

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated:13th Nov, 2014

Present:

**HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

APPEAL NO.165 OF 2013, APPEAL NO.176 OF 2013

AND

APPEAL No.314 OF 2013

APPEAL NO.165 OF 2013

In the Matter of:

**Ugar Sugar Works Limited
317, 9th main, 14th Cross
Jayanagar,II Block,
Bangalore-560 011**

..... Appellant

Versus

- 1. Government of Karnataka
Energy Department,
Vikasa Soudha
Bangalore-560 001**
- 2. Karnataka Electricity Regulatory Commission
6th and 7th Floor,
Mahalaxmi chambers,
9/2, M G Road,
Bangalore-560 001**

3. **The Karnataka Power Transmission Corporation Ltd.,
Cauveri Bhavan,
Bangalore-560 001
Karnataka**
4. **Power Company of Karnataka Limited
Cauveri Bhavan,
Bangalore-560 009**
5. **State Load Dispatch Centre
Race Course Road,
Anand Rao Circle,
Bangalore-560 009**
6. **Bangalore Electricity Supply Company Ltd
K R Circle,
Bangalore-560 001**
7. **Mangalore Electricity Supply Company Limited
3rd Floor, A.B Shetty Circle,
Pandeshwara,
Mangalore-575 001**
8. **Chamundeshwari Electricity Supply Company Limited
927, L J Avenue, New Kantharaj Urs Road,
Saraswathipuram,
Mysore-575 005**
9. **Hubli Electricity Supply Company Limited
P B Road,
Navanagar, Hubli-580 029**
10. **Gulbarga Electricity Supply Company Limited
Gulbarga Main Road,
Gulbarga, Karnataka**

...Respondent(s)

Counsel for the Appellant(s) : Mr. Prabhuling Navadgi
Mr. Satya Prakash
Mr. Shubharanshu Padhi

Counsel for the Respondent(s):Mr. Sanjay Sen, Sr Adv.
Mr. Anand K Ganesan
Ms. Mandakini Ghosh
Ms. Swapna Seshadri for R-3,4 & 5,7-10

APPEAL NO.176 OF 2013

In the Matter of:

**Himatsingka Seide Limited
10/24, Kumara Krupa Road,
High Grounds Near Sindhi High School
Bangalroe-560 001**

..... Appellant

Versus

- 1. Karnataka Electricity Regulatory Commission
6th & 7th Floor, Mahalaxmi Chambers,
No.9/2, M G Road,
Bangalore-560 001**
- 2. Government of Karnataka
Department of Energy
Vikasa Soudha, Vidhana Veedhi
Bangalore-560 001**
- 3. State Load Dispatch Centre
No.28, Race Course Road,
Bangalore-560 001**

4. **Chamundeshwari Electrical Supply Corporation Ltd.**
No.927, L.J Avenue,
New Kanth Raj URS Road,
Sarasawathi Puram,
Mysore-575 005.

5. **Bangalore Electricity Supply Company Ltd.,**
K R Circle,
Bangalore-560 001

...Respondent(s)

Counsel for the Appellant(s) : Mr. George Cheriyan
Mr. S Siva Sangarane
Mr. R Kanchana
Mr. Uttam Cheriyan

Counsel for the Respondent(s): Mr. Sanjay Sen, Sr Adv.
Mr. M G Ramachandran
Mr. Anand K Ganesan
Ms. Mandakini Ghosh
Ms. Swapna Seshadri for 3-5 & 10

APPEAL NO.314 OF 2013

In the Matter of:

M/s. Star Metallics and Power Private Limited
Metal and Ferroalloys Plant,
Mariyammanhalli,
Near Hospet-583 222
Bellary district
Karnataka State

..... Appellant(s)

Versus

- 1. Government of Karnataka
Energy Department,
Vikasa Soudha
Bangalore-560 001**
- 2. Karnataka Electricity Regulatory Commission
6th and 7th Floor,
Mahalaxmi chambers,
9/2, M G Road,
Bangalore-560 001**
- 3. Power Company of Karnataka Limited
KPTCL Building,
Kaveri Bhavan,
Bangalore-560 009**
- 4. State Load Dispatch Centre
Race Course Road,
Anand Rao Circle,
Bangalore-560 009**
- 5. Bangalore Electricity Supply Company Ltd
K R Circle,
Bangalore-560 001**
- 6. Mangalore Electricity Supply Company Limited
3rd Floor, A.B Shetty Circle,
Pandeshwara,
Mangalore-575 001**
- 7. Chamundeshwari Electricity Supply Company Limited
927, L J Avenue, New Kantharaj Urs Road,**

**Saraswathipuram,
Mysore-575 005**

- 8. Hubli Electricity Supply Company Limited
P B Road,
Navanagar, Hubli-580 029**
- 9. Gulbarga Electricity Supply Company Limited
Gulbarga Main Road,
Gulbarga, Karnataka**
- 10. Karnataka Electricity Regulatory Commission
Mahalakshmi Chambers,
6 & 7th Floor,
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Bangalore-560 001**

...Respondent(s)

