Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal nos. 37 of 2013 and 303 of 2013

Dated:23rd May, 2014

Present:Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member

Appeal nos. 37 of 2013

In the matter of:

G.M.R. Energy Limited …Appellant(s)
No. 25/1, 3rd Floor, Skip House
Museum Road
Bangalore – 560 001

Versus

1. **Karnataka Electricity Regulatory Commission …Respondent(s)**
   6th & 7th Floor,
   Mahalaxmi Chambers,
   # 9/2, M.G. Road
   Bangalore – 560 001

2. **Government of Karnataka**
   By its Principle Secretary
   Depratment of Energy
   Vikasa Soudha
   Dr. Ambedkar Veedhi
   Bangalore – 560 001

3. Karnataka Power Transmission Corporation Limited
K.R. Circle
Bangalore – 560 009

4. State Load Despatch Centre – Karnataka
Ananda Rao circle
Bangalore – 560 009

5. Power Company of Karnataka Limited
Cauvery Bhavan
K.G. Road
Bangalore – 560 001

6. Bangalore Electricity Supply Company Limited
K.R. Circle
Bangalore – 560 001

7. Chamundeshwari Electricity Supply Corporation Limited
No. 927, L.J. Avenue
New Kantharaj Urs Road
Saraswathipuram
Mysore – 570 009

8. Hubli Electricity Supply Company Limited
Saraswathipuram
Mysore – 570 009

9. Humbli Electricity Supply Company Limited
Navaanagar
Humbli – 587 117
Mangalore

10. Mangalore Electricity Supply Company Limited
Paradigam Plaza
A.B. Shetty Circle
Mangalore – 575 001

11. Gulbarga Electricity Supply Company Limited
Station Road
Gulbarga – 585 101

12. GMR Energy Trading Limited
No. 25/1, 3rd Floor
Skip House, Museum Road
Bangalore – 560 001

Counsel for the Appellant(s) : Mr. C.S. Vaidyanathan, Sr. Adv.
Mr. Gopal Jain
Mr. Alok Shankar
Ms. Pavni Poddar

Counsel for the Respondent(s) : Mr. Sanjay Sen, Sr. Adv.
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Mr. M.G. Ramachandran for Govt. of Karnataka
Ms. Swagatika Sahoo
Ms. Poorva Saigal

Appeal nos. 303 of 2013

1. Bangalore Electricity Supply Company Limited
K.R. Circle
Bangalore – 560 001

2. Mangalore Electricity Supply Company Limited
Paradigm Plaza, A.B. Shetty Circle
Mangalore – 575 001

3. Power Company of Karnataka Limited
Cauvery Bhavan, K.G. Road
Bangalore – 560 009

Versus

1. G.M.R. Energy Limited
No. 25/1, 3rd Floor, Skip House
Museum Road
Bangalore – 560 001

2. GMR Energy Trading Limited
No.25/1, 3rd Floor, Skip House
Museum Road
Bangalore – 560 001

3. Government of Karnataka by its Principle Secretary
Department of Energy
Vikasa Soudha Dr. Ambedkar Veedhi
Bangalore – 560 001

4. Chamundeshwari Electricity Supply Corporation Limited
No. 927, L.J. Avenue

New Kantharaj Urs Road
Saraswathipuram
Mysore – 570 009

5. Hubli Electricity Supply Company Limited
P.B. Road, Navanagar
Hubli – 580 025

6. Gulbarga Electricity Supply Company Limited
Station Road,
Gulbarga – 585 101

7. Karnataka Power
Cauvery Bhavan, K.G.. Road
Bangalore – 560 009

8. State Load Despatch Centre – Karnataka
Ananda Rao Circle
Bangalore – 560 009

9. Karnataka Electricity Regulatory Commission
6th & 7th Floor,
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Mr. Alok Shankar
Mr. M.G. Ramachandran for Govt. of Karnataka
Ms. Swagatika Sahoo
Ms. Poorva Saigal
Ms. Pavni Poddar

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

These Appeals have been filed against the order dated 30.11.2012 of the Karnataka Electricity Regulatory Commission determining the rate at which the generating company must be paid by the distribution companies to offset the adverse financial impact suffered by it as a result of State Government's order under Section 11(1) of the Electricity Act, 2003 for supply of power to the distribution companies.

2. While Appeal no. 37 of 2013 has been filed by GMR Energy Ltd., the generating company, Appeal no. 303 of 2013 has been filed by the distribution licensees and Power Company

of Karnataka Ltd, the State owned trading company, responsible for procuring power for supply to the distribution licensees.

3. The facts of the case are as under:

i) GMR Energy Ltd., hereinafter referred to as 'GMR'; has established a barge-mounted Naphtha based generating station having a capacity of 220 MW at Mangalore in the State of Karnataka. It entered into an Agreement for short term supply of power for the period from November 2008 to January 2009 to the distribution licensees through Power Company of Karnataka Ltd., hereinafter referred to as 'PCKL'.

ii) While the supply against the above short term Agreement was continuing, the Government of Karnataka by orders dated 30.12.2008 and 1.1.2009 directed all the generating companies in the State of Karnataka to supply electricity to the State grid under

Section 11(1) of the Electricity Act, 2003 and specified a tariff of Rs. 5.50 per kWh for the supply of electricity.

iii) The above orders of the Government of Karnataka were challenged by GMR before the High Court in Writ Petition which was dismissed by the High Court on 26.3.2010 upholding the orders passed by the State Government. Against the above order of the High Court, Special Leave Petitions were filed by GMR before the Hon'ble Supreme Court.

iv) During the course of proceedings before the Hon'ble Supreme Court, leave was granted to M/s. GMR to withdraw the prayer for tariff for supply of power by GMR before the Hon'ble Supreme Court with a liberty to approach the State Commission with regard to the tariff.

v) Pursuant to above, GMR filed a Petition being OP no. 47 of 2010 before the State Commission seeking

compensation for the electricity supplied by GMR to the distribution licensees during the period when orders of the State Government under Section 11(1) of the Act were in force.

vi) The State Commission by order dated 30.11.2012, disposed of the above Petition and granted the tariff of Rs. 6.90 per unit for the electricity supplied by M/s. GMR to the State grid for the period from January, 2009 to May, 2009 based on the short term market rate for round-the clock power based on bilateral agreements.

vii) Aggrieved by the impugned order dated 30.11.2012, GMR and the distribution licensees and PCKL have filed Appeal nos. 37 of 2013 and 303 of 2013 respectively. While GMR's contention is that the rate granted by the State Commission was inadequate to off-set the adverse financial impact suffered by it consequent to the State Government's order under Section 11(1), the

contention of the distribution licensees and PCKL is that the rate of Rs. 5.50 per unit decided by the State Government was adequate and the rate decided by the State Commission gave windfall profit to GMR.

4. In Appeal no. 37 of 2013, GMR, the Appellant, has made the following submissions:

A) Section 11 (2) of the Electricity Act provides for offsetting the adverse financial impact caused by the generating company as a consequence of a direction given by the Appropriate Government under Section 11(1) of the Electricity Act, 2003. This is a statutory remedy available to the generating company affected by such direction.

B) Section 11(2) of the Act being a measure of restitution, the generating company affected by the Government order under Section 11(1) has to be put back

in the same financial position in which it would have been had the Government order under Section 11(1) not been issued.

C) The use of word 'adverse' signifies the negative/harmful financial impact i.e. financial loss incurred by the generating company.

D) The Appellant was operating as a merchant plant since June, 2008 and was free to sell electricity generated by it in the market at the best available prices. The Appellant was unable to realize the market rates for electricity generated by it as a result of the Government order issued under Section 11(1) of the Act.

E) The Appellant had entered into PPA with GETL, a trading company of GMR group, for supply of entire electricity generated by it to GETL which in turn was to be sold in the market. The proceeds of such sales, net of the

trading margin of GETL, were to be paid to GMR. Based on this arrangement, GETL successfully participated in a tender called by PCKL on behalf of the distribution licensees, for supply of electricity between November 2008 to January 2009. For the month of January 2009, GETL were entitled to the rate agreed to between GETL and PCKL which was Rs. 8.85 per unit. The above said agreement was in the nature of Letter of Intent (LOI) issued to GETL and constituted a valid and binding contract between the said parties. Thus, the State Government had in effect unilaterally amended the said valid contract under the guise of the statutory powers under Section 11(1) of the Act.

