitioner for such utilisation of energy.
- ix) Subsequently the petitioner herein has also filed OP No. 06 of 2007 before APERC praying to direct APTRANSCO / APSPDCL to make payment of 1,47,86334/- in respect of surplus energy supplied from May, 2004 to March, 2006 on account of reduction of captive consumption. However, in view of the order of the Commission in O.P.No.27 of 2004 dated: 21-04-2007 APTRANSCO was ready to pay variable charges for the surplus energy delivered (Rs.28,81,573/-arrived at based on APERC's order dated 20-03-2004), provided such payment is towards full and final settlement in respect of such excess energy. The Commission while recording the above claim of APTRANSCO, vide its order dated: 14-09-2007 has directed to pay the said amount of Rs.28,81,573/-to the petitioner.

- x) Though, there was no amendment to the Power Purchase Agreement between the petitioner and APTRANSCO/APSPDCL obligating them to purchase surplus energy pumped into the grid on account of reduction in capital consumption, in view of the specific directions of APERC for payment of variable cost, they have made payments to the petitioner for such surplus energy supplied.
- xi) Aggrieved by the Commission's order dated 21-04-2007 in O.P.No.27 of 2004 dated 14-09-2007 in O.P.No.6 of 2007, the petitioner filed appeal Nos.92& 138 of 2007 which were dismissed by the Hon'ble Appellate Tribunal for Electricity vide its order dated 19-12-2008. Subsequently, the petitioner filed civil appeals 3891 and 3892 of 2009 against the above orders of Appellate Tribunal for Electricity and as to the pendency of such appeals before the Hon'ble Supreme Court so far the Appellate Tribunal for Electricity order is not disturbed nor any stay order granted.
- xii) In view of the above, (the respondents contends) that it is established that the payment towards surplus energy pumped on account of reduction captive consumption was settled and there are absolutely no grounds for payment of differential amounts.
- xiii) The respondent specifically contends that as is apparent these surplus quantities are not reflected in the agreed Power Purchase Agreement and therefore the petitioner's claim for payment of differential amounts on account of determination of variable cost for the said period, is not on basis of Power Purchase Agreement, also not on the basis of order of the Commission dated: 22-06-2013 in R.P.No.84/2003 in O.P.No. 1075/2000 pursuant to the judgement of the Appellate Tribunal for Electricity dated 20-12-2012 in appeal No.166 of 2011 and batch. The said claim of the petitioner that it is entitled for the differential amount as per the order dated 30-04-2013 in R.P.No. 04 of 2013 and batch is baseless, besides being false.
- xiv) The Commission order dated 22-06-2013 wherein the tariff for the existing NCE projects and projects commissioned between 01-04-2004 and 31-03-2009 except for the projects

covered by the negotiated Power Purchase Agreements, was determined and is applicable only to power purchased as per agreed Power Purchase Agreement. As such, the petitioner's claim for payment of differential amount along with interest is absolutely not tenable.

5. The petitioner, filed a rejoinder to the respondent's counter praying the Commission to allow the petition as prayed for. The important averments are as hereunder:

- i) On the maintainability of the petition, the ground of limitation is misconceived and incorrect and the petition seeks consequential relief of payment of differential variable cost pursuant to the consequential order dated 22-06-2013 of the Commission determining, inter alia, the variable cost for 2004 to 2009 in accordance with the judgement dated 22-12-2012 and the review order dated 30-04-2013 of the Hon'ble Appellate Tribunal for Electricity. The petitioner has claimed the amount from the respondent as far back as on 13-10-2014 and again on 01-09-2015, and there was no denial or dispute raised by the respondents to such claims. The question of limitation therefore does not arise. In any case any period of limitation with respect to the specific relief sought can be reckoned only from 22-06-2013 (and not 20-12-2012 as contended otherwise). The petition was filed on 01-12-2015 and no bar of limitation can be contended. The respondent itself has also seen and stated in paragraph-2 of the counter that the claim is based upon the Commission's order dated 22-06-2013.
- ii) It is entirely wrong, unreasonable and misconceived to contend that the order dated 20-03-2004 was applicable for the variable cost to be paid and the order passed in pursuance of further appeals and consequent proceedings arising out of the orders dated 20-03-2004 setting it at nought and determining the tariff afresh do not apply. The amounts paid by the respondents as variable cost in terms of the earlier orders of the Commission were on the basis of earlier Commission's order dated 20-03-2004. That order was challenged and set aside by the Appellate Tribunal for Electricity and remained set aside upon being remanded to the earlier Commission for determination afresh. Thereafter, pursuant to the appeals filed the Commission passed the order dated 22-06-2013 consequential to Appellate Tribunal for Electricity judgement in the appeals and review

