

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 159 of 2013 & I.A. No. 327 of 2013

Dated: 17th October, 2014

**Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice Surendra Kumar, Judicial Member**

In the matter of:

M/s. Aarti Steels Limited,
Plot No. 11/1B/41, Sector-11,
CDA, Cuttack,
Orissa-753 014

... Appellant (s)

Versus

- 1. Odisha Electricity Regulator Commission,**
Bidyut Niyamak Bhavan,
Unit-VIII, Bhubaneswar- 751012,
Orissa.
- 2. GRIDCO Limited,**
Vidyut Bhawan, Janapath,
Bhubaneswar- 751007,
Orissa, India.
- 3. Central Electricity Supply Utility,**
2nd Floor, IDCO Tower,
Janpath, Bhubaneswar- 751 022
- 4. North Eastern Electricity Supply
Company of Orissa Limited,**
Januganj, Balasore- 756019,
Orissa.
- 5. Western Electricity Supply Company,**
Distt. Sambalpur, Burla-768 017,
Orissa, India.

6. **Southern Electricity Supply Company,**
Plot N-1/22, Nayapalli,
Bhubaneswar, Orissa- 751 015 **...Respondent(s)**

Counsel for the Appellant (s) : Mr. Sanjay Sen, Sr. Adv.,
Mr. Rajiv Yadav,
Mr. Hemant Singh

Counsel for the Respondent(s): Mr. Rutwik Panda,
Mr. Rajesh Kumar Das,
Ms. Anshu Malik for R-1
Mr. Raj Kumar Mehta,
Mr. Antaryami Upadhayay,
Ms. Ishta C. Das Gupta for R- 2 & 3

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

The present Appeal has been filed by M/s. Aarti Steels Ltd. against the order dated 16.04.2013 passed by Orissa Electricity Regulatory Commission (“State Commission”) wherein in a remand proceeding the Appellant’s power plant was held to be a Captive Power Plant, relegating the Appellant to the generic tariff applicable to supply of surplus power from the Captive Generating Plants in the State of Orissa.

2. The Appellant is a company incorporated under the provisions of the Companies Act, 1956 and is engaged, *interalia, in* generation of electricity. The State Commission is the Respondent no. 1. GRIDCO Ltd. is the Respondent no.2. The Distribution Licensees of Orissa are the Respondent nos. 3 to 6.

3. The brief facts of the case are as under:
 - a) The Appellant operates a coal based thermal power plant having an installed capacity of 50 MW set up as an Independent Power Producer (IPP). The Appellant also owns a Captive Generating Plant of 40 MW capacity to meet the electricity requirement of its steel manufacturing operations. The 50 MW generating plant and the 40 MW Captive Generating Plant are located in the same premises.

- b) The Government of Orissa vide Notification dated 08.08.2008 laid down policy guidelines for the IPPs in the State.
- c) On 07.02.2009, the Appellant entered into a MOU with the Government of Orissa for setting up of a 500 MW IPP.
- d) On 28.08.2009 the Appellant sent a letter to the State Government that it was installing a 50 MW power plant at the existing plant site and the same was scheduled to be commissioned by October, 2009 which was to be treated as an IPP and requested the State Government to grant its power plant the status of IPP.
- e) On 24.10.2009, the Appellant entered into a Power Purchase Agreement (“PPA”) with GRIDCO. The PPA provided for supply of 12% of energy sent out from the

Power Plant of the Appellant at variable cost to GRIDCO.

- f) On 20.02.2010, GRIDCO filed petition no. 29 of 2010 before the State Commission for approval of PPA dated 24.10.2009. GRIDCO on the same date filed petition no. 29 of 2010 before the State Commission for determination of tariff for 12% of 50 MW power to be supplied as State's share.

- g) On 05.03.2010, the 50 MW power plant of the Appellant was synchronized and on 24.04.2010, its commercial operation was declared. The Appellant supplied the output of the 50 MW unit to GRIDCO from March 2010 to June 2011. On 04.05.2010, the State Commission directed GRIDCO to pay a provisional variable cost of 50 paise/kWh to the Appellant for the energy supplied by the Appellant from its 50 MW Power Plant.