F) During the period from 15.11.2008 to 31.12.2008, the Appellant had supplied power @ Rs. 8.85 per unit and payment was received at the same rate. As such the distribution licensees were obliged to purchase the power

at the same rate i.e. Rs.8.85 for the remaining period of contract i.e. 01.01.2009 to 31.01.2009. Therefore, as a result of State Government order dated 1.1.2009, the adverse financial impact on GMR was Rs. 8.81 – Rs.5.50 = Rs. 3.31 per unit, 4 paise being the trading margin of GETL.

G) For the period between February 2009 to 6.6.2009, the Appellant submitted details of procurement of power by the distribution licensees in short term market. The merchant power plant of the Appellant would have realized rate similar to the rate at which the distribution licensees were procuring power in short term market. The landed cost of power purchased by the distribution licensees in short term market during the months February, March, April, May and June were Rs. 7.08/unit, Rs.10.07/unit, Rs.10.31/unit, Rs.10.38/unit and Rs.5.70 per unit respectively. If these rates are considered then

the adverse financial impact suffered by the Appellant is Rs. 121.81 crores.

H) Further, the State Commission restricted the effect of the order upto 31.5.2009 even though Section 11(1) period ended only on 6.6.2009.

I) The State Commission also failed to grant interest to the Appellant.

m) The Appellant has relied on judgment dated 3.10.2012 of this Tribunal in Appeal no. 141 of 2012 and batch in the matter of Himatsingka Seide Ltd. Vs. Karnataka Electricity Regulatory Commission to press the above points.

5. In Appeal no. 303 of 2013, the distribution licensees have made the following submissions:

A) In terms of the State Government's order dated 1.1.2009 under Section 11(1), GMR was required to supply electricity to the State at the rate of Rs. 5.50 per

unit as specified in the said order. The State Government also specified the basis to arrive at this tariff of Rs. 5.50 per unit. On the date of offer for supply of power in short term for the period November 2008 to January 2009 by GMR against the tender by PCKL, i.e. on 30.10.2008, the Naptha price was Rs. 46.12 per kg and variable cost of generation worked out to Rs. 8.443 per unit. Meanwhile, the Government of India reduced the Import Duty on Naptha from 5% to 0% with effect from 1.12.2008. Negotiations were held with GMR to reduce the price of power being supplied by them to the distribution licensees against the agreement of short term power supply. Meanwhile, there was steep fall in the prices of Naptha from Rs. 46.12 per kg as on 30.10.2008 to Rs. 23.170 per kg as on 16.12.2008. Accordingly, variable cost of GMR's plant worked out to Rs. 4.241 per unit. GMR had been requested to pass on the benefit of reduction in price of Naphtha as also of import duty against the short term

supply order prior to issuance of State Government's directions under Section 11(1). Thus, the price of Rs. 5.50 per unit decided by State Government was appropriate and no further compensation ought to have been decided by the State Commission.

B) Section 11(1) of the Electricity Act is a special provision, providing power to the State Government to issue directions to generating companies for supply of electricity when extra-ordinary circumstances arise, such as acute shortage of electricity. It is a provision that is invoked in emergency situations. The power under Section 11(1) not only includes the direction to maintain and operate the generating unit, but also the terms and conditions for such directions.

(C) Section 11(2) provides that the State Commission "may" offset the adverse financial impact. Sub-Section (2)

is not a mandatory provisions which is invoked in every case of Section 11 direction, but is enabling provision wherein the tariff on cost admitted under Sub-Section (1) does not offset the adverse financial impact in relation to operation and maintenance of the generating station. The State Commission may offset the adverse financial impact under-Section 11(2) but the tariff has not to be determined by the State Commission.

D) The regulatory regime has been introduced under Section 11(1) under emergency situation. Thus, under such emergency condition the financial compensation envisaged under Section 11(2) cannot be linked to market prices or market conditions.

E) Only in cases where the State Commission comes to the conclusion that tariff/cost of operation and maintenance of a generating station under Section 11(1) is not sufficient and causes loss to the generator, is the

State Commission required to exercise the power under Section 11(2). The impugned order is wrong as the State Commission has failed to examine the adequacy of the tariff/cost provided in the State Government's order and the reasons in support thereof.

F) In emergency situation arising due to acute shortage of power, the market forces are necessarily distorted. If market dynamics is the touchstone for application of Section 11, then there is no purpose for procurement of electricity under Section 11(1) as it is always open for the distribution licensees to procure electricity from the market at the market price.

G) The touchstone for interpretation and application for a provision such as Section 11 needs to be public interest and not profiteering by the generating company in case of acute shortage of electricity.

(H) The Appellants in Appeal No.303 of 2013 have relied on (2009) 16 SCC 659 in the matter of Tata Power Ltd. Vs. Reliance Energy Ltd. to press this point.

I) The concept of regulatory jurisdiction and power to regulate itself requires the availability of commodity at fair prices. The purpose of regulation is to ensure fair prices and not leave to market forces for price determination. The power to regulate has been settled by the Hon'ble Supreme Court in (1964) 7 SCR 456 in the matter of V S Rice and Oil Mills Vs. State of A.P.

J) There are catena of judgments rendered by the Hon'ble Supreme Court where it has settled the principles to be applied in interpretation of statutory provisions for procurement of essential commodities in public interest. The same principles are to be made applicable to the present case.

K) The Section 11 of the Act provides regulatory jurisdiction to the State in extraordinary circumstances. This, in any event, cannot provide for a higher benefit to the generator in extraordinary circumstances. The purpose of Section 11 is to ensure availability of power at fair price and, therefore, the generator cannot under any circumstances be entitled to a tariff higher than the regulated tariff under Section 62 of the Act.

L) GMR had set up the 220 MW plant in the State based on PPA dated 15.12.1997 with the erstwhile Karnataka Electricity Board. The PPA was valid for a period of 7 years from the Commercial Operation Date of the plant and has since expired on 7.6.2008. During this period, the entire fixed cost of the generating unit was paid for by the distribution licensees and consequently the consumers. Thus, the tariff of Rs. 5.50 per unit decided by

the State Government is more than adequate as it covers the variable cost which is in the regime of Rs.4.241 per unit, along with a reasonable return.

M) The finding of the Tribunal in Himatsingka Seide case is not applicable to the present case as in that case the State Government's order did not specify the tariff to be paid. Further, the Tribunal in that case was not dealing with the question of law regarding principle to be applied for determining the adverse financial impact on the generator.

N) The claim of GMR in Appeal no. 37 of 2013 for payment of tariff of Rs. 8.85 per unit for the month of January 2009 and the price of purchase by the distribution licensees from outside the State for the other months has no merit as statutory order under Section 11(1) overrides the contract that was entered into for procurement by the distribution licensees from a trading company. Further,

reason for reduction of tariff from Rs. 8.85 to Rs.5.50 per unit was specially mentioned in the State Government's order which has attained finality.

6. Government of Karnataka though a party to the petition before the State Commission did not participate in the proceeding before the State Commission. However, the State Government has filed a counter affidavit in Appeal no. 37 of 2013 submitting the following:

A) The State Government had issued the directions for sale of electricity by the Appellants to the distribution companies in the State to enable them to maintain the supply of electricity to public at large in view of the extra-ordinary circumstances then existing and after duly considering the quantum of tariff that should be admissible to the Appellant. The State Government considered the relevant aspects including the price of Naphtha prevalent at the relevant time particularly the significant reduction in

Naphtha price. The matter regarding the challenge to the validity of the action of the State Government has become final with judgment of the Division Bench of the High Court dated 26.3.2010 upholding the directions given by the State Government.