Counsel for the Appellant(s) : Mr. Chandrashekar S

Counsel for the Respondent(s):_Mr. Sanjay Sen, Sr Adv.
Mr. M G Ramachandran
Mr. Anand K Ganesan
Ms. Mandakini Ghosh
Ms. Swapna Seshadri for R-3,4,5,6 & 9

J U D G M E N T

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON**

1. The Appellants, the Generating Companies have filed the Petitions before the State Commission u/s 11(2) of the Electricity Act, 2003 praying for off setting the adverse financial impact suffered by them for supplying electricity by them to the State Grid during the period from Feb, 2012 to May, 2013 @ of Rs.5.30 per unit in pursuance of the directions of the Government u/s 11 (1) of the Electricity Act, 2003. However, the State Commission, after hearing all the parties concerned, rejected their prayer in the Impugned Order dated 22.5.2013.
2. Hence, the Generating Companies have filed these Appeals challenging the Common Impugned Order passed by the State Commission on 22.5.2013 by which the State Commission has held that the tariff of Rs.5.30 per unit as fixed by the Government in its order is adequate and reasonable to compensate the Generating Companies.
3. Let us now deal with the facts of each of the Appeals.

4. **Appeal No.165 of 2013** has been filed by M/s. Ugar Sugar Works Limited. The short facts are as under:

(a) The Appellant is a sugar industry having co-generation facilities. It has got two generation plants in the State of Karnataka with a total installed capacity of 59.5 MW. The Appellant did not have the Power Purchase Agreement with any of the State Utilities. On the contrary, the Appellant Company entered into a Power Purchase Agreement with the Tata Power Trading Company Limited for the sale of energy generated from both the plants.

(b) The Appellant Company obtained Standing Clearance from State Load Despatch Centre in respect of both the plants.

(c) When things stood thus, the Government of Karnataka in exercise of its powers conferred u/s 11 of the Act, 2003 passed an Order on 27.1.2012 directing all the Generating Companies in Karnataka to operate and maintain their Generating Stations to maximum exportable capacity and supply all exportable electricity generated to the State Grid for utilization within the

State at the tentative tariff of Rs.5.30 per unit subject to determination of final tariff by the State Commission.

(d) The period of operation of the Government order has been specified from 01.2.2012 to 31.5.2012. As per the Government order, all the Generating Companies shall supply power to the State Utilities by injecting the electricity into the State Grid.

(e) Pursuant to the Government Order which directed all the State Electricity Supply Companies to approach the State Commission to fix the tariff for supply of energy by the Generators under Section 11 of the Electricity Act, 2003, the Distribution Companies in the State filed petitions before the State Commission u/s 62 of the Electricity Act.

(f) Similarly, the Generating Companies also presented Petitions u/s 11 (2) for the Act praying for off setting the adverse financial impact supplying electricity generated by them to the State Grid during the period from 1.2.2012 to 31.5.2012 at the rate of Rs.5.30 per unit.

(g) After entertaining the Petition, the State Commission held the public hearing after issuing public notices calling upon the interested persons to make their submissions.

(h) After hearing the parties, the State Commission passed the Impugned Order dated 22.5.2013 rejecting the Petitions filed by the Generating Companies in the Government Order. Hence this Appeal.

5. **Appeal No.176 of 2013** relates to M/s. Himatsingka Seide Limited. The short facts relating to filing of the Appeal are as under:

(a) The Appellant is a coal based power plant of 12.5 MW at the cost of Rs.87.9 Crores intended for captive consumption.

(b) From the inception, the Appellant has been using for Captive Consumption approximately 6.5 MW out of the total capacity of the Generator of 12.5 MW.

(c) The Appellant with the objective of selling surplus power generated through its agent Tata Power Company Limited applied for Open Access to the State Load Dispatch Centre.

(d) At that stage, the State Commission issued an Order u/s 11 of the Act directing all the Generators in operation in the State to supply all the electricity to the State Grid through the Notification dated 3.4.2010 at the rate of Rs.5.30 per unit.

(e) The Appellant thereupon, filed OP No.40 of 2010 with the State Commission and sought for compensation of Rs.7.60 per unit of the energy delivered to the Grid. In this Petition, the State Commission fixed Rs.5/- per unit to be paid for the power supplied to the Grid.

(f) The Appellant filed the Appeal No.141 of 2011 before this Tribunal against this order dated 24.3.2011. This Tribunal giving a judgment on 3.10.2012 remanded the matter for fixing the appropriate compensation.

(g) Accordingly, the State Commission passed the consequential order on 14.2.2013.

(h) When another Government Order had been issued on 27.1.2012 directing all the Generators to supply all the electricity to the Sate Grid for the period

from Feb to May, 2012, the Appellant supplied the surplus capacity of power.

(i) Thereupon, the Appellant filed OP No.31 of 2012 before the State Commission and sought for a compensation of Rs.7.50 per unit for each unit of energy delivered to the Grid system as against the provisional tariff of Rs.5.30 per unit fixed by the Government.

(j) The State Commission, through the majority members passed the common order dated 22.5.2013 upholding the Government order fixing the tariff at Rs.5.30 per unit.