order wherein the variable cost applicable from 01-04-2004 was determined. Therefore, the applicable variable cost for the period from 01-04-2004, as of now is only that as determined by the Commission's order dated 22-06-2013 the differential cost is payable pursuant to the order dated 22-06-2013.

6. Subsequently and in terms of order dated 26-11-2016 certain additional documents have been filed by the petitioner on 31-12-2016.

7. Further to the foregoing and based on the rival contentions of the parties, the issues that arise for consideration are:

A. Whether the petition is liable to be dismissed at threshold on the ground that the same is barred by the law of limitation, besides delay / latches?

B. Whether the variable cost paid for the surplus energy supplied to APTRANSCO / APSPDCL by the petitioners for the period from May, 2003 to November, 2004 in terms of the orders dated 21-04-2007 in O.P.No.27 of 2004 and order dated 14-09-2007 in O.P.No.06 of 2007 needs to be now paid in terms of the Commission's consequential orders dated 22-06-2013 in R.P.No.84/03 in O.P.No.1075/2000 pursuant to order dated 20-12-2012 of Hon'ble Appellate Tribunal for Electricity requiring the differential amount to be paid and a direction to be given in this regard by this Commission?

8. On the issue at para- 7(A) supra, the respondent contended that, the petitioner is claiming the differential variable cost in respect of surplus power that was pumped into the grid by it during the period from May, 2003 to November, 2004 and the said claim without going into the merits of the case is barred by the law of limitation besides being hit by delay and latches. As the petitioner requires to make claim before expiry of 3 years period from the date of its entitlement of the price in respect of goods supplied by it. Even according to the petition they did not raise this issue in any proceedings more particularly after orders of Appellate Tribunal for Electricity dated 20-12-2012, in respect of surplus power. Therefore, the petition is liable to be dismissed at threshold on the ground that the same is barred by the law of limitation, besides delay and latches.

9. On the other hand, the petitioner in their rejoinder stated that any challenge to the maintainability of the petition on ground of limitation is misconceived and incorrect and the petition seeks consequential relief of payment of differential variable cost pursuant to the consequential order dated 22-06-2013 of the Commission determining,

inter alia, the variable cost for 2004 to 2009 in accordance with the judgement dated 20-12-2012 and the review order dated 30-04-2013 of the Hon'ble Appellate Tribunal for Electricity. The petitioner has claimed the amount from the respondent as far back as on 13-10-2014 and again on 01-09-2015, and there was no denial or dispute raised by the respondents to such claims. The question of limitation therefore does not arise. In any case any period of limitation with respect to the specific relief sought can be reckoned only from 22-06-2013 (and not 20-12-2012 as contended otherwise). The petition was filed on 01-12-2015 and no bar of limitation can be contended. The respondent itself has also seen and stated in paragraph-2 of the counter that the claim is based upon the Commission's order dated 22-06-2013.

10. The claims of the petitioner as can be seen from the petition itself can be raised only upon passing of the order dated 22-06-2013 and not based on the order dated 20-12-2012 in as much as the said order only gives the parameters for determination of tariff and does not determine the tariff itself. Three year limitation period, when reckoned from 22-06-2013 ends by 21-06-2016. It is not disputed that the claims were originally made on 13-10-2014 and again on 01-09-2015. That being the case and in as much as the date of making the claim is well within the deadline of 21-06-2016, the petition is maintainable.

11. Having come to the conclusion, that the petition is maintainable, in answering the issue at (B), the following two questions need to be answered viz., (a) Whether the order dated 22-06-2013 issued pursuant to the judgement of the Hon'ble Appellate Tribunal dated 20-12-2012 in Appeal No.166 of 2011 and batch is applicable to the sale of surplus energy pumped into the grid on account of reduction in captive consumption by the petitioner. (b) Whether it was the intention of the Commission to allow the variable cost paid to the petitioner subject to future revisions or is it to be treated as full and final settlement in respect of such excess energy as contended by the respondent.

