

(2002) 04 AP CK 0025

In the Andhra Pradesh High Court

Case No : C.M.A. No's. 1458, 1553 and 2062 of 2000

R.V.K. Energy Pvt. Ltd., Hyderabad

APPELLANT

Vs

A.P.S.E.B., Hyderabad and Another

RESPONDENT

Date of Decision : 02-04-2002

Acts Referred:

Andhra Pradesh Electricity Reforms Act, 1998 — Section 12, 14, 14(1), 15A(3), 16
Constitution of India, 1950 — Article 226
Electricity (Supply) Act, 1948 — Section 18A, 43A
Electricity Act, 1910 — Section 28, 28(1)

Citation : (2002) 3 ALD 196 : (2002) 2 ALT 439

Hon'ble Judges : Ramesh Madhav Bapat, J; Dalava Subrahmanyam, J

Bench : Division Bench

Advocate : R. Subhash Reddy, for the Appellant; B.V. Rama Mohan Rao, for the Respondent

Final Decision : Allowed

Judgement

1. In all the three Civil Misc. Appeals a common point is involved except a little variation in the appeals and, therefore, they are disposed of by a common judgment.

2. The aforesaid appeals are filed against the orders of the Andhra Pradesh Electricity Regulatory Commission (for brevity "Regulatory Commission"). C.M.A.No.1458 of 2000 is filed against the order passed in O.P.No.2 of 1999 dated 31-3-2000 by a Company known as M/s. R.V.K. Energy (P) Ltd., and C.M.A.No.1553 of 2000 is filed by the share holders and consumers of the appellant company in C.M.A.No.1458 of 2000. C.M.A.No.2062 of 2000 is filed by a company known as M/s. Astha Power Corporation (P) Ltd., It is necessary to narrate the background of this litigation. The A.P. State Government formulated a policy for augmenting the power supply to ensure industrial growth by setting up of Mini Power Plants by private entrepreneurs under certain terms and conditions as given in G.O.Ms.No.116, Energy (Power) Department, dated 5-8-1995. It was subsequently revised and modified in respect of certain matters and a fresh

G.O.Ms.No.152, Energy (Power) Department, dated 29-11-1995 was issued by the State Government. In pursuance of the policy directives contained in G.O.Ms.No.152, the appellant company in C.MA.No.1458 of 2000 made an application for setting up of a Mini Power Plant. The State Government vide its order dated 29-2-1996 authorised the appellant company to set up a Mini Power Plant in the State of Andhra Pradesh with an installed capacity of 32.7 MW and to supply power to identified industrial consumers. The order was passed in accordance with Section 18A of the Electricity (Supply) Act, 1948 and the sanction was accorded u/s 28(1) of the Indian Electricity Act, 1910 for supply of energy and the permission was granted u/s 43-A of the Electricity (Supply) Act, 1948 to sell the electricity to identified consumers.

3. It is the further case of the appellant herein that originally the generation, transmission and supply of electricity was governed by the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948. The State Government promulgated the A.P. Electricity Reform Act (in short " Reform Act") as the subject matter falls under the Concurrent List of the Constitution of India and came into force with effect from 1st February, 1999.

4. It is the further case of the appellant herein that one of the objects of the said Act was to allow participation of private sector in Electricity Industry for generation, transmission and supply of electricity. Under the Reform Act, the Regulatory Commission was constituted in April 1999. In August 1999 the Regulatory Commission issued a notification directing all power producers to apply for licence/exemption or face action including imprisonment as spelt out in the notification.

5. It is the further case of the appellant herein that in response to the notification dated 20-9-1999, the appellant company made an application u/s 16 of the Reform Act to the Regulatory Commission seeking exemption from the requirement of a licence as contemplated under the Reform Act. The application of the appellant company was numbered as O.P.No.2 of 1999. Meanwhile the A.P. Transco sought approval of wheeling agreement. On 13-12-1999 the Regulatory Commission issued a notice asking the appellant company to show cause as to why G.O.Ms.No.15 should not be made applicable to the appellant company. The APTRANSCO and the State Government filed affidavits before the Regulatory Commission contending that the appellant had been authorised to put up Mini Power Plant under G.O. Ms.No.152 dated 29-11--1995 and G.O. Ms.No.15 dated 9-3-1998, was not applicable to the appellant. The Regulatory Commission heard the appellant as well as the APTRANSCO and passed an interim order on 3-1-2000 approving the wheeling agreement between the appellant and the APTRANSCO and also granted exemption to the appellant till 31-3-2000 as certain formalities prescribed under the Reform Act including the publication of notice had not been complied with and further directed that formalities be completed immediately. The approval of wheeling agreement, which has become final, in effect means communication of the Commission's no objection to third

party sales by the appellant as otherwise, there is no need for the appellant or APTRANSCO to enter into a wheeling agreement.