- h) On 30.07.2010, the Appellant also filed an application for determination of final tariff in respect of 12% power to be supplied to the State at the variable charges. On 18.08.2010, the State Commission determined the provisional tariff of 175 paise/kWh for 12% energy and further directed GRIDCO to make payment @ 175 paise/kWh in respect to power over and above 12% supplied to GRIDCO. Thereafter on 05.04.2011, GRIDCO unilaterally fixed a provisional tariff of Rs. 2.43/kWh in respect of 88% of power supplied by the Appellant and made payments for past supplies in terms thereof. The Appellant supplied entire power from its 50 MW unit to GRIDCO from March 2010 to June 2011.
- i) On 21.04.2011, the Appellant filed a petition for determination of final tariff in respect of power supplied

- over and above State's entitlement of 12% and proposed a tariff of Rs. 4.31 per kWh. On 14.07.2011 GRIDCO informed the Appellant that it was not interested in purchasing balance 88% power.
- j) On 13.09.2011, the State Commission passed the order directing GRIDCO to make payment @ Rs. 3.02 per unit for energy purchased till the date of order out of balance 88% generation from the 50 MW unit which was based on average rate of power purchase from NTPC's Eastern Region generating stations.
- k) The Appellant filed an Appeal before this Tribunal being Appeal no. 191 of 2011 against the order dated 13.09.2011 of the State Commission.
- l) The Tribunal by judgment dated 04.10.2012 disposed of the Appeal no. 191 of 2011 remanding the matter to

the State Commission to determine the tariff of Appellant's 50 MW power plant and pass fresh order in accordance with law after hearing the parties.

- m) By impugned order dated 16.04.2013, on the matter remanded by this Tribunal, the State Commission constituted a committee to enquire into the status of the 50 MW plant and determined the status of the 50 MW generating plant along with the 40 MW Captive Power Plant to be that of a Captive Power Plant of the Appellant. The State Commission also held that the price fixed by the State Commission from time to time for procurement of surplus power from the Captive Generating Plants of the State shall be applicable for any surplus power drawn from 90 MW (50 MW+40 MW) Captive Generating Plant of the Appellant. The State Commission also rejected the PPA entered into between the Appellant and GRIDCO.

n) Aggrieved by the impugned order dated 16.04.2013, the Appellant has fled this Appeal.

4. The Appellant has made following submissions:

a) The State Commission's finding that the Appellant's 50 MW unit is a Captive Power Plant is de hors the relevant provisions of the Electricity Act, 2003 and the Electricity Rules 2005. The State Commission has ignored the fact that during the relevant period, the Appellant did not utilize any electricity generated by the subject 50 MW unit for captive consumption. It is mandatory to have captive consumption of at least 51% of the aggregate annual electricity generated in such plant. This has not been examined by the State Commission.

b) The State Commission has misdirected itself by premising impugned Captive Generating Plant status to the 50 MW unit on extraneous considerations such as the unit initially conceived as a Captive Generating Plant, commonality of certain auxiliaries with the 40 MW Captive Generating Plant, environment clearance and Fuel Supply Agreement (“FSA”). The State Commission overlooked the fact that the FSA was signed after coal linkage was granted well after expiry of the relevant period of power supply by the Appellant to GRIDCO. The Appellant supplied power to GRIDCO from March 2010 to June 2011, whereas the FSA was signed on 19.07.2012.

c) The State Commission has failed to adhere to the scope of the remand ordered by this Tribunal vide judgment dated 04.10.2012. The Tribunal in its judgment had pointed out the 50 MW power generation

as part of Appellant's IPP and therefore it was not open to the State Commission to revisit the IPP status of Appellant's 50 MW unit. The State Commission's earlier order dated 13.09.2011 too proceeded on the basis of that the subject power plant was an IPP. The State Commission instead of determining the tariff after verification of the cost details as per the remand order, chose to consider the 50 MW unit as CGP and applied generic CGP tariff rate. The enquiry into IPP/CGP status of the subject power plant was wholly extraneous to determination of cost plus tariff.

- d) The State Commission's approach all along has been directed towards denying cost plus tariff to the Appellant, even though it was agreed basis for tariff determination under the PPA.

5. In reply, GRIDCO, the Respondent no. 2 herein, has made the following submissions.
 - a) Even though there is no specific provision in the Electricity Act 2003 specifying the authority to decide the status of a power plant i.e. whether it is an IPP or CGP, under the scheme of the Act, in case such a question arises, the Appropriate Commission is not precluded from going into the said question. In case a party goes before the State Commission for approval of PPA or determination of tariff, the State Commission is required to examine whether the power plant satisfies the requirement of Act/Rules/Regulations for IPP or CGP as the case may be. Such powers have to be read into the powers of the State Commission under Section 61(1)(a), 86(1)(a) and 86(1)(b).