(k) Aggrieved by this, the Appellant has filed this Appeal.

6. **Appeal No.314 of 2013** relates to Star Metallics and Power Private Limited. The short facts are as under:

(a) The Appellant has a Ferroalloys Plant with two submerged electric arc furnaces comprising one 20 MVA and other 15 MVA furnaces.

(b) The Appellant uses the a combination of Indian Coal which is being sourced from the Singareni Collieries Company Ltd (SCCL) and imported coal as fuel for its power plant.

(c) The Appellant established 32 MW coal based captive thermal power plant. During the period when the power plant was in operation, the Appellant Company had sold surplus power through Indian Energy Exchange New Delhi after meeting its own power requirements for production of ferroalloys.

(d) At this stage, on 27.1.2012 the Government of Karnataka issued the notification u/s 11 of the Electricity Act directing all the Generating Companies to supply all exportable electricity generated by them to the State Grid at Rs.5.30/-per unit subject to determination of final tariff by the State Commission.

(e) The Appellant during the relevant period supplied the electricity to the State Grid. The average price of electricity on the Indian Energy Exchange during that period was approximately Rs.9.30 per KWHr. Since the price paid by the State Government Utilities was only Rs.5.30 per unit, the Appellant suffered loss of

Rs.4 per unit due to the issuance of the Notification u/s 11 of the Electricity Act, 2003. Therefore, the Appellant filed a Petition before the State Commisison seeking for the compensation to be fixed at the rate of Rs.9.30 per unit.

(f) The State Commission after considering the materials and hearing the parties rejected its petition by confirming the selling price at Rs.5.30 per unit fixed by the State Commisison.

(g) Aggrieved by this, the Appellant M/s. Star Metallic and Power Private Ltd has filed this Appeal.

7. Since the issues raised in these Appeals are common and Impugned Order passed in these Appeals also is common, this common judgment is being pronounced.
8. Let us now refer to the submissions made by the learned Counsel for the Appellants in each of the Appeals.
9. The following are the grounds raised in **Appeal No.165 of 2013:**

(a) The Appellant had PPAs with Tata Power Trading Company Ltd under which the Trading

Company had agreed to pay minimum amount per unit of electricity sold. Thereafter, the energy would be sold as per the market dynamism which obviously refers to the spot exchange. The Appellant had its transaction through IEX. The Appellant and produced before the State Commission the IEX average rate for the months from Feb, 2012 to May, 2012. However, instead of the IEX rates, the State Commission wrongly relied upon Central Commission's bilateral transaction rates for the FY 2011-12 for the purpose of affirming the rates paid as per the State Government's order.

(b) The perusal of Section 11 (1) & (2) of the Act, 2003 would make it evident that in the event of Government deciding to exercise its power under sub Clause 1 of Section 11; it becomes mandatory obligation upon the Government to off set the adverse impact which the Generating Companies may suffer. In the instant case, the Appellant had to forego an amount of Rs.19.07 Crores for supplying the power to the State Grid from its plant. The Division Bench of High Court of Karnataka also held in the Writ Appeal filed by the parties that if the electricity generated and supplied to the State Grid as per the Government

Order is not fetching the generating Company the actual price, the adverse financial impact has to be remedied by the authority. This has been ignored by the State Commission.

(c) If the Appellant is not compensated, they would suffer adverse financial impact and incur huge losses for having delivered energy in pursuance to the said Government Notification. The provision of the Act makes it crystal clear that said adverse financial impact has to be off set by the Government. This was not taken note of by the State Commission.

(d) The principle adopted by the State Commission in adopting the data published by the Central Commission and bids received by the State Utilities is opposed to the mandate of Section 11(2) of the Act, 2003. The principle of compensation u/s 11(2) requires to be interpreted keeping in view the law laid down by the Hon'ble Supreme Court of India under Article 300 A of the Constitution of India.

- 10.** The submissions made by the Appellant in **Appeal No.176 of 2013** are as follows:

(a) The Appellant should be compensated at the average rate prevailing at the Indian Energy Exchange for the period from Feb, 2011 to May, 2012 which was Rs.9.15 per KWHr. The Appellant also should be compensated of Rs.9.28 Crores being the average rate prevailing at the Indian Energy Exchange rate for the relevant period during which the Appellant supplied electricity to the State Grid pursuant to the Government Notification.

(b) The Appellant should be compensated at Rs.7.50 per unit being the cost of generation of power per unit for the power supplied by the Appellant while Section 11 was in force. This claim was supported by the Chartered Accountant's certificate with all relevant details incurred for February to May 2012 such as fuel cost, water charges, chemical consumption and repair and maintenance etc of which were actuals and supported by invoices and audited by Chartered Accountant. The State Commission has not considered those materials while confirming the Government Order.

(c) The State Commission erred in adopting the rate of Rs.5.30 per unit obtained by the State Utilities in the short term market pursuant to the tenders floated by them for the supply of power for the months of November, 2011 to June, 2012. The Approved weighted average of Rs.5.30 per unit is not indicative of the rate. The rates should have been obtained for supply of short term power for the period February to May, 2012.