B) In terms of Section 11, upon the State Government exercising the powers under Sub-Section (1), the function of the State Commission under Sub-Section (2) is only to oversee at the instance of the generating company whether there is any adverse financial impact on the generator and if so to the extent of such adverse financial impact, the measures to be taken to offset the same. The above provision does not provide for payment of compensatory damages as in the case of contractual relationship where the measures of damages under Section 73 of the Indian Contracts Act, 1872 is related to market price prevalent at the relevant time. The tariff to be

paid to the generating company which has been mandated is not damages as per Section 73 of the Indian Contract Act, 1872 but an amount which offsets the adverse financial impact, namely the generating company is not out of pocket by obeying such statutory directions.

(C) The generator cannot be said to be subjected to adverse financial impact unless the price payable to it is less than the regulated tariff that may be determined under Section 61, 62, 64 and 86 of the Electricity Act, 2003. It cannot be that the generating companies are to be compensated with market prices prevalent. If so, the vesting of the statutory power with the State Government to issue directions under Section 11(1) will be redundant.

(D) The State had provided various facilities for the generating stations set up in the State and such facilities had been enjoyed by the Appellants under the State

Support Agreement dated 12.7.2000 wherein substantial fiscal and other benefits were provided to the Appellant.

(E) The generating station of the Appellant has been functioning for many years in the business of generation and sale of electricity and making gains. The capital cost of the generating station of the Appellant had been serviced long back during the period when Power Purchase Agreement ('PPA') was existing between the Appellant and the Karnataka Utilities from the Commercial Operation Date of the project upto June 2008 (7 years). Thus, the cost of generation of electricity by the Appellant at the relevant time when Section 11(1) direction was in operation, was much less. The price of Rs. 5.50 decided by the State Government adequately covers all the cost and expenses of the Appellant plus a significant return.

(F) The scope and powers of the State Commission under Section 11(2) of the Act was to consider whether Rs. 5.50 per unit determined by the State Government was not adequate to cover the cost and expenses of the Appellant besides giving a reasonable return.

(G) The State Government in its affidavit has given calculations to establish that even with price of Rs. 5.50, the Appellant has been benefitted.

(H) The rate agreed in the Agreement entered into between the distribution licensees and the Appellant for short term supply would not be applicable for January 2009, firstly as the State Government's order under Section 11(1) overrides every agreement and secondly as Clause 15 of the Letter of Intent indicated that in case of any restriction imposed by the State on any establishment for sale or purchase of power, the same shall be binding on both the parties.

7. We have heard Shri C.S. Vaidyanathan, Learned Senior Counsel representing GMR, Shri Sanjay Sen, Learned Senior Counsel for the distribution licensees and other utilities of Karnataka and Shri M G Ramachandran, Learned Counsel for the State Government on the above issues in both the Appeals.

8. In view of the rival contentions of the parties, the following questions would arise for our consideration:

i) Whether the State Government is empowered to determine the tariff and terms and conditions of power supply by the generating companies to the distribution licensees against the directions given under Section 11(1) of the Electricity Act, 2003?

ii) Whether the State Government can regulate the rate and other terms and conditions of supply by a

generating company during the period when Section 11(1) is in vogue under Essential Commodities Act?

iii) Whether the role of the State Commission under Section 11(2) of the Electricity Act, 2003 is restricted to examine on an application by a generating company whether the rate determined by the State Government for supply against directions under Section 11(1) meets the expenses of the generating station plus a reasonable return and order compensation only if it is found that the generating company is not able to meet its expenses in supplying power under Section 11(1) directions?

iv) Whether the State Commission was correct to interpret the 'adverse financial impact on the generating company' as a consequence of the directions of the State Government under Section 11(1) of the Act and link it to the rate that the

generator would have got in the market for sale of power had there been no Section 11(1) direction?

v) Whether the State Commission has to determine the rate of supply by the generator under Section 11(1) directions on the basis of principles adopted in determining the tariff under Section 61, 62 and 86(1)(b) of the Act?

vi) Whether the fact that the Appellant had been supplying power to the erstwhile Karnataka Electricity Board under a PPA dated 15.12.1997 which was valid till 7.6.2008 and the fiscal concessions given by the State Government at the time of setting up the power project by the Appellant have to be considered by the State Commission while determining the adverse financial impact on the generator as a consequence of Section 11(1) directions?

vii) Whether GMR is entitled to tariff of Rs. 8.85 per unit for the month of January, 2009 as per the agreement for short term supply to the distribution licensees existing prior to invoking of Section 11(1) by the State Government?

viii) Whether the State Commission has erred in not considering the rate at which the distribution licensees procured power in short term market during the period February 2009 till the end of Section 11(1) direction period for deciding of adverse financial impact?

ix) Whether the State Commission has erred to restrict the period of Section 11(1) directions up to 31.5.2009 instead of up to 6.6.2009 as claimed by GMR?

x) Whether GMR is entitled to interest for delay in payment by the distribution licensees/PCKL ?

9. All the above issues are interconnected and therefore being dealt with together.

10. Let us first examine the findings of the State Commission in the impugned order. The relevant extracts of the impugned order are reproduced below:

> *"30. This Commission had an occasion to deal with the issue of offsetting the adverse financial impact of the Generating Companies, who had supplied electricity as per the statutory Orders issued under Section 11(1) of the Electricity Act, 2003, in OP No. 16/2010. After considering the meaning of 'adverse financial impact' as contemplated under Section 11(2) of the Electricity Act, 2003, and duly following the observations of the Hon'ble High court of Karnataka in its Order dated 26.3.2010 passed in W.P. Nos.590 and 591 of 2009 filed by the Petitioner, this Commission, by its Order dated 24.3.2011, held as under:*
>
> > *"18. We have considered the rival contentions as summarized above. In our view, while interpreting the phrase of `adverse financial impact" used under Section 11(2) of the Electricity Act, 2003, we have to keep in mind that the entire economics of a generating company depends upon the revenues*

received by it over a long period of time and not for a few months only. Unless a generating company has a long term power purchase agreement, its revenues do fluctuate depending upon the price for power prevailing in the market for short term transactions. The Hon' ble Division Bench of the Karnataka High Court at Para 84 of its judgment in Writ Petition No.590 & 591 of 2009 has observed that "Adverse Financial Impact means the electricity generated by virtue of direction issued by the Government is not fetching the generating company the price what it would have fetched in the event of their supplying to the licensee or customer, i.e., less than the same".

19. In the light of the observations of the Hon'ble High Court cited above, as also the decision of this Commission in OP No. 24/2008, we have come to the conclusion that offsetting adverse financial impact of a generator would mean fixing a rate keeping in view both the revenue that a generator could have realized by selling the power in the short term market, subject to the said rate covering the costs of generation, so that the generating company does not incur a loss. In these cases, we have found that the estimates of the cost of generation were vary from one company to another as also one category of generators to another. We have therefore come to the conclusion that for the present purpose, it would be adequate if the rates determined are generally what generating companies could realize from the market when they are generating power without being compelled by Orders under Section 11 of the Act. The rates

prevailing in the market during the relevant period therefore become relevant for our consideration.

20. The short term power market mainly consists of power traded through licensed traders, and that supplied on the basis of day ahead bids in two power exchanges. We do not think that the prices prevailing in the power exchanges can be the appropriate basis to fix the rates as the quantum of power traded through the exchange is hardly about 5 % of the total power consumed in the country and the rates in the exchange keep fluctuating very frequently. In our view, the price of power supplied through bilateral contracts and traders offers a better indication of the price that a generating company could have realised for its power for short term sales of a few weeks or months. Even these prices vary from month to month. Further, there are costs associated with marketing of power through traders and transmission costs which need to be suitably discounted to arrive at the revenues realized by the generating companies.

21. We have looked at the statistics published by CERC relating to short term power transacted through traders during the period between April and June 2010. The average prices during these months were Rs.5.68 in April, Rs.6.26 in May and Rs.5.57 in June 2010 for energy supplied on round the clock basis. After discounting the marketing expenses and transmission charges involved, it would be reasonable in our opinion to assume that short term sales of power would have resulted in net revenues of about Rs.5.00 per kwh during the above period. We have also seen that the offers

received from the traders included a guaranteed price of only Rs.5/- to some of the petitioners in these cases."