6. It is the further case of the appellant that on 25-3-2000 the appellant received a notice from the Regulatory Commission fixing the hearing on 28-3-2000. In the notice it was mentioned that as the Regulatory Commission was empowered under the Reform Act and it intended to review the issue of third party sales of the appellant company. The hearing was conducted on 28-3-2000 and the impugned order was passed by the Regulatory Commission on 31-3-2000. The Regulatory Commission, by the said order dated 31-3-2000, declined to grant exemption and proceeded to direct the appellant to sell energy directly to the APTRANSCO and directed both the parties to negotiate the terms for such supply.

7. Aggrieved by the said order, the appellant company herein has preferred the present appeal u/s 39 of the Reform Act.

8. In O.P.No.2 of 1999 the order was passed by the Regulatory Commission on 31-3-2000. The operative portion of the order is extracted as under:

"37. The Commission hereby directs as under:

(i) The "exemption" granted to the applicant, G.B.R. Power Projects Limited under interim orders dated 03-01-2000 is extended upto 1-7-2000 on the same terms and conditions;

(ii) After 1-7-2000 the applicant will sell the power generated to AP TRANSCO only;

(iii) The applicant and AP TRANSCO are directed to negotiate and arrive at a fair and reasonable rate for the power supplied, after taking into account the debt obligations and other outgoings of the applicant and allowing the applicant an appropriate rate of return. AP TRANSCO will take the initiative in this matter. If both parties agree they may consult C.E.A. in the matter, but in any event they should ensure that the agreed proposal should reach the Commission by 1-6-2000;

(iv) When the applicant and AP TRANSCO are agreed on the quantum of fair and reasonable return, a PPA may be drawn up and submitted for the approval of the Commission by 05-06-2000;

(v) The agreement to be reached between the parties should clearly provide for a satisfactory payment mechanism (through a Letter of Credit arrangement) whereby the payment to the applicant is appropriately secured; and

(vi) In the event of AP TRANSCO and the applicant are unable to reach a settlement by 1 June, 2000, on any of the issues, the unresolved issues may be referred to the Commission by either of the parties. The Commission will hear the parties on the difference and pass appropriate orders which shall be binding on both the parties.

This order is signed by the Andhra Pradesh Electricity Regulatory Commission on the 31st March, 2000.

Sd/ Sd/ Sd/ A.V.SUBBA RAO. D.LAKSHMI G.P. RAO NARAYANA
MEMBERMEMBERCHAIRMAN "

9. In O.P.No.2 of 1999 the order was passed on 31-1-2000, and in O.P.No.348 of 2000 the order was passed on 1-7-2000. The operative portions of the orders passed in the aforesaid O.Ps., are not extracted in our judgment as they are practically on par with the order passed in O.P.No.2 of 1999.

10. As stated earlier, different power generating Companies and the share holders have filed the present appeals.

11. The learned senior counsel Mr.Somayaji for Mr. R.Subhash Redddy, appearing for the appellants herein raised the following submissions for consideration.

1) It was submitted by the learned senior counsel for the appellants herein that the Commission improperly construed section 14 of the A.P. Reform Act.

2) It was contended by the learned senior counsel that the Commission encroached upon the policy directions of the Government in contravention of Section 12 of the A.P. Reform Act.

3) It was contended by the learned senior counsel that the Commission exceeded its jurisdiction by traversing beyond the application filed by the appellant seeking exemption by directing the appellant to sell directly to AP Transco.

4) It was submitted by the learned senior counsel that the rights accruing to the appellant under G.O. 152 being interfered with by the Commission, which renders the impugned order illegal.

5) It was further contended by the learned senior counsel that the order of the Commission is in violation of principles of natural justice and is in contravention of the statutory business regulations framed by the Commission.

12. We have to consider firstly what permission was given by the State Government to different power generating Companies to start generating the electricity. The permission was granted by the Government by issuing G.O.Ms.No.152. G.O.Ms.No.152 dated 29-11-1995 reads as under:

GOVERNMENT OF ANDHRA PRADESH ABSTRACT ELECTRICITY - Generating of power through Mini Power Plants of capacity 30MW in private sector - utilisation of power generation in industrial load centres - Revised policy frame-work - Orders -Issued.