(d) The Appellant is entitled for the losses suffered since it utilises the imported coal as 100% raw material whereas in captive power plant in Sugar Mills use the process waste "Bagasse" as raw material and the iron & steel Mills use the process gas as raw material which do not come at a cost. It is settled fact that coal is costlier fuel than Bagasse. Hence the rational of fixing of tariff at Rs.5.30 per unit irrespective of the type of generators is not viable and justified.

11. The submissions made by the Appellant in **Appeal No.314 of 2013** are as follows:

(a) The State Commission has wrongly looked at the contention of all the Appellants before the Commission

in same measure and applied the same yard stick to all the Generators regardless of the size and source of the Generators i.e. co-generation, captive plant, Indian Power Producers etc., which will have impact in cost of generation.

(b) Though the Government order which specifies that all the Distribution Licensees will have to fix the tariff for supply of energy by the Generators source wise i.e. co-generation, thermal, bio-mass, IPP etc. It has not been done in the instant case. Moreover, the State Commission has failed to consider the data in the cost between the co-generation, thermal, bio-mass etc.,

(c) The Appellant has incurred a sum of Rs.7.44 per unit during the relevant period. The same is substantiated by the Appellant by producing various documents along the Memorandum dated 19.12.2013. The cost of generation of electricity which the Appellant has incurred for the period was Rs.7.44 KWHr as against the tentative tariff of Rs.5.30 per KWHr fixed by the Government. The documents produced by the Appellant to show the details of the cost of generation,

the Distribution Companies have never challenged the same. Thus, the Impugned Order is passed without applying its mind to the above material placed by the Appellant. Hence, the Impugned Order is liable to be set-aside.

12. On these grounds, the learned Counsel for the Appellants elaborately argued and filed the written submissions explaining the grounds referred to above to substantiate their prayer for setting aside the Impugned Order.
13. In reply to these submissions raising various grounds, the learned Counsel for the State Commission, Distribution Companies and the Government of Karnataka made detailed submissions and filed their Written Submissions in justification of the Impugned Order and contended that there is no reason to interfere with the Impugned Order which is well justified.
14. In the light of the rival contentions, the following questions would arise for consideration:
 - (a) **Whether the State Commission failed to notice that the cost of production as projected by the Appellants is the proper basis for determining**

the rate at which the Generator is to be compensated?

(b) Whether the Impugned Order passed by the State Commission in rejecting the claim of the Appellants by relying upon the bids received by the Distribution Utilities three months prior to the Government Order and statistics published by the Central Commission relating to the short term power transacted through trader between the period April, 2012 and June, 2012 is legal?

(c) Whether the principle adopted by the State Commission in adopting the data published by the Central Commission and bids received by the State Utilities is opposed to the mandate u/s 11 (2) of the Electricity Act, 2003 which speaks of off setting the generator specific adverse financial impact, is legal?

(d) Whether the principle of compensation as enunciated u/s 11(2) of the Act requires to be interpreted keeping in view the law laid down by the Hon'ble Supreme Court of India under Article 300A of the Constitution of India.

(e) Whether in the facts and circumstances of the case, the State Commission is right in the methodology adopted in determining the tariff u/s 11(2) at Rs.5.30 per unit to off set the adverse financial impact on the Appellant consequent to the Government directions under Section 11(1) without dealing with the individual specific facts of each of the Appellant's case?

15. Since all the questions are inter related and inter connected, it would be appropriate to deal with all the issues together.
16. Let us now discuss these issues.
17. These Appeals have been filed by the various Generating Companies challenging the common Impugned Order dated 22.5.2013 passed by the State Commission.
18. In this order, the State Commission, while rejecting the claims of the Generating Companies for higher tariff, has upheld the Order of the Government and held that the tariff of Rs.5.30 per unit is adequate and reasonable to compensate the Generating Companies.
19. The main issue which arises in these Appeals is with reference to the tariff payable to the Appellant Generating

Companies for sale of electricity from their Generating Companies during the period from 1.2.2012 to 31.5.2012 in pursuance of the Notification issued by the State Government u/s 11 (1) of the Electricity Act.

- 20.** The State Government in the Notification specified a provisional rate of Rs.5.30 per unit for the electricity supplied during the relevant period subject to the final approval of the tariff by the State Commission. In other words, the State Government did not determine any particular tariff in exercise of its power u/s 11(1) but only fixed an interim rate provisionally subject to the approval of the final tariff by the State Commission.
- 21.** The Generators then filed a Petition before the State Commission seeking for a higher tariff for the adverse financial impact said to have been caused to the Generators. Some of the State Government Utilities also filed a Petition before the State Commissions seeking for the reduction in the figure of Rs.5.30 per unit.
- 22.** The State Commission while passing the Impugned Order has taken into account the price which would have been paid to the Generators if the power had been procured by the Distribution Companies through the tender route to be

supplied to the State of Karnataka considering the transmission corridor constraint at the relevant time.