31) The principle adopted by this Commission in the above OP No.16/2010 and connected cases has been upheld by the Hon',ble Appellate Tribunal for Electricity (ATE), vide its Order dated 3.10.2012 passed in Appeal Nos.141 and 142 of 2011.

32) During the course of arguments, the learned Senior Counsel for the Petitioner has also fairly submitted that what could be considered by this Commission is not the highest market price, but a fair or true market price.

33) The Petitioner, in support of its claim, has relied upon its Agreement with GETL, wherein the Trader has agreed that it would make all efforts to secure the highest possible rate based on market dynamics, which, in other words, means that the Petitioner was expecting, at the most, to get the market Price minus trading margin."

"35) In our view, the adverse financial impact claimed by the Petitioner for the month of January, 2009 and for the months of February, 2009 to May, 2009, has to be the same and not different, as sought to be made out by the Petitioner.

36) Though it is true that the Petitioner had supplied electricity for the month of December, 2008 at the rate of Rs.8.85 per Unit, as agreed to in the LoI issued by Respondent No.4 –PCKL, the same was modified by the Government of Karnataka in exercise of its powers

conferred under Section 11(1) of the Electricity Act, 2003 and the Petitioner was ordered to supply electricity at the rate of Rs.5.50 per Unit. The validity of this Government Order is not before this Commission, nor is this Commission competent to decide on the same under Section 86(1)(f) of the Electricity Act, 2003. Consequently, we have to adopt the principle adopted by this Commission in OP No.16/2010 and connected cases, which has been approved by the Hon'ble ATE, for the months from January, 2009 to May,2009 in arriving at the adverse financial impact suffered by the Petitioner."

"38) The weighted average price of electricity traded on short-term basis through traders during the period from January, 2009 to May, 2009 works out to Rs.7.00 per Unit. However, the actual price that could be realized by the Generator out of this price will be somewhat less than the nominal price, i.e., after deducting certain expenses like the traders' margin at 4 paise per Unit, charges for Open Access paid to SLDC and 1% to 2% discount often offered on the invoice as normal trade practice. We have seen from a number of Power Purchase Agreements entered between Generators and Traders that the transmission losses from the point of injection to the State Transmission Network by the Generators and up to the delivery point, including inter-State Transmission Network, if any, are borne by the buyers of the energy. Therefore, in our view, the expenses to be deducted from the price mentioned above do not include the transmission losses and transmission charges. While some of the charges stated above vary from case-to-case, we feel that deduction of ten paise per Unit should be adequate to cover such expenses, including the Trader's margin of 4 paise.

Therefore, we determine that payment of Rs.6.90 per Unit for the electricity supplied during the disputed period is appropriate to offset the adverse financial impact suffered by the Petitioner. Accordingly, we order that the Respondents shall pay to the Petitioner the difference between Rs.6.90 per Unit and the actual payments already made, i.e., Rs.5.50 per Unit for all the electricity supplied from the date of the Government Order to end of the period mentioned in the Government Order, i.e., 31.5.2009, within 4 (four) weeks from the date of this Order. Issue No.2 is answered in the above terms.

39) As regards the month of June, 2009, we cannot deal with the same in these proceedings, as the Government Order under Section 11(1) of the Electricity Act, 2003, came to an end on 31st May, 2009. Considering that the rate of Rs.5.50 per Unit which the Respondents have paid and supply of electricity was only for six days, we feel the same need not be re-opened."

11. The findings of the State Commission in the impugned order are summarized as under;

i) The Commission had dealt with the issue of offsetting the adverse financial impact of the generating companies who had supplied electricity as per statutory orders issued under Section 11(1) of the Act in OP No.

16 of 2010. After considering the meaning of 'adverse financial impact' as contemplated under Section 11(2) of the Act and following observations of the Hon'ble High Court in order dated 26.3.2010, the State Commission had held that offsetting adverse financial impact of a generator would mean fixing a rate keeping in view both the revenue that a generator could have realized by selling the power in the short term market, subject to the said rate covering the costs of generation, so that the generating company does not incur a loss. The price prevailing in the power exchange was not found to be appropriate as the rates keep fluctuating very frequently. Therefore, the State Commission considered the average rate at which the power was transacted by the traders during the relevant period under round the clock contracts as per the statistics published by the Central Commission after discounting the marketing expenses and transmission charges involved.

ii) The principle adopted by the State Commission in OP no. 16 of 2010 was upheld by the Appellate Tribunal vide judgment dated 3.10.2012 in Appeal nos. 141 and 142 of 2011.

iii) The same principle was adopted for determining the adverse financial impact on GMR in the present case. The State Commission computed the weighted average price of electricity traded on short term basis through traders during the period January 2009 to May 2009 at Rs.7 per unit based on the statistics published by the Central Commission. After deducting the trading margin, charges for open access paid to SLDC, etc., the State Commission decided that the payment of Rs. 6.90 per unit for the electricity supplied during the period of dispute would be appropriate to offset the adverse financial impact suffered by GMR. Accordingly, the

distribution licensees was directed to pay difference of Rs. 6.90 per unit and Rs. 5.50 per unit for the electricity supplied from 1.1.2009 to 31.5.2009 within 4 weeks from the date of the order.

iii) Though the GMR had supplied electricity for the month of December, 2008 at the rate of Rs. 8.85 per unit as per the LOI issued by PCKL, the same was modified by the State Government in exercise of power conferred under Section 11(1) of the Act and GMR was ordered to supply electricity at the rate of Rs. 5.50 per unit. Therefore, the claim of GMR for rate of Rs. 8.85 per unit for January 2009 was not accepted.

iv) The claim of GMR for supply during June 2009 was rejected as the Government's order under Section 11(1) came to an end on 31.5.2009 and considering that the licensees had paid @ R. 5.50 for the electricity supplied

from 1st June to 6th June, 2009, the State Commission did not consider to reopen the matter.

12. Let us now examine the judgment of this Tribunal in judgment dated 3.10.2012 in Appeal nos. 141 of 2012 and batch reported as 2013 ELR (APTEL) 0106 in the matter of Himatsingka Seide Ltd. Vs. KERC & others.

13. The issue in the above Appeals was pertaining to fixation of price for supply of power by the generating companies to the distribution licensees in compliance with the directions of the State Government under Section 11(1) of the Act for the period from 8.4.2010 to 10.6.2010. The questions framed in this Appeal no. 14 of 2012 & batch by this Tribunal were as under: .

> ***"i) Whether the State Commission was right in fixing a uniform rate of Rs. 5/- per unit without considering the actual cost of production and the adverse financial impact on the generating stations of the Appellants in Appeal no. 141 and 142 of 2011 due to***

implementation of the State Government's order issued under Section 11(1) of the Act?

ii) Has the State Commission erred in determining the rate of power for supply of power by the generators to distribution licensees in compliance of the State Government's directions u/s 11(1) of the Act at Rs. 5/- per unit based on the rates prevailing in short term trading after discounting for marketing expenses and transmission charges without actually determining these expenses?

iii) Whether the State Commission has jurisdiction to interfere with the order of the State Government issued u/s 11(1) deciding the rate of Rs. 5/- per unit for the entire supply of power by biomass generators having PPAs with the distribution licensees to the disadvantage of the generators?

iv) Was the State Commission correct in determining the normal supply obligation under the PPA by biomass generators based on the average generation during the corresponding months of previous three years without considering the actual generation from the biomass plant which was having a declining trend over the years due to unviable PPA tariff?

v) Whether the Appellants are entitled to interest for delay in payment of charges by the distribution licensees?"