- b) The order dated 04.12.2012 of the Tribunal did not preclude the State Commission from going into the question of status of the 50 MW generating unit.

- c) There is sufficient material on record that the 50 MW generating unit was conceived and developed as a CGP by the Appellant in addition to its 40 MW unit.

- d) In a meeting held on 18.09.2013, the Task Force on power projects constituted by Government of Orissa has decided not to recommend the extension of the MOU dated 07.02.2009 between the State Government and the Appellant. In view of the said development, the question of 50 MW generating unit being treated as an IPP does not arise.

6. CESU, the Respondent no. 3, has also adopted the submissions made by GRIDCO in supporting the impugned order.
7. The State Commission in its submissions has stated that it has acted as per the directions of the Tribunal dated 04.10.2012 in Appeal no. 191 of 2011.
8. On the above issues we have heard Mr. Sanjay Sen, Learned Senior Advocate for the Appellant, Mr. R.K. Mehta, Learned Counsel for the GRIDCO and CESU and Mr. Rutwik Panda, Learned Counsel for the State Commission.
9. On the basis of rival contentions of the parties the following questions arise for our consideration:
 - i) **Whether the State Commission has passed the impugned order as per the directions given in the**

- judgment dated 04.12.2012 of the Tribunal remanding the matter to the State Commission?**
- ii) Whether the State Commission has erred in deciding that the tariff for electricity supplied by the Appellant's 50 MW power plant to GRIDCO has to be the generic tariff decided by the State Commission from time to time for supply of surplus power by the Captive Generating Plants in the State to GRIDCO?**
10. All the above issues are interconnected and are being dealt with together.
11. We find that on 07.02.2009, the Appellant entered into a Memorandum of Understanding with the government of Orissa for setting up a thermal power plant of about 500 MW capacity at Ghantikhal, Cuttack, in the State of Orissa. The Appellant agreed to that a nominated

agency authorized by the Government will have right to purchase 14% of power sent out from the power plant(s) at variable cost if coal blocks are allocated to IPP within the State otherwise it will provide 12% power at variable cost. Tariff for such power will be determined by the State Commission. The Appellant had right to sell the balance power from the power plant(s) to any party outside or inside the State of Orissa as per the applicable laws.

12. We find that a PPA dated 24.10.2009 was entered into between the Appellant and GRIDCO, as a nominated agency to act on behalf of the State Government to receive delivery of 14%/12% share of the State Government in terms of the MOU. The PPA provided for proposed installed capacity of the thermal power station as 500 MW out of which 50 MW was likely to be commissioned by November, 2009. The charges

payable by GRIDCO to the Appellant were restricted to variable cost (energy charges) in regard to 14%/12% of capacity entitlement to GRIDCO, to be determined as per norms, guidelines and directions of the Appropriate Commission. Thus, the PPA entered into between the Appellant and GRIDCO was in respect of 12% of power generated from the Appellant's Power Plant as an IPP.

13. We find that the State Commission in the order dated 13.9.2011 observed that GRIDCO was taking power from the Appellant's 50 MW power plant but is not agreeing to pay even the provisional negotiated price for 88% of the power generated but at the same time GRIDCO was creating hurdles in granting open access to the Appellant for supply of its power to a third party which was not desirable for the growth of the power sector in the State. The State Commission directed GRIDCO to decide how much power it wanted to take

out of the balance 88% power from the 50 MW power plant of the Appellant so that the Appellant could sell the balance power to third party. The State Government was also asked to decide the status of the 50 MW unit as an integrated part of the proposed 500 MW IPP and then revise the MoU. After settling these issues, the PPA may be entered into between the Appellant and GRIDCO and while deciding the PPA other issues regarding drawal of start up power and issues related to commonality of the auxiliaries with CGP and fuel management of 50 MW unit should be mutually settled. However, for power supplied in the past it directed payment towards balance 88% power at the average tariff of NTPC's power plants in Eastern Region for FY 2010-11 (Rs. 3.02 per kWh).

14. The above order of the State Commission was challenged by the Appellant before this Tribunal in Appeal no. 191 of 2011.

15. Let us now examine the judgment dated 04.10.2012 of this Tribunal in Appeal no. 191 of 2011 by which the matter was remanded to the State Commission.