ENERGY (POWER-I) DEPARTMENT G.O.Ms.No.152 Dated 29-11-1995 Read the following

1. G.O.Ms.No.116, Energy (Pr.I) Department dt. 5-8-1995.

2. Government letter No.7529/P.r.I/1/95, dt. 15-8-1995.

ORDER

Orders have been issued in the G.O.

1. Stated above, giving permission to the private entrepreneurs to set up mini power plants of 30 MW capacity with residual fuel in industrial load centres in Andhra Pradesh subject to adoption of the approach mentioned therein. The procedure in regard to the selection of investors, submission of proposals etc., was also enumerated vide the same G.O.

2. The State Government with a view to encourage private investment in short gestation power plants that are essentially expected to supply power to industrial consumers at an investment of less than Rs.100 crores have decided to revise the policy frame work on mini power plants.

3. Accordingly, in modification of the G.O. read above, the following revised policy frame work for mini power plants is issued on the lines indicated below, namely:

1. the Mini Power Plants (hereinafter called as M.P.P) will essentially be group captive, dedicated power stations. As such they will generate and supply power to identified consumers, who have entered into agreement with the developers of mini power plants. Such power plants would be best suited to serve customers through a dedicated distribution system, preferably over small compact areas.

2. Prospective investors and entrepreneurs, based on their study of demand conditions, and after finalising negotiations with end consumers of power, for production and supply of power, will draw up their detailed project reports and submit their application to the Andhra Pradesh State Electricity Board. These applications will be processed by the Andhra Pradesh State Electricity Board in the fastest feasible manner and the licences will be issued in conformity with provisions of existing Electricity Acts & Other Statutes, preferably within a period of four weeks from the date of filing of complete application by the developer and after duly obtaining orders in circulation.

3. Energy from the mini power plants can be supplied to identified consumers using either Andhra Pradesh State Electricity Board's existing distribution network after obtaining a licence u/s (3) of the Indian Electricity Act, 1910. In the case of the former, Andhra Pradesh State Electricity Board may on request, lease out the distribution net work to the developer. Detailed arrangements like lease, rent etc., will be worked out on mutually acceptable terms between the Andhra Pradesh State Electricity Board and the Mini Power plant developers. Similar arrangement can also be finalised for the dedicated net work established by Mini Power Plant developers so as to conform to statutory requirement.

4. Where, however, it becomes necessary for the power generated by the Mini Power Plant to be wheeled using the Andhra Pradesh State Electricity Board

transmission network, wheeling charges will be collected from the developers in kind and as a percentage of the energy delivered at the inter-connection points. The proposed rates of wheeling charges are as follows:

i. 132 KV consumers 8%

ii. 33 KV consumers () 10% for a distance upto 50 KM

11 KV consumers () 12% for distance between 51 KM and 100 KM
LT consumers () 15% beyond 100 KM

5. infrastructure like sub station and tie line, if any, required for interfacing the mini power plants with the Andhra Pradesh State Electricity Board grid will be erected at the cost of the Mini Power Plant developer.

6. in the event of the mini power plants generating power in excess of the requirement of their consumers, the same can be purchased by the Andhra Pradesh State Electricity Board. Such purchases by the Andhra Pradesh State Electricity Board may be upto 15% of individual Mini Power Plant capacity. The Andhra Pradesh State Electricity Board may also purchase power beyond 15% of the Mini Power Plant capacity, at Andhra Pradesh State Electricity Board's option without conferring any pre-emptive right of sale on the Mini Power Plant. The price for supplies made to the Andhra Pradesh State Electricity Board will be weighed average price of purchase of power made by the Andhra Pradesh state Electricity Board from Central and other State Electricity Enterprises on a monthly basis. Settlement of accounts will be on a monthly basis. The above procedure would be in force upto the end of December 2000 AD and would be subject to review thereafter.

7. the mini power plants would need to undertake scheduled outages for maintenance. Scheduling of the outages of the individual Mini Power Plants will need to be done in coordination with Andhra Pradesh State Electricity Board and should be normally scheduled during the period of surplus power in the year i.e., from August to November. When scheduled outages are undertaken as above, Andhra Pradesh State Electricity Board will supply power to the Mini Power Plant at the then prevailing tariff rates for industrial consumers. For unscheduled breakdown in the supply of power by the Mini Power Plants, subject to availability, Andhra Pradesh State Electricity Board will be willing to supply power to the Mini Power Plant but at a rate equal to 133% of the industrial tariff then prevailing. The normal outage every year will not exceed one month in the year. For availing the supply of power during outages the Mini Power Plants developer will need to pay in advance a security deposit equivalent to the estimated consumption of power for a period of 30 days.