14. The findings of the Tribunal on the first two issues was as under:-

> ***"9.5 The findings of the State Commission are summarized as under:***
>
> ***i) Offsetting adverse financial impact on a generator which supplied electricity in compliance of the directions of the State Government under section 11(1) would mean fixing a rate keeping in view the revenue the generator could realize in short-term market subject to the condition that rate covers the cost of generation so that the generating company does not incur a loss.***
>
> ***ii) Short-term market mainly consists of power traded through trading licensees and that supplied on the basis of bids in the Power Exchange on day to day basis. The rate in Power exchange fluctuate very frequently. Thus price of power supplied through traders though bilateral contracts is considered appropriate.***
>
> ***iii) According to statistics published by the Central Commission, the average price of power traded has been Rs. 5.68 in April,***

Rs. 6.26 in May and Rs. 5.57 in June, 2010.

iv) After discounting for marketing expenses and transmission charges involved, rate of Rs. 5 per KWh is decided.

v) The offers received from traders by some of the generators also included a guaranteed
price of Rs. 5/- per unit.

9.6 We are in full agreement with the principle that the State Commission adopted in offsetting the adverse financial impact on the generators for supplying electricity in compliance of the directions of the State Government u/s 11(1) of the 2003 Act. The Appellants could have realized the revenue from supply of electricity at the rates prevailing in the short-term market during the period under consideration. Accordingly, we do not find any infirmity in the State Commission arriving at average short-term market price of Rs. 5.68, Rs. 6.26 and Rs. 5.57 per unit respectively prevailing in the months of April, May and June, 2010 based on the statistics of price of traded power published by the Central Commission. There is also no infirmity in the principle adopted by the State Commission to determine the price of power supply after discounting the marketing expenses and transmission charges. However, we agree with the Appellants that the State

Commission has erred in fixing the price at Rs.5/- per unit without determination of marketing expenses and transmission charges. It is also not understood that when the average rates in the months of April, May and June, 2010 were Rs. 5.68, Rs. 6.26 and Rs. 6.26 respectively how a rate of Rs. 5/- per kWh for all the three months was decided. It would mean that the discount on account of marketing expenses & transmission charges was Rs. 0.68, Rs. 1.26 and Rs. 0.57 per unit during the months of April, May and June 2010 respectively. However, we do not find any explanation in this regard in the impugned order."

"9.8 If the traded price is for the energy supplied at the point of interconnection of the network of the State Transmission Licensee with the Inter-State Transmission system then for generators directly connected to State Transmission licensee's network, the transmission charges/system losses of the State Transmission Licensee will have to be discounted. The marketing expenses could be the trading margin of the trader.

9.9 In view of above, we direct the State Commission to determine the discount on account of marketing expenses and transmission charges. Accordingly, the rate for supply of energy by the Appellants during the period April-June, 2010 may be re-determined within a period of 45 days from the

date of this judgment. However, we are not giving any directions regarding calculation of the marketing expenses and transmission charges, etc. and the State Commission shall determine the same after hearing the Appellants."

"9.12We have examined the generation cost data furnished by the Appellants in Appeal nos. 141 and 142 of 2011. We observe that the claims made by the Appellants are based on the principles used in determining the tariff of a generating company for supply of power for long term under Section 62 of the Act on cost plus basis and not on the principles to be adopted for short term trading for a period of three months. The Appellants themselves have argued that principles of tariff determination u/s 62 will not be applicable in this case where the rate is to be determined u/s 11(2) by the State Commission. Thus the Appellants can not claim the tariff on the principles for determination of tariff for long term basis on cost plus basis u/s 62 of the Act. We feel that for Appellants' captive power plant the price based on short term market rate decided by the State Commission should definitely cover the incremental cost of generation to generate the additional power for supply to the distribution licensee plus a reasonable margin, so that the generator does not suffer loss."

"9.14 The Appellants Power Plants are cogeneration plants and have been installed for

captive use and are expected to have a high efficiency. Only the power surplus to the requirement of the captive use is sold by the Appellants. At this stage, for the purpose of the present cases, what is required to be seen by us is that the Appellants do not incur any loss in supplying power in compliance of the State Government's direction when the price is fixed by the State Commission on the basis of price of electricity in the short term market. We are not inclined to go into the estimated loss of profit considering the return on investments on the generation assets of the Appellants which will be depending on the perceptions of generators regarding return on investment and as the supply was for only on short term in which the principles of cost plus tariff including specified return on investment will not be applicable. However, we have to ensure that the price of supply decided by the State Commissions covers the variable cost plus a margin. We find that the variable cost of the plant even on the parameters and calculations furnished by the Appellants which in our opinion are on higher side, is less than Rs. 5/- per unit. Further, the case of the Appellants is that they have not been able to recover the cost of generation calculated with the required return on capital investment, depreciation, etc. but it is not their case that they have not been able to recover the incremental cost of generating the additional power for supply to the distribution licensee. Thus, we reject the claim of the Appellants regarding fixing of

price based on cost of production at Rs. 6.50 per unit."

15. On the third issue the Tribunal has held as under:

"10.6 We find that the State Commission has not exercised its powers u/s 62 for tariff determination in the present case but has determined the rate u/s 11(2) of the Act as has been expressly recorded in the impugned order. The rates determined by the State Commission are based on the average short-term market rates for power traded through the trading licensees during the period. However, in the case of biomass generators having existing PPAs with the distribution licensees, it held that only the supply over the normal supply under the PPA will be subjected to the rate determined u/s 11(2). Admittedly, the PPA was in vogue during the period when directions were given to the Appellants by the State Government to maximise generation and the PPA had not been suspended during that period. Therefore, the Appellant was entitled to the rate determined u/s 11(2) of the Act for the energy supplied over and above the quantum the Appellant would have supplied had there been no Government direction. Therefore, for quantum of supply which would have been made as per the PPA which the State Commission has termed as 'normal PPA obligation', the Appellant is entitled for PPA tariff which is the tariff determined by the State Commission u/s 62. The Appellant would be entitled to rate determined u/s 11(2) for the quantum of energy supplied over and above the quantum that the Appellant would have supplied in

terms of the PPA, had there been no directions given by the State Government u/s 11(1) to maximize generation."

"10.8 We find that in the present case the State Government only fixed a rate of Rs. 5/- per unit subject to the approval by the State Commission and had directed the distribution licensees to approach the State Commission. In GMR Energy case referred to by the Appellant, M/s. GMR Energy and others had challenged the State Government's order u/s 11. The High Court while dismissing the Writ Petitions, had indicated that the Appellants could seek remedy u/s 11(2) from Appropriate Commission if the State Government order had any adverse financial impact on them. The findings in the judgments referred to by the learned counsel for the Appellant will be of no use in this case."

"10.10 However, in the present case the State Government in its order clearly stated that the rate of Rs. 5/- per kWh was subject to the approval of the State Commission and the distribution licensees were directed to approach the State Commission in this regard. Therefore, the findings in the cases referred to by the Appellant will not be relevant in this case. The doctrine of promissory estoppel is not applicable as firstly the State Government's order expressly stated the fixation of tariff subject

to approval of the State Commission and secondly, there is no estoppel against the statute as only the State Commission is authorized to offset the adverse financial impact on the generator under Section 11 (2) of the Act.

10.11 In view of above, we hold that the State Commission has jurisdiction u/s 11(2) of the Act to decide the rate of power supplied by the Appellant in compliance of the State Government's direction u/s 11(1) of the Act."

16. On the fourth issue the Tribunal has held as under:

"11.8 However, we find that the PPA tariff is much more than the variable charges at the power plant. The generation over and above the normal supply obligation as decided by the State Commission will be payable at Rs. 5/- per kWh. Thus, there can be no loss to the Appellant due to additional generation made during the period April-June 2010. We feel that the Appellant cannot raise and State Commission cannot address the issue related to inadequate PPA tariff determined under Section 62 of the Act in the present proceedings for determination of rate of supply by the State Commission u/s 11(2)."