23. The State Commission has not given the Generating Companies the short term weighted average prices of power transacted at the national level. The reason is that it was as low as Rs.4.34 per unit and did not represent the rate of Southern Region due to transmission constraints.
24. Taking into consideration all the relevant works, the State Government determined the rate of Rs.5.30 per unit as specified in the Government Order.
25. Let us refer to the relevant findings in the Impugned Order of the State Commission which are as under:

“28) The short term rates prevailing at the National level during the relevant period were: Rs.4.41 per Unit for February, 2012, Rs.4.37 per Unit for March, 2012, Rs.4.35 per Unit for April, 2012 and Rs.4.26 per Unit for May, 2012 giving a Weighted Average rate of Rs.4.34 per Unit for the entire period. If we deduct 10 (ten) paise as the marketing expenses, as mentioned above, the net realization by the Generators in the present cases works out to Rs.4.24 per Unit.

29) on the face of it, it appears logical for this Commission to go by the rates prevailing in the short-term bilateral market at the National level as published by the CERC, as was done in the earlier

cases cited above but for certain factors which differentiate the present case from the earlier cases dealt with by this Commission, viz., OP No.16 of 2010 and connected cases. In the present case, unlike in the earlier cases, the rate adopted in the Government Order of Rs.5.30 per Kwh is based on the rates obtained by the Distribution Licensees through a transparent bidding process for short term power purchased during the period from November, 2011 to June, 2012. The rates obtained in the bids referred to above ranged between Rs.5.15 per Unit and Rs.5.30 per Unit of RTC power, giving a Weighted Average Rate of Rs.5.29 per Unit. Further, the above rates obtained through the bidding process were approved by this Commission and the Respondents have purchased energy on that basis for three months prior to and during the period when the Section 11 order was in operation.

30).....

31) We have given careful thought to the above issue in the light of the circumstances prevailing during the relevant period. The distribution utilities in the State issued a tender for procurement of 500 MW of RTC firm power on a short term basis for the period from 10th November 2011 to 15th June 2012. This notification was issued on 28th/29th October 2011 by the Power Company of Karnataka Limited (PCKL) on behalf of the distribution utilities. In response they received offers with rates ranging from Rs.5.15 per Kwh to Rs.5.30 Kwh as shown below :

.....

32) *The distribution utilities accepted the above offers of 210 MW after obtaining the approval of this Commission in its letter dated 17.11.2011. The weighted average cost of the power supplied to distribution utilities from the above sources approved by the Commission was Rs.5.29 per Kwh. As has been submitted by the learned counsel on behalf of the respondents, the Government also considered the rates obtained in the above tender for procurement of short term power as the benchmark for provisionally fixing the rate at which power had to be supplied by the generating companies in compliance to the orders under Section 11 issued by them on 27.11.2012.*

33) *Thus, while the weighted average rate for RTC power in bilateral transactions at the national level was much lower at Rs.4.34 per unit during the period, it is clear that for the power available for procurement by the distribution utilities in Karnataka, it was considerably higher as evidenced by the bids received barely three months earlier to the Government issuing their order under Section 11. It is also significant to note that even at that higher rate, the supply that could be obtained through the bidding process approved by the Commission was only 210 MW against the tender for 500 MW floated by the utilities. This was on account of the non-availability of the required transmission corridor for the State utilities to obtain power at the lower rates prevailing outside the Southern Region during the period in question. This is evident from the letter dated 10.11.2011 from PCKL addressed to the Commission, the relevant portion of which is extracted below :*

“11. As already informed vide letter under reference, the availability of corridor from WR & ER is very meagre at present and Karnataka may get corridor under MTOA only from June 2012, the only option available is to tap energy from generation sources in Karnataka.

12. As against the LOIs placed for procurement for 780 MW RTC firm power, only 530 MW is available from Karnataka generators. Out of 250 MW from outside sources, nil power for November 2011 and only 72 MW of RTC power for December 2011 is available due to corridor congestion.”

34) Therefore this Commission, considering the facts placed before it, approved the short-term power procurement of whatever that could be purchased through the short-term tenders.

35) The Government Order bearing No.EN 2 PPC 2012, dated 27.1.2012, issued under Section 11 of the Act, in its Preamble, also explicitly mentions this position of non-availability of corridor for procurement of power from outside the southern region, in the following words :

36) In the Petitions filed on behalf of the MESCOM, BESCOM and CESC also, the circumstances explained in the Government Order necessitating issuance of the Section 11 Order have been reiterated, as noticed at the beginning of the Order.

37) Thus, in view of the non-availability of corridor for procurement of power from the Northern and Western zones to the State, the power obtained under Section

11 orders of the State Government could also have commanded a price similar to the one obtained in the tenders if the generators who later supplied power in compliance of Section 11 orders could participate in the tenders called on behalf of the utilities. This leads us to the conclusion that the principle earlier adopted by this Commission, of giving the generators the rate they would have got in the market but for the orders issued under Section 11, requires that the generating companies which have supplied power in compliance of Section 11 orders in the present case need to be paid at the rates comparable to the rates obtained by the State's distribution utilities in the bidding process rather than at the weighted average rate of bilateral transactions for short term power at the national level, as done in the earlier cases of supply under Section 11 of the Act.