8. the Mini Power Plant developer shall necessarily sell power to the consumers above the Board's High Tension tariff rate; and

9. once industrial consumers enter into agreement with the Mini Power Plant developer, their security deposit with the Andhra Pradesh State Electricity Board

will be refunded after adjusting the amounts, if any, due from them to the Andhra Pradesh State Electricity Board for the supply of power. Individual consumers can at their option continue to be consumers of Andhra Pradesh State Electricity Board paying minimum charges and maintaining security deposit with a view to obtaining energy supplies from the Andhra Pradesh State Electricity Board network independent of Mini Power Plants arrangement with the Andhra Pradesh State Electricity Board; and

10. the Government of Andhra Pradesh will also recommend to the Government of India for exempting mini power plant equipment from customs duty when imported. The Government will also help the mini power plant developer to obtain preferential treatment in fuel supply allocation.

4. The above policy frame work shall come into force with immediate effect.

(BY ORDER AND IN THE NAME OF THE GOVERNOR OF ANDHRA PRADESH) Sd/
P.V.Bhide SECRETARY TO GOVERNMENT"

By reading this G.O., it is evident that the A.P. State Electricity Board was not able to cope up with the demands of the consumers regarding the electricity. When there was a failure on the part of the A.P. State Electricity Board, the Government thought it fit to encourage the private sector to set up Mini Power Plants by which the load of A.P. State Electricity Board would be reduced to that extent and by giving the permission to private sector and passing orders in G.O.Ms.No.152 dated 29-11-1995. The Government of Andhra Pradesh relieved the burden of A.P. State Electricity Board to certain extent. This is the background for allowing the private sector to generate electricity. With this background we have to consider the entire litigation before us.

The private sector was made to invest huge amounts for installation of Mini Power Plants. Before issuing G.O.Ms.No.152, the Government had issued G.O.Ms.No.116 on 5-8-1995. The object for establishing and permitting the private sector to establish Mini Power Plants is clearly evident from the said G.O., which reads as under:

GOVERNMENT OF ANDHRA PRADESH ABSTRACT ELECTRICITY -Generation of power through Mini Power Plants of capacity of 30MW in private sector - Utilisation of power generation in Industrial Load Centres - Implementation - Orders - Issued.

-x -x- x-

ENERGY (POWER-I) DEPARTMENT

13. G.O.Ms.No.116 Dated: 5-8-1995 Read the following:

ORDER

1. The liberalisation policy of the Government in respect of industrial economy has brought in its wake not only competition in the industry but also State

Government taking with each other to attract investment from other parts of the country and from outside the country. Andhra Pradesh State is well placed for locating industries in various fields but lack of adequate infrastructure facilities particularly non-availability of power has become a serious constraint.

2. The State Government considering the power position in the State have taken a series of measures for augmenting power including privatisation. Many new projects in the public and private sectors are being implemented in the State. The measures taken by the Government of Andhra Pradesh/A.P.State Electricity Board to augment power capacity would take considerable time for the large sized power plants to come up due to the long gestation periods. Also , the plants required a number of statutory clearances from Central Electricity Authority etc. The power plants costing less than Rs.100 crores do not require Central Electricity Authority's clearance and such projects could be cleared at the State level, thereby reducing the gestation period considerably. The State Government have therefore, felt that it would be appropriate to set up mini power plants based on residual fuels in the industrial estates to relieve the burden of the industrial load centres and tail end areas which are suffering from stress on account of transmission and distribution problem. The Government have also felt it necessary to take up mini power plants of 30 MW capacity which could be implemented within a period of 12 - 18 months at suitable locations where industries are concentrated and the power plants can meet the demand of industries without any interruption.

3. Government after careful examination of the matter have taken a decision to accord permission to private parties for setting up mini power plants with residual fuel in the industrial load centres in the State based on the following approach namely:-

1.The prospective generator under this scheme will have to secure a tie up with the consumers regarding quality, quantity and price of power to be supplied.

2. In this scheme, there shall be an arrangement for an uninterrupted power supply to the industrial load centres, except during unavoidable outages like maintenance etc. During this period, consumers will get such power from A.P. State Electricity Board, as then available in the Grid system provided the consumers continue with the minimum demand contract with the Board. In the alternative, the generating stations must have a contract with A.P. State Electricity Board to supplement power as a back up in the event of necessity. The modalities of such arrangement will have to be worked out between the generator and A.P. State Electricity Board mutually.

3.In order to achieve quick grounding of the scheme, generating stations have capacity of about 30 MW will be taken.