12. As regards the point (a), the respondents have contended that the APERC order dated 22-06-2013, wherein the tariff for the existing NCE projects and projects commissioned between 01-04-2004 to 31-03-2009 except for the projects covered by the negotiated PPAs, was determined, is applicable only to power purchase as per agreed PPA. They further stated that the surplus quantities are not reflected in the agreed PPA between the petitioner and respondent and therefore the petitioner's claim for differential amounts to this surplus energy on account of determination of variable cost for the said period is not on the basis of PPA. These essential facts have not been disputed even by the petitioner except to say that the variable cost allowed in orders dated 21-04-2007 in O.P.No.27 of 2004 and order dated 14-09-2007 in O.P.No.06 of 2007 being from the order dated 20-03-2004 in R.P.No.84/03 in O.P.No.1075/2000 implies that

payments need to be made in terms of the orders dated 22-06-2003, which is a consequential order pursuant to several stages of litigation and pursuant to Hon'ble Appellate Tribunal's order dated 20-12-2012, requiring a direction from the Commission to pay the difference in cost as requested by the petitioner. Such a view that since the variable cost as in 20-03-2004 order would automatically become applicable when the said order got revised by way of order dated 22-06-2013, does not hold water unless and until it can be categorically shown that the order dated 22-06-2013 based on the scope enshrined therein also applies to the instant case where the transaction is not covered by the PPA. The petitioner nowhere has demonstrated to the above effect. As such, from this point of view, the variable cost determined in order dated 22-06-2013 pursuant to ATE order dated 20-12-2012 is not applicable to the instant case.

13. As regards the point (b), at the outset, it is to be noted that we need not traverse beyond the orders dated 21-04-2007 in O.P. No.27 of 2004 and order dated 14-09-2007 in O.P.No.6 of 2007 in answering this question. The respondent also having heavily relied upon these two orders contended that the payments towards surplus energy pumped into the grid on account of reduction in captive consumption by the petitioner was settled, and there are absolutely no grounds for payment of differential amounts. At this point, it may be apt to carefully analyze the above said orders touching upon the question under investigation. It is to be pointed here that both the above said orders broadly deal with similar issues albeit for different periods. That being the case it may be necessary to extract the relevant portions of the order chronologically.

14. Coming to the order dated 21-04-2007 in O.P.No. 27 of 2004, the following extracts may be worth noting.

Para-21 - the issue with regard to payment of amounts ..... for the energy exported by the petitioner to the respondents for the months of May, 2003 .....and April, 2004 has to be viewed separately from the issue with regard to entering into PPA with the petitioner by the respondents incorporating the condition therein to purchase entire surplus energy exported by the petitioner without any limitations. The very fact that the respondents received power from the power plant of the petitioner, with or without a valid PPA, cast a duty upon the respondents to compensate the petitioner for such utilization of energy. Irrespective of the fact, that the respondent have not entered into PPA as amended by the Commission containing provision for purchase of additional / surplus power on account of reduction in captive consumption, the respondents cannot getaway from the fact that the energy was pumped into its grid.

Para-22 - the matter has been carefully considered. In the case of two other developers mentioned by the respondents, specific direction regarding the price to be paid was given by the Commission, which is not the case with regard to the petitioner. However, the fact has to be taken into account that the petitioner is a captive power plant and therefore not entitled to compensation for fixed costs. The fact that the petitioner uses a non-conventional source of fuel is not relevant to the issues in the present petition, because the aforementioned directions of the Commission refer only to the reduction in captive consumption and the sale of surplus power consequently becoming available with the petitioner. There is, therefore merit in the contention of the respondent that the petitioner need to be compensated only to the extent of variable cost incurred by it. It would, therefore meet the ends of justice if the petitioner were paid the variable cost.

Para-23 - direction cannot be given to the respondents "Licensees" to enter into PPA with the petitioner as prayed for in the petition, since the respondents have not come forward to enter into PPA with the petitioner herein. So far as the relief of the payment amount as claimed by the petitioner in this petition, the petitioner is entitled to payment to extent indicated in para-22 above, for the reasons mentioned in foregoing paragraphs. The petition is allowed to the extent indicated above with regard to payment.