16. The findings of the Tribunal in judgment in Appeal no. 191 of 2011 are summarized as under:
 - i) The Commission's first objection, though not explicitly revealed in the impugned order behind not determining the tariff in terms of the provisions of the statute is that the status of 50 MW plant was yet to be ascertained, and it raised the questions before the final hearing took place. It was not the objection of the GRIDCO so far the counter affidavit of the GRIDCO is concerned and it

was not the case of GRIDCO before the State Commission that in respect of either 12% of ex-bus energy or in respect of 88% of the balance power that the 50 MW power plant is a captive generating unit and not the IPP. That it was an IPP has not been disputed at any forum. The principal question is if the parties fail to arrive at any mutual settlement, subject to final approval of the State Commission in respect of variable cost of 12% of power or in respect of 88% of the power than what should have been price in respect of either, and whether in deciding the issue the State Commission has taken note of cost of generation of energy incurred by M/s. Aarti Steel Ltd. and other parameters. It was because of acute power shortage that the GRIDCO by letter dated 30.11.2011 agreed to take the entire quantum of power as against the rate approved or approvable by the State Commission. Both

the GRIDCO and SLDC treated the 50 MW power plant of Aarti Steel Ltd. as IPP.

- ii) In the final order the State Commission did not take the stand that since the queries raised by the State Commission in its order dated 04.05.2010 or 18.08.2010 were not complied with it was unable to determine the tariff. So far as the materials made available before the State Commission is concerned, it was apparent that the Arti Steel Ltd.'s power plant was an IPP, and the 50 MW power generation was part of the project. It was the CESU that raised the question. If the capacity of the project goes for revision then changes may be necessary in the MOU or in the PPA, but it cannot be the ground for not determining the tariff according to the law. The State Commission did not say that the order impugned is a provisional one, nor did it say that because of the queries not being allegedly

complied with final determination of tariff was impossible. In fact it determined the tariff, but according to a method which cannot be agreed upon.

- iii) When supply has already been made as the GRIDCO all along maintained that the State was experiencing acute shortage of power, when the MoU did not put any embargo to the GRIDCO purchasing the balance 88% of power generated by Aarti Steel, when the Commission did not question the GRIDCO's purchase of power from the IPP on the ground of possible higher tariff, when on the other hand the Commission all along in its previous order wished for a negotiated settlement, when the spirit of the present order is for a negotiated price, and when the parties fail to arrive at the negotiated price, the responsibility rested with the Commission to exercise its statutory power and determine the tariff in terms of the principles laid down

in the provisions of the Act and also in terms of the Commission's own Regulations as may be applicable in the given situation.

- iv) Aarti Steel Ltd.'s petition was under Section 86(1)(a), (b) & (f) read with Section 62 of the Electricity Act, 2003 and they invoked the jurisdiction of the State Commission for exercise of power in respect of 88 % of the power being supplied to GRIDCO in respect of which there was no concluded contract. The presence or absence of agreement enforceable by the law is not of paramount importance. The State Commission should have determined the tariff in terms of the principles laid down in the provision of the Act and also in terms of the Commission's own applicable Regulations. Again the impugned order is silent about the final order in respect of variable cost for 12% power to be supplied to GRIDCO.

- v) Determining the tariff of Aarti Steel Ltd. by taking into consideration the rate payable to NTPC's Central Generating Plants in the Eastern Region is not in order as the cost structure of NTPC's power plant may be different. The submissions of Aarti Steel that because of denial of open access, they did not find no other way than agreeing to the request of the GRIDCO in the matter of supplying the balance 88% of power and in such circumstances, the Commission's refusal to consider all relevant aspects in the matter for the purpose of determining the tariff is to put the ASL to jeopardy cannot be brushed aside at one stroke without any reason whatsoever.
- vi) The Commission was occupied with various queries regarding construction power/start up power for the 50 MW unit, change of configuration of power project,

connection arrangements, etc., which may not have nexus with tariff determination process. The State Commission also did not say that because they could not be satisfied with the information they could not determine the tariff. The Commission recommended the parties to sit with the Government in order that MoU and PPA could be revised. This is altogether a different issue which probably did not confront the Commission in discharging its statutory powers.

- vii) The Appeal is allowed by setting aside the impugned order and the matter is remanded back to the State Commission with direction to pass order afresh in accordance with law after hearing the parties and on the basis of the materials as were made available before the State Commission and may be produced further by the parties to the extent of relevancy.

17. Thus, the Tribunal had remanded the matter of determination of variable charges for 12% power and total tariff for balance 88% power supplied by the Appellant to GRIDCO as per the principles laid down in the provisions of the Electricity Act and also in terms of the Commission's own Regulations.