4.the pricing arrangement will be subject to fixation of tariff by the Regulatory Commission ultimately.

5. any duties or taxes that may be imposed by the Government, A.P.S.E. Board as per rules shall automatically apply to this scheme.

6. wheeling of power will be made through A.P. State Electricity Board at the request of the generator at a rate to be finalised on mutual agreement with Andhra Pradesh State Electricity Board.

7. total quantity of generation to be earmarked under this scheme will have an upper ceiling which will be decided in consultation with A.P. State Electricity Board.

8. this scheme shall operate within the frame work of the Indiana Electricity (Supply) Act, 1948 and the Rules made thereunder.

9.this scheme being essentially market oriented in charter will not be subject to any binding procedure. The policy of the Government will be publicised for the benefit of the prospective generators and consumers. In the event of more generators making offers, then the principle of first-come-first-served will be followed, and

10. where the A.P. State Electricity Board proposes to take up such units in the tail end areas, a system of competitive binding will be adopted. The A.P. State Electricity Board shall identify the location of the units in the tail end areas and the generating companies with specific generation capacity prior to calling for the bids. Proper care shall betaken to ensure that both competitive prices and proven and cost effective technologies are preferred in the bidding process.

(BY ORDER AND IN THE NAME OF THE GOVERNOR OF ANDHRA PRADESH)
M.C.MAHAPATRA Principal Secretary to Government"

4. By reading the said G.O., what we have stated in the foregoing paragraphs of the judgment that the Government wanted to reduce the burden of A.P. State Electricity Board to supply electricity to its consumers has come true.

5. To appreciate the first contention raised by the learned senior counsel for the appellants herein, we have to see whether the Government had granted any permission or authorisation to the private sector to set up the Mini Power Plants and whether the private industrial sectors were under the obligation to apply for exemption. To appreciate this contention, it is necessary to read the Government letter dated 29-2-1996, which is written by Sri P.V. Bhide, I.A.S., Secretary to Government. It is addressed to M/s. G.B.R. Power Projects Limited, which reads as under:

" BY REGD.POST WITHACK DUE

" GOVERNMENT OF ANDHRA PRADESH ENERGY DEPARTMENT

LETTER No. 1089/P.r.I/1/96-1 Dated 29-2-1996

From Sri P.V.Bhide, I.A.S., Secretary to Government

To

M/s.G.B.R. Power Projects Limited M.I.G.87, APIIC Colony Jeedimetla

Hyderabad 500 055 (WE)

Sir,

Sub: Setting up of Mini Power Plant in private sector To serve Industrial Load Centres _ Approval - Accorded.

Ref: 1. From M/s G.B.R. Power Projects Ltd., letters Dated 8-12-1995 and 8-1-1996.

2.From the M.S. APSEB letter No.CE/I.P.C./ SE.III/311/P.MP/D.No.227/96 dt.31-1-1996.

After careful consideration of your proposal dated 8-12-95 and 8-1-1996, the Government of Andhra Pradesh conveys in accordance with section 18A(a) of Electricity Supply Act, 1948, its approval to establish, operate and maintain a generating station of 32.7 MW capacity at Bhanur village, Patancheru Mandal, Medak District based on furnace Oil as fuel along with tie line and substation connected therewith to supply power to the Industrial consumers contained in the Annexure-I. Sanction is also accorded u/s 28(1) of Indian Electricity Act, 1910 for supplying energy to the specified consumers as per annexure-I. Permission is also accorded u/s 43-A of Electricity Supply Act, 1948 for entering into a contract for the sale of electricity generated by the company to the consumers as per the Annexure-I. This permission is subject to the following conditions.

1. the total completed cost of the project shall not exceed Rs.100 crores.
2. the provisions of Indian Electricity Act, 1910, Electricity Supply Act, 1948, Indian Electricity Rules, 1956 and other statutory regulations/clearances shall be adhered to by the company. An illustrative but not exhaustive list of clearances required are given in the Annexure-II. The company shall be got registered as a Generating Company as required by section 15-A of Electricity Supply Act, 1948, if not already done, within a month of this approval.
3. the plant shall become operational by 31-12-1996. In case of delay beyond 31-12-1996, the company will have to seek revalidation of permission with reasons therefore. If the commissioning of all the units of the project is not completed by 30-6-1997, the permission accorded will automatically be cancelled.
4. the copies of actual supply agreements with the identified consumers shall be furnished to the A.P. State Electricity Board in advance of commencement of supply. Along with the agreements, 3 months notices seeking termination of the agreements with the A.P. State Electricity Board by the identified consumers of generating company, if they so desire shall be submitted to the A.P. State

Electricity Board.