17. On the last issue regarding interest for delay in payment the Tribunal held as under:

> ***"12.1 It is true that the payment should have been made to the Appellants for the energy supplied on the directions of the State Government within a reasonable time after raising of invoice. However, the rate for supply was determined by the State Commission only on 24.3.2011. Thus, the delay in payment has also caused adverse financial impact on the Appellants and the Appellants are required to be compensated on this account as per Section 11(2) of the Act.***
>
> ***12.2 Accordingly, the State Commission shall consider the delay in payment to the Appellants and pass orders for appropriate interest to be paid to the Appellants by the distribution licensee for delay in actual payment after the supply was made."***

18. The summary of findings of the Tribunal in Himatsingka Seide case are as under:

> ***"13.1 We are in agreement with the principle adopted by the State Commission in offsetting the adverse financial impact on the generators complying with the directions of the State Government u/s 11(1) of the Act by fixing rate keeping in view the revenue that a generator***

could have realized by selling power in the short-term market, subject to the said rate covering the cost of generation, so that the generating company does not incur a loss. Accordingly, we do not find any infirmity in the State Commission arriving at average short-term market price of Rs. 5.68, Rs. 6.26 and Rs. 5.57 per unit respectively prevailing in the months of April, May and June, 2010 based on the price of traded power as per the statistics published by the Central Commission. There is also no infirmity in the decision of the State Commission to fix the price after discounting the marketing expenses and transmission charges. However, the State Commission has not actually determined the marking and transmission expenses and has arbitrarily fixed the price at Rs. 5/- per kWh. Accordingly, we direct the State Commission to determine the discount on account of marketing expenses and transmission charges and redetermine the rate of supply of energy to be paid to the generators during the period April-June 2010, after hearing the Appellants.

13.2 The Appellants are entitled to payment of interest charges for the delay in actual payment by the distribution licensees."

19. On going through the above judgment, we are of the view that the findings of the Tribunal in Himatsingka Seide case will

squarely apply to the present case. In the present case, the State Commission has also followed the same principle as followed in the order dated 24.3.2011 which was upheld by the Tribunal in appeal no. 141 of 2012.

20. Admittedly, GMR's generating station prior to the State Government's order under Section 11(1) was operating as a merchant power plant selling electricity in the short term market. In fact the GMR's generating station entered into an agreement with the trading company for supply of power and the trading company in turn had participated in the tender for short term procurement of power by PCKL on behalf of the distribution licensees for the period November 2008 to January 2009 and was given Letter of Intent by PCKL for supply of power @ Rs. 8.85 per unit. In fact for supplies made during November and December 2008 to the distribution licensees against this LOI, payment @ Rs. 8.85 per unit was made to GMR.

21. Subsequent to the period of this short term arrangement, but for the directions of the State Government under Section 11(1), GMR would have sold its power in the market as a merchant power plant as its PPA for long term supply with the distribution licensees had expired in June 2008 and since then it was selling power in the short term market. Therefore, there is no infirmity in the State Commission's decision to link the price of power supplied by GMR against directions under Section 11(1) of the State Government to the market rate of power. But, for the order of the State Government for supply of power @ Rs. 5.50 per unit, GMR would have sold its power in the market and, therefore, the adverse financial impact of the directions under Section 11(1) will be the difference between the rate that GMR would have got in the short term market and the rate fixed by the State Government i.e. Rs. 5.50 per unit.

22. The only check that is to be exercised is that the rate of power decided by the State Commission should cover the variable cost of the power plant plus a reasonable profit. This is necessary to cover the eventuality when the market rate is lower than the variable cost of generation. Under such a condition, the generator would not like to run its power plant as the market rate would not compensate even for the expenses incurred for operating the plant. If under such an eventuality, the generator has to run the power plant to supply power to the State Grid against directions of the State Government under Section 11(1), then the State Commission under Section 11(2) of the Act, shall compensate the power plant to cover the variable cost plus a reasonable margin of profit. In the present case the short term market price prevailing during the period of Section 11(1) directions as decided by the State Commission, covers the variable cost of the power generation and, therefore, the compensation has to

be based on basis of the short term market price as determined by the State Commission.

23. One of the main features of the Electricity Act, 2003 as also mentioned in the Statement of Object and Reasons of the Act, is that generation has been delicensed. Only Hydro projects need the approval of the Central Electricity Authority regarding the issues of dam safety and optimum utilization of water resources. Trading has also been recognized as a distinct activity and according to Section 66 of the Act, the State has to promote the development of market including trading.

24. Trading licences have been granted by the Central and State Commissions on the basis of their Regulations. Power exchanges have also been set up to facilitate short term transactions at a central platform. All these measures have helped in development of power market in pursuance of the provisions of the Electricity Act. Admittedly, GMR's power

station was operating as a merchant power plant having no long term agreement for sale of power prior to evoking of Section 11(1) by the State Government, and was selling power in short term market at the prevailing market rates as per law. By invoking Section 11(1), GMR was directed to supply power to the State grid/distribution licensees at Rs. 5.50 per unit, thus depriving it of the rate of power that GMR would have got in the market.

25. Learned Counsel for the distribution licensees and State Government have argued that the State Government can regulate the rate and terms and conditions of supply during the period when Section 11(1) is in vogue under the Essential Commodities Act. They have also quoted a number of rulings of the Hon'ble Supreme Court regarding regulation of price of essential commodities under the Essential Commodities Act.

26. We are not able to agree with the above contention of the Learned Senior Counsel for the distribution licensees and the State Government. Firstly, the electricity is not an essential commodity within the meaning of the provisions of the Essential Commodities Act, 1955 or any other statute. Secondly, the Electricity Act, 2003 is a complete code and therefore the compensation to the generating company for offsetting any adverse financial impact of the directions of the State Government under Section 11(1) has to be decided as per the provisions of the Electricity Act, 2003.

27. Section 11 of the Electricity Act, 2003 is reproduced as under:

> *"11. Directions to generating companies.-(1) The Appropriate Government may specify that a generating company shall, in extraordinary circumstances operate and maintain any generating station in accordance with the directions of that Government.*
>
> ***Explanation**.- For the purposes of this sections, the expression "extraordinary circumstances" means circumstances arising out of threat to security of the State, public order or a natural calamity or such other circumstances arising in the public interest.*

(2) The Appropriate Commission may offset the adverse financial impact of the directions referred to in sub-section (1) on any generating company in such manner as it considers appropriate."

28. Thus, the State Government can only give directions under Section 11(1) for operation and maintenance of the generating station in accordance to its directions. The State Commission alone has been empowered under Section 11(2) of the Electricity Act to offset the adverse financial impact on the generating company as a result of operating and maintaining the power plant as per the directions of the State Government under Section 11(1). The State Government is not empowered to determine the rate or terms and conditions at which the generating companies will supply power to the State Grid against directions u/s 11(1) of the Act. The rate specified by the State Government in the order regarding direction under Section 11(1) is only a rate at which the distribution licensees have to make payment to the generating company

in the interim period till the State Commission under Section 11(2) decides the compensation to be given to the generating company, if any, to offset the adverse financial impact of the directions of the State Government under Section 11(1).

29. Learned Counsel for the distribution licensees and State Government have argued on use of word 'may' in Section 11(2) to emphasize that the State Commission may intervene under Section 11(2) only if the rate determined by the State Government is inadequate to cover fully the expenses of cost of power generation plus a reasonable return. We are unable to accept the contention of the Learned Senior Counsel for the distribution licensees and State Government for the following reasons:

i) The direction under Section 11(1) by the State Government may not result in any adverse financial impact on the generating company. For example in view of draught in the State, the State Government may direct

the generating companies to defer the planned outage for annual maintenance or overhaul of generating unit(s) or may direct a multipurpose hydro power station to release more or less water through the machines than the schedule for a specified period or may direct a power plant to schedule generation in a desired manner without having any impact on the overall generation. In such cases there may not be any adverse financial impact on the generating unit and, therefore, no determination may be required under Section 11(2). Thus, under certain conditions there may not be a need to determine adverse financial impact under Section 11(2).

ii) Rate paid by the distribution licensee for supply made under Section 11(1) directions may be adequate and the generating company may not raise any claim under Section 11(2).

Therefore, use of word 'may' in Section 11 (2) is because there may not be any adverse financial impact on the generator due to Section 11 (1) directions in certain circumstances. It does not mean that the Section 11 (i) empowers the State Government to decide the tariff at which the generator will supply electricity to State Grid under Section 11 (1) directions on the basis of cost of generation.