38) We are aware that the weighted average prices of short-term transactions of power at the national level are generally a more stable indicator of the price of electricity than the prices obtained by the utilities in any State. However, when the utilities in the State were unable to access sufficient power from outside the state / zone for reasons of corridor constraints and have, by due process of bidding according to guidelines, discovered the price of electricity in the regional market, it is clear that the said price reflects the price that may be commanded by a generating company in the State. In other words, the short-term power market becomes clearly segmented due to the corridor constraints mentioned above and the generators who have supplied power in this case are

entitled to payment at rates prevailing in the State as ascertained through the bidding process adopted.

39) For the above reasons, we feel that the rate of Rs.5.30 per unit indicated by the Government in their order of 27.11.2012 is reasonable and the same should be paid for the power supplied by the generating companies, including Petitioners In these cases, for the supply of energy made in compliance of the orders issued under Section 11 of the Act between 1st June 2012 and 15th June 2012”.

26. The crux of the above findings are as follows:

(a) The short term weighted average rates prevailing at the national level published by CERC for bilateral transactions was Rs. 4.34 per unit for the period February, 2012 to May, 2012 and after deducting 10 Paise towards marketing the average rate worked out to Rs.4.24 per unit.

(b) The Government Order had fixed the tentative rate of 5.30 based on rates obtained by public utilities in a transparent tender process for purchase of short term power for the period November, 2011 to June, 2012.

(c) Distribution Utilities in the state issued a tender for 500 MW of RTC for the period 10 Nov 2011 to 10

June, 2012. Out of the requirement of 500 MW, bids were received only for 210 MW. Only 5 Generating Companies bid for the tender.

(d) The weighted average rate for bids received by Distribution Utilities pursuant to the tenders worked out to 5.29 which were accepted after obtaining the approval of the State Commission.

(e) While the weighted average for bilateral transaction at the National Level was much lower at 4.34 it was considerably higher as evidenced in the bids received barely 3 months earlier to the Government Order.

(f) The State Commission noted that the Government order also similarly recognises the position of non availability of transmission corridor for procuring the power from outside Southern Region.

(g) In view of non availability of transmission corridor for procurement the power from Northern Region and Western Region, the power obtained under Section 11 by the State Government could also have commanded a price similar to that of the tender.

- 27.** Thus, the State Commission concluded that the principle earlier adopted by the Commission giving the generators the rate they would have got in the market, but for the orders issued under Section 11, requires that the Generating Companies each would have to be paid at the rates comparable to the rates obtained by State Utilities in the bidding process, rather than the weighted average rate of bilateral transactions by short term power at the national level as done in earlier cases of supply under Section 11 of the Act.
- 28.** The above issues have been dealt with by this Tribunal in judgment dated 03.10.2012 in Appeal no. 141 of 2012 and batch in the matter of Himatsingka Seide Ltd. Vs. KERC and others

“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.”

- 29.** Thus, in the above case the Tribunal agreed with the principle adopted by the State Commission in offsetting the adverse financial impact on the generators 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. It was also held that the Appellant cannot claim the tariff on the principles of determination of tariff on long term basis on cost plus basis under Section 62 of the Electricity Act. However, the price

decided by the Commission on the basis of short term market rate should definitely cover the incremental cost of generation plus a reasonable margin so that the generator does not suffer financial loss.

- 30.** This issue was also considered by the Tribunal in Appeal no. 37 of 2013 and batch in the matter of GMR Energy Ltd. Vs. KERC & Ors. in which the Tribunal also relied on the judgment dated 03.10.2012 in Appeal no. 141 of 2012.

“.....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.....”

- 31.** In the above judgment in Appeal No.37 of 2013 the Tribunal relied upon the judgment rendered in Appeal no. 141 of 2012 in Himatsingka Seide case and held that the adverse financial impact of the directions under Section 11(1) will be the difference between the rate that the generator would have got in the short term market and rate fixed by the State Government. However, the only check that is to be exercised is that the price of power decided by the State Commission should cover the variable cost of power plant plus a reasonable margin of profit to take care of the eventuality when the market rate is lower than the variable cost of the generating station.
- 32.** The findings of the Tribunal in the Appeal no. 141 of 2012 and 37 of 2013 will squarely apply in the present case.

33. In the present case, the State Commission has found that the weighted average rate of short term power prevailing at the national level during the relevant period after discounting the marketing expenses was Rs. 4.24 per unit. However, the rates obtained in the bidding process for short term power procurement undertaken on behalf of the distribution companies for the period from November 2011 to June 2012 were between Rs.5.15 per unit and Rs. 5.30 per unit for round the clock power, giving weighted average rate of Rs. 5.29 per unit. Considering that there were transmission constraints in the procuring power from Northern and Western region, the State Commission instead of allowing the weighted average rate of short-term power at national level decided to allow rate of Rs. 5.30 per unit to the Appellants for the power procured under the directions of the State Government under Section 11(1) of the Electricity Act, 2003. We do not find any infirmity with the approach of the State Commission in determining the market price of short term power in the State of Karnataka. The State Commission has correctly deviated from its earlier approach of allowing the short term rates prevailing at the national level by adopting the rates obtained by the distribution licensees for short term procurement of power

as the latter was higher due to the transmission constraints in procuring power from Northern and Western region.