5. the terms and conditions prescribed in respect of wheeling, back up supply, sale of surplus power, tariff to consumers of the company, provision of dedicated system, inter-linking with A.P. State Electricity Board's Grid etc., in G.O. Ms. No.152, Energy (P.r.1) Department, dt.29-11-1995 shall be strictly adhered to as detailed in the Annexure-III.

6. the company shall enter into the necessary "Agreements" with the A.P. State Electricity Board before the commissioning of date of the first unit of the Mini Power Plant. This agreement shall among other conditions reflect the conditions stipulated in G.O.Ms.No.152, dt. 29-11-1995. The A.P. State Electricity Board shall enter into this agreement only after ensuring that the company has obtained all clearances and has adhered to all stipulations as mentioned in this approval letter.

7. the total contracts maximum demand of the identified consumers with the Generating Company shall not exceed 1.25 times the net capacity of the plant adjusted to the local conditions.

8. the generating company shall keep their Generation at its maximum rating during peaking hours of the day as declared by the A.P. State Electricity Board from time to time.

9. the company shall arrange at its cost, the inter connection of Generating Plant to 132 KV Grid of the A.P. State Electricity Board.

10. the company shall arrange to provide dedicated distribution system, if necessary, to the identified consumers to be executed by the A.P. State Electricity Board at the Company's Court.

11. the approval accorded in this letter and conditions mentioned herein are subject to modifications in accordance with Government policies.

Yours faithfully Sd/ For Secretary to Government."

6. By reading the said letter, it is evident that sanction was accorded by the Government to private industries i.e., M/s.G.B.R. Power Projects Limited to set up Mini Power Plants and the sanction was accorded as per the provisions of section 28(1) of the Indian Electricity Act, 1910 for supplying energy to specified consumers as per Annexure-I attached to the said letter. By the said letter, the Government had also accorded sanction to the private sector i.e., the Power Generating Companies u/s 43-A of the Electricity Supply Act, 1948 by entering into contract for sale of electricity generating by the Companies to the consumers as per annexure-I of the said letter. Section 28(1) of Indian Electricity Act, 1910 reads as follows:

"28. Sanction required by non-licensees in certain cases:--

No person other than a licensee shall engage in the business of supplying energy

to the public except with the previous sanction of the State Government and in accordance with such conditions as the State Government may fix in this behalf and any agreement to the contrary shall be void."

While commenting upon the aforesaid provisions of law, the learned senior counsel Mr. V.R.Reddy appearing for the Regulatory Commission submitted that the sanction given by the Government as per letter dated 29-2-1996 is not the sanction at all. It was further contended that interpretation of the section in a proper manner would show that the Government had not accorded such licence to the private sector. We are not in agreement with the submission made by the learned senior counsel. It was also contended by the learned senior counsel Mr. V.R.Reddy that after coming into force the A.P. Electricity Reform Act, 1998, as per section 14 the Companies have to obtain fresh licence from the Regulatory Commission. In order to support his contention, the learned senior counsel has produced certain licences granted to some other companies, those who are not before us.

Before considering whether fresh licence is required or otherwise, we will consider whether it is a fact that the Government had granted licence to the appellants herein.

Section 28(1) of the Indian Electricity Act, 1910 empowers the Government to accord sanction. This section is negatively worded stating that no person other than the licensee shall engage in the business of supplying energy to the public except with the previous sanction of the Government. In the letter dated 29-2-1996 the Government had accorded sanction in very words stating that sanction is accorded u/s 28 of the Indian Electricity Act, 1910 for supplying energy to specified consumers as per annexure-I. There is no ambiguity in the letter written by the Secretary to the Government to M/s. G.B.R. Power Projects Limited granting sanction for supplying energy to specified consumers.

From the above letter it also appears that further sanction was accorded by the Government to M/s. G.B.R. Power Projects Limited u/s 43-A of Electricity Supply Act, 1948. Section 43-A of the Electricity Supply Act, 1948 reads as under:

" 43-A. Terms, conditions and tariff for sale of electricity by Generating Company:-- (1) a Generating Company may enter into a contract for the sale of electricity generated by it----

a) with the Board constituted for the State or any of the States in which a generating station owned or operated by the Company is located;

b) with the Board constituted for any other State in which it is carrying on its activities in pursuance of sub-section (3) of Sec. 15-A; and

c) with any other person with consent of the competent government or governments.

2) The tariff for the sale of electricity by a Generating Company to the Board

shall be determined in accordance with the norms regarding operation and the Plant Load Factor as may be laid down by the Authority and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined, from time to time, by the Central Government, by notification in the Official Gazette.