18. Let us now examine the impugned order dated 16.04.2013 passed by the State Commission.

19. We find from the impugned order that the State Commission made an inquiry into the status of the 50 MW power plant of the Appellant. The State Commission constituted an Inspection Team to the Appellant's power plant for field inquiry. On the basis of the inspection report, and the available records, the State Commission came to the conclusion that 50 MW power plant of the Appellant is a Captive Generating

Plant and is an extension of the existing Captive Generating Plant of 40 MW capacity.

20. In view of above, the State Commission directed to treat the 50 MW unit as an extension of the existing 40 MW Captive Generating Plant and held that tariff decided by the State Commission for procurement of surplus power from the Captive Generating Plants of the State by GRIDCO shall also be equally applicable to the present case for any surplus power drawn from the 90 MW (40 MW + 50 MW) CGPs of the Appellant. Accordingly, the State Commission also did not approve the PPA of 50 MW capacity as it was not considered to be an IPP.

21. We find that the State Commission has failed to adhere to scope of the remand ordered by this Tribunal vide Judgment dated 4.10.2012 in Appeal no. 191 of 2011.

Instead of determining the tariff based on the provisions of the Act and its own Regulations, the State Commission has proceeded to enquire into the status of the 50 MW power plant by constituting an Inspection Team.

22. In the previous order dated 13.9.2011, the State Commission instead of determining the tariff of Appellant's power plant of 50 MW capacity on cost plus basis as per its Regulations, decided that the 88% energy supplied by the Appellant may be paid by GRIDCO at NTPC-Eastern Region tariff. The Tribunal in Appeal No. 191 of 2011 held that linking the tariff of the Appellant's power plant with NTPC tariff was not in order and directed determination of tariff as per the provisions of the Act and its Regulations by taking into account the costs incurred by the Appellant. There was no occasion for the State Commission to institute an

enquiry regarding the status of the 50 MW unit in the remand proceedings.

23. There was no PPA between the Appellant and GRIDCO regarding supply of entire power output of 50 MW unit. The PPA between them only covered supply of 12% power at variable cost. As held by the State Commission in its earlier order dated 13.9.2011 that the Appellant was not permitted to supply power to third party by denying open access and in the process the entire power was consumed by the distribution company through GRIDCO. The State Commission in its order dated 13.9.2011 had recorded that the *“a situation has been created in which power is generated and is taken by GRIDCO for consumption in the State but the purchaser does not agree to pay even provisional negotiated price of 88% of the power generated and at the same time hurdles are being*

created in granting open access". The State Commission had further stated that this was "not a desirable situation for the growth of power industry in Orissa".

24. The State Commission in its earlier order dated 13.9.2011 had also held that the need to ensure supply to meet demand entails that additional power would have to be procured after-all contracted supplies have been procured from State Generator, Central Generating Stations and surplus power of CGPs and such additional power procured from an IPP whose fuel supply is dependent purely on the open market or e-auction or even imports. Further, the State Commission decided the rate for supply of 88% power from the 50 MW power plant of the Appellant considering it as an IPP. If the State Commission had considered the Appellant's 50 MW plant as Captive

Generating Plant then there was not need for the State Commission to recognize supply of 12% power at variable cost as per the PPA and determining provisional variable cost for 12% power.

25. However, in the impugned order the State Commission has made as a U turn and decided that the generic tariff decided by the State Commission for purchase of surplus power of Captive Generating Plants from time to time would be payable to the Appellant for the entire energy supplied to GRIDCO.

26. We do not want to go into the question whether the 50 MW plant is a Captive Generating Plant as that was not an issue remanded to the State Commission and is not relevant to determine the tariff of the 50 MW unit for supply to GRIDCO as per the provisions of the Act and the Tariff Regulations of the State Commission. Even if

it is accepted that the 50 MW unit of the Appellant is a CGP, there was no question of applying the generic tariff applicable for purchase of surplus power from the CGPs in the State to be made applicable to the present case where the entire power output of the 50 MW unit was consumed by GRIDCO even though a PPA provided for supply of 12% power at variable cost. The State Commission should have determined the tariff for power supplied to GRIDCO from March 2010 to June 2011 as per the provisions of the Act and its own Regulation taking into consideration the capital cost of the 50 MW unit, actual landed cost of coal and secondary fuel oil and operational and financial parameters as per its Tariff Regulations.