- 34.** Another plea taken by the Appellants is that the rates as prevalent in Indian Energy Exchange (IEX) should be the yardstick to be applied for offsetting the adverse financial impact as they had been trading their surplus power only on IEX.
- 35.** According to the Respondents it would not be correct to rely on IEX where the rates fluctuate on daily basis and which account for a small percentage of total short term power purchases.
- 36.** We feel that IEX rates reflect the rates in the day ahead market which may not be correct reflection of rate for round the clock power for short term power supplied for a period of four months as is applicable in the present case. Therefore, the State Commission has correctly not adopted the IEX rates.
- 37.** The State Commission has also dealt with the specific contentions of the Appellants relating to their claims about the cost of generation and trading arrangements with power trading companies.

38. Let us deal with the specific issues relating to the Appellants.
39. The relevant finding of the State Commission relating to Ugar Sugar Works Ltd. (Appeal no. 165 of 2013) are as under:-

“22) Shri Prabhuling K. Navadgi, the learned Counsel appearing for the Petitioner in OP No.40/2012, has contended that the Petitioner had two PPAs With Tata Power Trading Company Limited in relation to two of its Generating Units. Under the said PPAs, the Petitioner would have realized IEX rates, the average IEX rates according to him being Rs.7.21 per Unit for February, 2012, Rs.10.29 per Unit for March, 2012 and Rs.11.51 per Unit for April, 2012. On account of supplying electricity at the rate of Rs.5.30 per Unit pursuant to the Government Order dated 27.1.2012, the Petitioner as pointed out in the I.A. dated 5.3.2013, has suffered a loss to the tune of Rs.19.07 Crores.

23) We have considered the above submissions of Shri Prabhuling K.Navadgi, learned Counsel for Petitioner in OP No.40/2012, in the light of the PPAs produced in support and also the weighted average market rates prevailing during the relevant period. The first PPA dated 3.3.2008, produced as Annexure- A, provides for a rate of Rs.3.61 per Unit and the second PPA dated 4.9.2009, produced as Annexure-A1, provides for a rate of Rs.4.50 per Unit. Both these PPAs do not make it binding on the Purchaser therein to pay the rates prevailing in the power exchange as

contended by the Petitioner. This is clear from Article-3 of the PPA dated 4.9.2009, which is extracted below:

“3. Price & Period

The annual average rate at the delivery point for the period 05th September 2009 to 04th September 2012 shall be Rs.4.50 per kWh. All efforts will be made by TPTCL to secure the highest possible rate based on market dynamism....”

Therefore, the Petitioner cannot contend that it has suffered a loss to the tune of Rs.19.07 Crores as claimed by him.”

- 40.** We are in agreement with the findings of the State Commission. We do not find any merits in the contentions raised by the Appellant in Appeal no. 165 of 2013.
- 41.** The findings of the State Commission in respect of Himatsingka Seide Ltd. (Appellant in Appeal no. 176 of 2013) are as under:-

“21) The submission of Shri Prabhuling K. Navadgi, the learned Counsel appearing for the Petitioner in OP No.31/2012 that the cost of generation incurred by his client is Rs.7.50 per Unit and the Government having paid Rs.5.30 per Unit for the electricity supplied, there is adverse financial impact to an extent of Rs.2.20 per Unit which needs to be offset by this Commission, also does not commend

acceptance. From the cost details furnished by the Petitioner, it is seen that the Petitioner's plant uses imported coal costing about Rs.3300 per MT as fuel. However, the per KWH cost of fuel is claimed to be Rs.5.53 and interest cost another Rs.0.98. We consider these projections to be unrealistic as explained in the earlier paragraphs dealing with the claim of the Petitioner in OP No.29/2012. Also, these figures do not agree with the assumptions of cost of production in the Petitioner's project report, which has also been submitted to us. Further, when a similar contention was raised in the earlier Petition OP No.40/2010 filed by the very same Petitioner, this Commission, vide its common Order dated 24.3.2011, had rejected the same and had adopted the weighted average market rate principle. Aggrieved by the said Order of the Commission, the Petitioner had filed Appeal No.141/2011 before the Hon"ble ATE and had raised the same contention then before the Hon"ble ATE. The Hon"ble ATE, at Paragraphs 9.10 to 9.14 of its Order dated 3.10.2012, has rejected the said contention and held as follows :

"9.10 Another point raised by the generators is that the State Commission did not consider the actual cost of production though the data was furnished by the Appellants.

9.11 We find that even though the principle adopted by the State Commission in fixing the rate was price of electricity in short term market provided the rate covers the cost of generation so that the generating company does not incur a loss, the State Commission

did not actually consider the actual cost of generation to check if the generating companies would incur any loss at the price fixed by the State Commission. The reason given by the State Commission for not considering the same is that the generation cost data furnished by the various generators varied.