15. As can be gathered from the above extracts of the order in O.P.No. 27 of 2004 dated 21-4-2007, it is very clear that there is no power purchase agreement as it relates to sale of additional / surplus power on account of reduction in captive consumption and the direction of the Commission to pay for such power at the variable cost itself appears to be a considerate view being taken at that point in time even when the basic tenets of a purchase transaction are not present, such as there being an offer and acceptance of the same, may be due to such supply of power being never intended to be gratuitous.

16. With the above observations, it is now appropriate to examine the import of the order dated 14-09-2007 in O.P.No. 6 of 2007 and for that purpose the following relevant portions of the order are extracted hereunder :

Para-15 according to the respondent, the excess units of energy delivered over and above 2.4 MW as per the PPA, which was subsisting between the parties i.e. 2.27 MU of energy, were not required to be purchased by the respondents at all. However, in view of the order of the Commission in O.P.No. 27 of 2004, R-1 is ready to pay for the surplus energy delivered at the rate of variable charges,



provided that such payment is towards full and final settlement of the account in respect of such excess energy.

Para-16 Thus while the petitioner takes exportable capacity of 3.4 MW into consideration for arriving at the amount remaining unpaid to it, the respondents vehemently opposed the said contention stating that they are liable to pay for 2.4 MW exported by the petitioner at the tariff fixed by the Commission, which was in fact paid and are willing to pay for the excess energy delivered by the petitioner over and above 2.4 MW at the rate of variable cost of energy in line with the orders of the Commission dated : 21-04-2007 in O.P.No. 27 of 2004.

Para-17 After thorough examination of the matter, including the order passed in OP.No. 27 of 2004, the Commission is of the opinion that there is force in the contention of the Counsel for the respondents, especially in view of the fact that there is no subsisting and valid PPA between the parties. The reliance placed on behalf of the petitioner on the order dated 17-07-2004 in O.P.No. 21 of 2004 will not help the cause of the petitioner for several reasons, including that the facts that fell for consideration of the Commission in that case were different, especially the existence of a valid and subsisting PPA in that case.

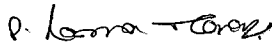
Para-18 In view of the above, the respondents are directed to pay an amount of Rs.28,81,573/- to the petitioner within four weeks of receipt of this order without interest and thereafter, with interest at 10% per annum.....

17. As can be seen from the above, the intention of the Commission directing the respondents to pay certain amounts as indicated therein based on the variable cost even when there was no PPA and against the backdrop of the respondents rather hesitantly paying the variable cost for the surplus power given consequent to reduction in captive consumption with a caveat that such payment is towards full and final settlement of the account in respect of such excess energy, give a meaning that the intention of the Commission is to give some sort of compensation for the excess energy so supplied even when it does not meet the basic tenets of purchase, there being an offer and acceptance. Accordingly, it cannot be thought to be a matter of review when the variable cost adopted at that time under goes a change and whatever payment has been made has to be understood only in terms of it being construed to be towards full and final settlement of the account in respect of such excess energy.

18. Viewed from any angle, that is from the point of view of applicability of Commission's consequential order dated 22-06-2013 pursuant to Appellate order dated 20-12-2012 being limited to instances covered by only agreed PPAs and not applicable to the instant case since there is no concluded PPA for purchasing surplus energy consequent to reduction in captive consumption and also from the point of view of the import of orders of the Commission dated 21-07-2007 in O.P.No.27 of 2004 and dated 14-09-2007 in O.P.No.6 of 2007 being that the payments allowed to be made for the excess energy supplied consequent to reduction in captive consumption are, in the nature of compensation and towards full and final settlement of account in respect of such excess energy, the request of the petitioner to direct the respondent to pay the differential amount of Rs.31,22,107/- and 50% thereof as interim payment pending the final decision of Hon'ble Supreme Court (as prayed for) cannot be granted. The issue of paying interest on the same consequently does not arise.

19. In view of the above, the petition stands dismissed. No costs.

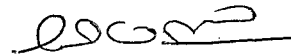
This Order is corrected and signed on this the 07<sup>th</sup> day of April, 2017.



P. Rama Mohan  
Member



Dr P. Raghu  
Member



Justice G. Bhavani Prasad  
Chairman