Provided that the terms, conditions and tariff for such sale shall, in respect of a Generating Company wholly or partly owned by the Central Government and in respect of a Generating Company wholly or partly owned by one or more State Governments be such as may be determined, from time to time, by the government or governments concerned."

7. Section 43-A of the said Act empowers the Government or a Board constituted by the State Government to enter into contract with a company for supply of electricity generating by them to the consumers. By a combined reading of Section 43-A of the Electricity Supply Act, 1948 and section 28(1) of the Indian Electricity Act, 1910, it is evident that the private sector i.e., M/s. G.B.R. Power Projects Limited and other Companies were granted sanction to suitable power generating plants and generate power and to supply to third parties. Therefore, it will not be open for the learned senior counsel Mr. V.R.Reddy to say that no sanction was accorded by the Government to generate and supply electricity to third parties.

8. Now we will proceed to scrutinise as to whether after the commencement of A.P. Electricity Reform Act, the Companies, those who have been given sanction to generate and supply electricity to third parties, are required to apply for fresh licence. Section 14 is the relevant section in A.P. Electricity Reform Act, 1998, which speaks about the Licensing of Transmission and Supply. Section 14 of the said Act reads as under:

"14. Licensing:-- (1) No person, other than those authorised to do so by licence or by virtue of exemption under this Act or authorised to or exempted by any other authority under the Electricity Supply Act 1948, shall engage in the State in the business of--

a) transmitting electricity; or

b) supplying electricity,

2) Where any difference or dispute arises as to whether any person is engaged or is not engaged or about to engage in the business of transmitting or supplying electricity as specified in sub-section (1), the matter shall be referred to the Commission and the decision of the Commission shall be final.

3) The Commission shall have the power to order any unlicensed person to cease operating and disconnect its apparatus.

4) Notwithstanding anything contained in any other provisions of this Act and until the establishment of the Commission in terms of section 3, the State

Government shall have the power to grant provisional licences under this section having a duration not exceeding twelve months to any person or persons to engage in the state in the business of transmission or supply of electricity on such terms and conditions as the State Government may determine consistent with the provisions of this Act, subject to the following conditions, namely----

a) upon the establishment of the Commission, each of the provisional licences granted by the State Government shall be placed before the commission and shall be deemed to constitute an application for grant of a licence by the Commission under the provisions of this Act; and

b) each provisional licence granted under this section shall cease to be valid from the date notified by the Commission.

5) The State Government shall be entitled to confer on the provisional licensees under sub-section (4) such powers, rights and authorisation as the Commission is entitled to grant to the licensees under this Act."

9. By reading section 14 (1) of the said Act, it is evident that no person other than those authorised to do so by licence or by virtue of exemption granted under this Act or authorised to or exempted by any other authority under the Electricity Act shall engage in the State in the business of transmitting electricity or supplying electricity. In other words, it means that the persons, who are already accorded sanction need not apply for fresh licence, but if such licence is not granted, then they have to apply for exemption u/s 16 of Reform Act and not otherwise.

10. The learned senior counsel Mr. V.R. Reddy submitted that after commencement of Reform Act, every private sector has to apply for licence u/s 14 of Reform Act. We are not in agreement with the submission made by the learned senior counsel. Section 14 (1) of Reform Act recognises earlier sanction granted to the Companies under the Electricity (Supply) Act 1948 and therefore the contention raised by the learned senior counsel Mr. V.R. Reddy that fresh licence is required is hereby negated.

11. It can be seen from the impugned order passed by the Regulatory Commission that they did not speak about giving exemption or directing the Companies to apply for fresh licence is totally absent. It is also evident from the documents on record especially the G.B.R. Power Projects Limited had applied for granting exemption under this Act, in fact, it was not necessary but for whatever reasons they did apply for exemption under the Reform Act. In that event, it was necessary for the Regulatory Commission to pass appropriate orders stating that the appellants are entitled for exemption as prayed for or not. But instead of giving finding on the above issue, the Regulatory Commission went on taking the side of the APTRANSCO and directed the Power Generating Companies to sell electricity generated by them only to APTRANSCO because according to the Regulatory Commission, the APTRANSCO is in a debt trap and it can be held to recover its financial help and perform its assigned function efficiently.

12. The learned senior counsel Mr. Somayaji while commenting upon the aforesaid observation of the Regulatory Commission, it was submitted that when there being no material on record, such conclusion was arrived at by the Regulatory Commission. If at all, the APTRANSCO is in debt trap, they cannot be helped at the costs of the appellants.