30. Hon'ble Supreme Court in the matter between Tata Power Co. Ltd. Vs. Reliance Energy Ltd. reported as (2009) 16 SCC 659 has held as under:

> *"78. Electricity is not an essential commodity within the meaning of the provisions of the Essential Commodities Act, 1955 or any other statute. It is, however, in short supply. As the number of consumers as also the nature of consumption have increased manifold, the necessity of more and more generation of electrical energy must be given due importance. The Preamble of the 2003 Act, although speaks of development of electricity industry and promotion of competition, it does not speak of equitable distribution of electrical energy. The statutes governing essential and other commodities in respect whereof the State intends to exercise complete control, provide for equitable distribution thereof amongst the consumers."*

> *"83. The primary object, therefore, was to free the generating companies from the shackles of licensing regime. The 2003 Act encourages free generation and more and more competition amongst the generating companies and the other licensees so as to achieve customer satisfaction and equitable distribution of electricity. The generation company, thus, exercises freedom in respect of choice of site and investment of the generation unit; choice of counter-party buyer; freedom from tariff regulation when the generating company supplies to a trader or directly to the consumer.*
>
> *84. If delicensing of the generation is the prime object of the Act, the courts while interpreting the provisions of the statute must guard itself from doing so in such a manner which would defeat the purpose thereof. It must bear in mind that licensing provisions are not brought back through the side-door of regulations."*

Thus, the Hon'ble Supreme Court in the above judgment has held that Electricity is not an essential commodity within the meaning of the provisions of the Essential Commodities Act, 1955 or any other Statutes.

31. Learned Senior Counsel for the distribution licensees has also relied on Paragraph 85, 88, 89 and 103 of the above Tata Power judgment of the Hon'ble Supreme Court and V S Rice and Oil Mills V State of AP (1964) 7 SCR 456 to press their

point that Section 11(1) direction issued by the State Government vest regulatory powers to the State Government qua generation of electricity, which activity is otherwise de-licensed under normal condition. We do not accept the same as these rulings are not relevant to the present case. The Hon'ble Supreme Court is the judgment in Tata Power case under paragraph 85 only states the powers of the State Government to give directions under Section 11. Paragraph 88 and 89 regarding directions by the Commission to the licensee under Section 23 are also not relevant to the present case. In paragraph 103 of the judgment it is stated that wherever regulation of generating companies is necessary the same has been provided for and Section 11 and Section 60 provide for adequate indication in this behalf. However, there is no finding that the State Government will regulate the tariff and other terms and conditions of supply of the generating company under Section 11(1). Thus, the rulings referred to by

the distribution licensees will not be of any help to the present case.

32. In view of the above, the first three question raised by us at i), ii) and iii) are answered in negative. We have already answered the fourth question in affirmative that the State Commission has correctly interpreted the adverse financial impact on the generating company as consequence of the direction of the State Government under Section 11(1) of the Act by considering the rate that the generator would have got in market for sale of power had there been no Section 11(1) directions, subject to such rate covering the cost of generation.

33. We do not agree with the Learned Senior Counsel for the distribution licensees that the State Commission should have determined the rate of supply by the generating company under Section 11(1) directions following the principles of Section 61 and 62 of the Act.

34. Admittedly, the supply of power by GMR during the period when Section 11(1) directions in force was not against a Power Purchase Agreement ('PPA') entered into with distribution licensees. It is not the case where the generator and the distribution licensee have approached the State Commission to approve the PPA and determine the tariff under Section 62 of the Act. The State Commission under Section 86(1)(b) of the Electricity Act, 2003 has to regulate the electricity purchase and procurement process of distribution licensee including the price at which electricity shall be procured from the generating companies through agreements. This is not the case where the generator has supplied power against an agreement with the distribution licensee. Therefore, the principles of determination of generation tariff on cost plus basis under Section 61, 62 and 86(1)(b) of the Act shall not be applicable for determining the compensation to offset the adverse financial impact of the

directions under Section 11(1) of the Act on a generating company.

35. Further, this issue has also been decided by this Tribunal in Himatsingka Seide case that Section 62 will not have any application in the cases where power is supplied under Section 11(1) directions. Accordingly the fifth issue is also decided against the distribution licensee

36. Learned Senior Counsel for the distribution licensees and the State Government have argued that if the rate is to be based on the prevailing market rate then there was no need to issue directions under Section 11(1) as the distribution licensee can procure power in the open market and giving powers to the State Government u/s 11 (1) would be meaningless.

37. We do not agree with the above contention of the distribution licensees and the State Government. The exercise of the power by the State Government under Section 11(1) may not be restricted to the extreme shortage of power due to large

gap between demand and supply, as applicable to the present case. There may be an exigency when a particular hydro power plant has to be operated in a particular manner to avoid threat of flood or to meet essential irrigation and drinking water requirement in a draught condition. There may be an exigency where maximization of generation at a power plant is necessary to maintain power supply in a part of State which is facing a threat of a natural calamity and where transmission of power from other generating sources may not be technically feasible due to transmission constraints. Similarly, the planned maintenance or overhaul of a generating unit may be required to be deferred in the event of extra ordinary situation arising in the State due to a natural calamity. Under such conditions, the State Government may issue directions under Section 11(1) of the Act to operate and maintain a generating station in a desired manner to meet the extra ordinary situation arising in the State. Under these conditions, there may not be any adverse financial impact of the direction

under Section 11(1) on the generating station. Thus, the powers under Section 11(1) can be invoked by the State Government under different conditions which may not be akin to the present case where the directions were given to the generating company to supply power to the State distribution companies due to acute power shortage in the State. Under other situations as stated above the procurement of power from the market may not provide the desired relief to the State.

38. In the present case the State Government has exercised powers under Section 11(1) when the State was facing power crisis to direct the generating stations in the State to supply power to the distribution licensees in the State. In such a condition, it may not always be possible for the distribution licensees to procure required quantum of power from open market as the power available in the market under shortage conditions may be far less than the demand of power from the

various States. Under such a condition when other States are also competing for procurement of power from the market, the supply of the required quantum of power cannot be guaranteed. Even if power is available in the market, the source of power generation may be outside the State or the region and there may be transmission constraints in procuring the power. Invoking of Section 11(1) directions has guaranteed the availability of power to the State distribution licensees that too from the power plants located in the State, without any transmission constraint.

39. Another issue raised by the distribution licensees and the State Government in the Appeal is that GMR was given fiscal concessions by the State Government at the time of setting up the power plant and it was supplying power to the erstwhile Electricity Board under the PPA dated 15.12.2997 for a period of 7 years from the Commercial Operation Date of the power plant and during this period the power plant had recovered the

fixed cost and these facts were not considered by the State Commission.

40. We find that the above issues were was not raised before the State Commission and new issues have been raised in the Appeal which is not permissible. Nevertheless, we find that the PPA dated 15.12.1997 had expired in June 2008 and since then GMR had been selling power in the market for which it was entitled legally. The electricity Act also permitted GMR to sell power in the market at the prevailing market rates as it did not have any PPA for supply of power to the distribution licensee. In fact the distribution licensees were procuring power from GMR against short term contract at market determined price after following competitive bidding process, from November 2008 onwards. Therefore, the distribution licensees cannot raise the extraneous issue of fiscal benefits given by the State Government for attracting investment in the State at the time of setting up GMR's power

project and the issue of PPA which has since expired in the matter of determining the adverse financial impact of power exercised by the State u/s 11(1).

41. The distribution licensees/PCKL have also raised the issue of windfall profit to GMR. We are not inclined to accept the contention of the distribution licensees/PCKL. GMR was legally entitled to sell power in the market during the period January to May 2009 had there been no direction under Section 11(1) by the State Government. Therefore, it is entitled to be compensated for the same under Section 11(2) of the Act taking into account the prevailing market rate of power.