9.12 We 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.

9.13 We find that the parameters on which the cost of production has been claimed by the Appellants are on higher side. For example in Appeal no. 141 of 2011, the Appellant has claimed auxiliary consumption of 14.9% which is very high and the Appellant has not

indicated the station heat rate and the heat used in the captive process. The Appellant has also claimed 16% margin over cost per unit including interest cost @ 12% which is not in line with the accepted economic principles which only allow return on equity. Thus the claim of the Appellant is high and is not based on the accepted economic principles. Similarly, in Appeal no. 142 of 2011, the Appellant has made the claim on the normative plant load factor of 80% instead of taking the actual PLF during the period April-June, 2010 when they were asked to maximize generation. The heat rate of TG of 3500 kcal/kWh and auxiliary consumption of 12% are also high. The heat used in captive process has not been indicated.

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.”

42. Thus the State Commission has analyzed the cost of generation of the Appellant in Appeal no. 176 of 2013 and also referred the findings of this Tribunal in judgment dated 03.10.2012 in Appeal no. 141 of 2011. In the above Appeal, the Tribunal had also rejected the contentions of the Appellant regarding their claim of cost of generation.
43. In view of above, we do not find any merit in the claim of the Appellant in appeal no. 176 of 2013.
44. The State Commission has dealt with the specific contentions of M/s. Star Mettalics. The Appellant in Appeal no. 314 of 2014 are as under:

“15) In the light of the above submission of the Counsel, we have looked into the cost structure of this generating unit as furnished by the Petitioner. In the break-up of the cost of generation given by the Petitioner, fuel cost per Kwh is shown as Rs.5.03, taking the landed cost of coal at Rs.4,600/-per tonne, with a gross calorific value of Rs.4,200/- Kcal. However, the Petitioner has not provided details of the Station Heat Rate and the specific consumption of coal by the unit, even though the same was sought during the course of the hearing. According to the 2009 Tariff Regulations of the Central Electricity Regulatory Commission, the Design Heat Rate of coal-based generating plants commissioned after 2009 is given as ranging between 2,300 Kcal/Kwh to 2,176 Kcal/Kwh, yielding a Gross Station Heat Rate (GSHR) of 2,450 Kcal/Kwh to 2,317 Kcal/Kwh. However, since these norms are applicable to larger generating units of more than 200 MW capacity, we cannot take the CERC Regulations as the basis for arriving at the cost of fuel for the smaller capacity generating station of the Petitioner.

16) We have seen that recently, the U.P. Electricity Regulatory Commission has issued Regulations, specifying Terms and Conditions of Generation Tariff in October, 2012, after circulating a discussion paper. These regulations specify a GSHR of 2,800 Kcal/Kwh for Thermal Power Plants of 0 to 50 MW capacity using imported coal. Taking 2,800 Kcal/Kwh with an auxiliary consumption of 8.5%, the Net Station Heat Rate works out to 3,060 Kcal/Kwh. This gives a specific consumption of 0.728 Kg of coal per Kwh. and a fuel cost of Rs.3.06 of coal per Kwh (at Rs.4,600 per MT of coal), which may be rounded off

to Rs.3.10, as fuel cost, inclusive of the cost of oil of about two ml. per unit.

17) The Respondents in this case have also submitted calculations of fuel requirement in the case of cogeneration units in sugar factories which use coal in the absence of bagasse. These smaller capacity thermal units (often less than 50 MW) have a station heat rate of about 3,700 Kcal, as assumed in the Tariff Order 20 for Renewable Energy issued by this Commission on 11.12.2009. This gives a specific consumption of about 0.80 Kg of coal per Kwh. At the price of Rs.4,600 per MT of landed cost of imported coal indicated by the Petitioner, the cost of coal works out to about Rs.3.70 per Unit and not Rs.5.03 per Unit as claimed by the Petitioner.”

- 45.** We agree with the findings that the State Commission. We do not find any merits with the contentions of the Appellant in Appeal no. 314 of 2013.
- 46.** In view of above, we feel that the State Commission has correctly decided the rate of Rs. 5.30 per unit for the energy supplied by the Appellants in pursuance of the directions of the State Commission under Section 11(1) of the Electricity Act. Therefore, no further compensation is required to be allowed to the Appellants.

47. Summary of our findings

i) The State Commission has correctly determined the rate of Rs. 5.30 per unit for the electricity supplied by the Appellants to the distribution licensee as fixed in the direction of the State Commission under Section 11(1) of the Electricity Act.

ii) The findings of this Tribunal in Appeal no. 141 of 2012 and batch in the matter of Himatsingka Seide Ltd. Vs. KERC and others and Appeal no. 37 of 2013 and batch in the matter of GMR Energy Ltd. Vs. KERC & Ors. would squarely apply to the present case.

iii) The State Commission has considered the specific claims of the Appellants relating to cost of generation and contracts with the traders and correctly rejected the same. We do not find any merits in the claims of the Appellants.

48. In view of our above findings, we do not find merit in these Appeals. Consequently, the Appeals are dismissed. No order as to costs.

49. Pronounced in the open court on this **13th day of November, 2014.**

(Rakesh Nath)
Technical Member
Dated:13th Nov, 2014

(Justice M. Karpaga Vinayagam)
Chairperson

√REPORTABLE/~~NON-REPORTABLE~~