13. It is a factual position that APTRANSCO at present is only a licensee, who supplies the energy to all the consumers. If the APTRANSCO is in debt trap, it cannot be made financially healthy at the cost of the appellants. There is also a covenant in the agreement between the power generating companies and the APTRANSCO that they would sell the surplus energy to the APTRANSCO only. To that extent, the APTRANSCO is made financially healthy by the private Power Generating Companies and the APTRANSCO has also entered into an agreement with the Power Generating Companies, which is called wheeling agreement, by which APTRANSCO is supported financially by Private Power Generating Companies as the private Power Generating Companies have no independent network and therefore, they are required to use the network of supplying electricity, which is established by APTRANSCO in the State. Thus, it will not be open for the Regulatory Commission to say that whatever the power generated by the private POWER generating companies have to be sold only to the APTRANSCO.

14. It is seen from the order impugned, which was passed by the Regulatory Commission that they are trying to set aside the order and solemn promise given by the State Government earlier to the Private Power Generating Companies for generating and supplying of electricity to identified consumers. Such power is not vested under the Regulatory Commission under the Reform Act. Therefore, the direction given by the Regulatory Commission has to be set aside to that extent and it is accordingly set aside.

15. The learned counsel for the appellants submitted that the appellants companies have already entered into an agreement with third parties (identified consumers) to supply energy at a particular rate. If the private companies are made to sell the power generated by them only to the APTRANSCO, then there will be breach of agreement on the part of the private power generating companies and if the suits for damages are filed by identified consumers for breach of contract, then the private power generating companies will be landed in the debt traps. By the impugned order, it appears to us that while lifting the APTRANSCO from the debt traps, the Regulatory Commission has thrown the private companies into debt traps.

16. After the application for exemption is made by the G.B.R Power Projects Limited, they were made to notify in the newspaper calling for the objections for generating and supplying the energy to the private sector and no objections were received. More over, the APTRANSCO has given no objection by filing the affidavits. Under these circumstances, the Regulatory Commission ought not to have directed the private power generating companies to supply energy only to

APTRANSCO.

17. The learned senior counsel Mr. E. Manohar appearing on behalf of the APTRANSCO submitted at the Bar that the scope of appeal is very limited and the questions and disputes raised by the learned senior counsel for the appellants are not the subject matter of the appeals. This Court is not exercising the powers under Article 226 of the Constitution of India. It is not the review petition and it is only an appeal u/s 39 of the Reform Act and therefore the question raised by the learned senior counsel for the appellants cannot be gone into. We are not in full agreement with the submission made by the learned senior counsel Mr. E. Manohar for the reason that the Regulatory Commission has exceeded its jurisdiction and given directions to the appellants power generating companies beyond the scope of the application made by them for exemption and therefore there was no other alternative for the appellants herein except to file an appeal u/s 39 of Reform Act.

18. The learned senior counsel Mr. E. Manohar further submitted at the Bar that while dealing with the appeals, the Court has to see whether the order passed by the Regulatory Commission is right or wrong. The learned senior counsel relied upon the observations made by the Author Wade in his book on Administrative Law, 7th Edition, which reads as under:

" Review and appeal contrasted: The system of judicial review is radically different from the system of appeals. When hearing an appeal the Court is concerned with the merits of the decision under appeal. When subjecting some administrative act or order to judicial review, the Court is concerned with its legality. On an appeal the question is "right or wrong"? On review the question is "lawful or unlawful"?"

19. We have no hesitation in accepting the aforesaid proposal. We are also aware that we are not exercising the powers under Article 226 of the Constitution of India as we are deciding the appeal u/s 39 of the Reform Act. But, in the present case, we are required to set aside the order on the ground that the order passed by the Regulatory Commission itself is beyond the scope of the prayer made by the appellants companies for granting exemption and directing them to supply the energy produced by them only to APTRANSCO. It is an admitted fact that the applicant had applied for the exemption under the Act. According to our findings, such application was not necessary, but any way they did apply for the exemption. Under these circumstances, the only duty of the Regulatory Commission was to grant exemption or giving finding as to whether such application is required or not. That was the issue before us. But writing a big order, the Regulatory Commission at least in the impugned order have exceeded its jurisdiction and therefore, we are inclined to set aside the said impugned order.

20. Considering the factual and legal positions on record, we are of the considered view that the above appeals are required to be allowed by setting

aside the impugned orders passed by the Regulatory Commission in the above O.Ps.

21. In the result, the appeals are allowed. In the circumstances of the case, we make no order as to costs.