42. Admittedly, the GMR's plant was operating as a merchant power plant since July, 2008. Let us understand the operation of a merchant power plant. A merchant power plant does not have any long term PPA for supply of power and sells power in short term at market rates. The market rate is

governed by the supply and demand of power. When the supply is in excess of the demand, the market rates come down. Under such conditions, the merchant power plants particularly those based on liquid fuel may not be able to sell the power and may have to be shutdown. Thus, a merchant power plant takes the market risk. On the other hand a power plant having a long term PPA with tariff based on cost plus principles under Section 62 of the Electricity Act is assured of recovery of its full expenses with return on investment if it operates the power plant within the operational norms specified by the State Commission and thus, has a low element of risk. Therefore, if a merchant power plant is able to get a favourable rate during the period of high demand, it should not be considered from the narrow angle and has to be viewed from long term perspective of operation of a merchant power plant.

43. Thus, the sixth issue is also decided against the distribution licensees and the State Government.

44. We are also not convinced by the contention of GMR that they are entitled to a tariff of Rs. 8.81 per unit for January 2009 as per the LOI given prior to invoking Section 11(1) by the State Government and from February 2009 till the end of Section 11(1) direction period at the rate at which the distribution licensees had procured power in short term market. Firstly, the distribution licensees were already negotiating with GMR about passing the benefit of import duty reduction and reduction in price of Naphtha for supply of power against the short term agreement prior to the invoking of Section 11(1) directions by the State Government. Secondly, the State Government gave specific directions under Section 11(1) on 1.1.2009 to GMR to supply power to the distribution licensees taking into consideration the reduction in price of Naphtha. The LOI for short term supply from November 2008 to January 2009 itself had a provision that the restriction imposed by the State Government shall be binding on both

the parties. Thirdly, the State Commission has determined the weighted average rate of round the clock power in short term market through traders for the period January 2009 to May 2009 when Section 11(1) directions were in vogue which in our opinion is a fair compensation for adverse financial impact of the directions under Section 11(1) on GMR.

45. In view of above the seventh and eighth issues are decided against GMR.

46. M/s. GMR have sought compensation for supplies made upto 6.6.2009 whereas the State Commission has determined the rate upto 31.5.2009 as per the order dated 1.1.2009 of the State Government invoking Section 11(1) in respect of supply by M/s. GMR upto 31.5.2009 and ignoring the period of 6 days of June 2009 as it was a short period and the GMR had been paid at Rs. 5.50 per unit during this period.

47. We do not want to interfere with the above findings of the State Commission considering that the State Government's order dated 1.1.2009 specified the period of Section 11(1) upto 31.5.2009 and bills for the period 1.6.2009 to 6.6.2009 have been settled by PCKL/distribution licensees @ Rs.5.50 per unit. Accordingly, no relief is granted to GMR on this account. The ninth issue is disposed of accordingly.

48. The tenth and the last issue is regarding interest on delay in payment by the distribution licensees.

49. We find that the State Commission in the impugned order had directed the Respondents (distribution licensees/PCKL) to pay to GMR the difference between Rs. 6.90 per unit and the actual payments already made i.e. Rs. 5.50 per unit for all electricity supplied from the 1.1.2009 to 31.5.2009 within 4 (four) weeks from the date of order. The Distribution Licensees have not honoured the directions of the State Commission. This Tribunal has already held in Himatsingka

Seide case that the payment should have been made to the generating company within a reasonable time after raising of invoice and the delay in payment has also caused adverse financial impact on the generating company which is required to be compensated.

50. In this case GMR had challenged the validity of directions of the State Government under Section 11(1) in a writ petition before the High Court which was dismissed. Thereafter, SLP was filed by GMR before the Hon'ble Supreme Court. During the proceeding before the Hon'ble Supreme Court, GMR had sought leave to raise the issue of offsetting the adverse financial impact before the State Commission which was granted. Only then GMR filed a petition before the State Commission which resulted in passing of the impugned order. Therefore, GMR cannot claim the benefit of interest for the period prior to determination of the adverse financial impact under Section 11(2) of the Act by the State Commission

through the impugned order as the delay in filing the petition before the State Commission for relief u/s 11(2) was on their own accord. However, money became due for payment to GMR four weeks from the date of the impugned order dated 30.11.2012. Accordingly, GMR is entitled to interest after for the period commencing after four weeks from 30.11.2012 till the outstanding payment is made fully by PCKL/distribution licensees.

51. GMR had filed an IA for payment of dues as per the order of the State Commission but it was vehemently opposed by the distribution licensees/PCKL.

52. As the payment of money was due to GMR four weeks after 30.11.2012 as per the impugned order which was not honoured even though there was no stay on the impugned order, we hold that the GMR is entitled to simple interest @ 12% from the date when the payment was due to be paid to GMR as per the impugned order of the State Commission till

30 days from the date of communication of this judgment. Thereafter, for any further delay in payment, GMR will be entitled to interest @ 12% per annum on the outstanding dues to be compounded on quarterly basis. Accordingly, directed.

53. <u>Summary of our findings:</u>

i) Off setting the adverse financial impact on a generator which supplied electricity to the distribution licensees in compliance of the directions of the State Government under Section 11(1) of the Electricity Act, 2003 would mean fixing a rate keeping in view the revenue the generator could have realized in short term market subject to the condition that the rate covers the cost of generation so that the generating company does not incur a loss.

ii) The findings of the Tribunal in judgment dated 3.10.2012 in Appeal no. 141 of 2012 and batch reported as 2013 ELR(APTEL) 0106 in the matter of Himatsingka Seide Vs KERC & Others will squarely apply to the present case.

iii) But for the directions of the State Government under Section 11(1) of the Act, GMR would have sold its power in the market as its PPA for long term supply with the distribution licensee had expired in June 2008 and since then it was selling power in the short term market. Thus, there is no infirmity in the State Commission linking the price of power supplied by GMR against the direction under Section 11(1) to the market rate of power. But, from the order of the State Government to supply power at Rs. 5.50 per unit, GMR would have sold its power in the market rate and therefore, the adverse financial impact of the directions under Section 11(1) will be

the difference between the rate that GMR would have got in the short term market and the rate fixed by the State Government i.e. Rs. 5.50 per unit.

iv) The State Government cannot regulate supply including the price and other terms and conditions of supply by a generating company during the period when Section 11(1) is in vogue under the Essential Commodities Act, 1955. Electricity is not an essential commodity within the meaning of the provisions of the Essential Commodities Act, 1955 as held by the Hon'ble Supreme Court in the matter between Tata Power Co. Ltd. Vs. Reliance Energy Ltd. reported as (2009) 16 SCC 659. Electricity Act is a complete Code and the State Commission alone has to offset adverse financial impact of direction under Section 11(1) of the Electricity Act, 2003 as per Section 11(2) of the Act. The State Government is only empowered

to give directions under Section 11(1) of the Act for operation and maintenance of generating station.

v) The principles of determination of tariff under Section 61, 62 and 86(1)(b) of the Act shall not be applicable for determination of compensation to the generating company to offset the adverse financial impact of the direction under Section 11(1) of the Act.

vi) The State Commission has correctly determined the rate of power for supply by GMR during the period of operation of Section 11(1) from January 2009 to May 2009 which in our opinion fairly offsets the adverse financial impact of Section 11(1) direction on GMR.

vii) We reject the contention of GMR for rate of Rs. 8.85 per unit for January 2009 and the rates claimed for the period from February, 2009 to May, 2009.

viii) GMR is entitled to simple interest @ 12% from the date when payment was due to be paid to GMR as per the impugned order of the State Commission till 30 days from the date of communication of this judgment. Thereafter, for any further delay in payment by the distribution licensees/PCKL, GMR will be entitled to interest @ 12% per month on the outstanding dues to be compounded on quarterly basis.

54. In view of our above findings, Appeal no. 37 of 2013 filed by GMR is allowed in part. Appeal No. 303 of 2013 filed by the Distribution Licensee, is dismissed.

55. No order as to costs.

56. Pronounced in the open court on this 23rd *day of May, 2014*.

(Rakesh Nath) **(Justice M. Karpaga Vinayagam)**
Technical Member **Chairperson**

REPORTABLE/~~NON-REPORTABALE~~

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