27. Section 61 of the Electricity Act is relevant here which is reproduced below:

“61. Tariff regulations.—*The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:—*

- (a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;*
- (b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;*
- (c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;*
- (d) safeguarding of consumers’ interest and at the same time, recovery of the cost of electricity in a reasonable manner;*
- (e) the principles rewarding efficiency in performance;*
- (f) multi-year tariff principles;*
- (g) that the tariff progressively, reflects the cost of supply of electricity, and also, reduces cross-subsidies in the manner specified by the Appropriate Commission;*
- (h) the promotion of co-generation and generation of electricity from renewable sources of energy;*
- (i) the National Electricity Policy and tariff policy”.*

28. When a case is remanded back by the Appellate Tribunal to a State Commission, the remand proceedings have to be carried out by the State Commission strictly in accordance with the terms of remand. The State Commission cannot decide the matter on extraneous consideration as done in this case. The enquiry into IPP status of the power plant was extraneous to the determination of tariff for power supplied to GRIDCO from March 2010 to June 2011 on cost plus basis as per the Tariff Regulations and beyond the scope of the remand. Therefore, the tariff for supply of power by Aarti Steel to GRIDCO had to be determined on the basis of cost details submitted by the Appellant subject to prudence check by the State Commission and subject to the Tariff Regulations.

29. Learned Sr. counsel for the Appellant has argued that in the first round of litigation before the State Commission, the Appellant was not granted a cost-plus tariff even though it had been called upon by the State Commission vide order dated 4.8.2010 to submit the tariff calculation along with the various cost elements thereof. Instead of undertaking cost plus tariff determination, the State Commission vide order dated 13.9.2011, decided to grant the NTPC –ER tariff to them. After the setting aside of the order dated 13.9.2011 by the Tribunal, the State Commission devised a method to somehow deny cost plus tariff to the Appellant by designating the 50 MW plant as a CGP. Therefore, the Tribunal instead of remanding the matter back may consider to determine cost plus tariff

- by engaging the services of an independent agency.
30. We are not inclined to accept the request of the Learned Senior counsel for the Appellant as we feel that the determination tariff is the function of the State Commission. However, the tariff has to be determined by the State Commission as per our directions.
31. Learned counsel for the State Commission has referred to the various rulings of the Hon'ble Supreme Court regarding the regulatory powers of the State Commission. We feel that these rulings are not relevant to the present case which was remand proceeding in pursuance to the directions given by this Tribunal in Appeal no. 191 of 2011.
32. Learned counsel for the State Commission has submitted that ascertaining the status of the power plant was a pre-condition for determination of tariff. We

do not accept the contention of the learned counsel for the State Commission. For determination of tariff of the 50 MW power plant on cost plus principles as per the Tariff Regulations of the State Commission as per the remand directions of the Tribunal, it was not necessary to make an enquiry about the status of the Power Plant. The application of generic tariff for procuring surplus power of CGP in the State was not relevant to the present case where the entire output of the 50 MW unit was consumed by GRIDCO due to power shortage in the State by unlawfully denying open access to the Appellant as also held by the State Commission in the earlier order dated 13.9.2011.

33. In view of above, we set aside the impugned order and direct the State Commission to determine the tariff of the 50 MW power plant taking into consideration the capital cost, actual landed cost of fuel and after

applying its generation tariff regulation for financial and operational parameters within 3 months from the date of communication of this judgment.

34. Before parting, we wish to record our displeasure about the conduct of the Orissa Commission. This is not the first time that the State Commission has acted contrary to the directions of this Tribunal. It seems that the Orissa Commission does not understand the hierarchy of the judiciary and judicial discipline. When a superior court gives a direction to the subordinate court or remands a matter with specific directions it is the duty of the subordinate court to comply with the same in letter and spirit. We hope that Orissa Commission will in future act responsibly and comply with the directions given in this order.

35. **Summary of our findings:**

(i) We find that the State Commission has failed to adhere to scope of the remand ordered by this Tribunal vide Judgment dated 4.10.2012 in Appeal no. 191 of 2011. In the previous order dated 13.9.2011, the State Commission instead of determining the tariff of Appellant's power plant of 50 MW capacity on cost plus basis, decided that the 88% energy supplied by the Appellant may be paid by GRIDCO at NTPC-Eastern Region tariff. The Tribunal in Appeal No. 191 of 2011 held that linking the tariff of the Appellant's power plant with NTPC tariff was not in order and directed determination of tariff as per the provisions of the Act and its Regulations by taking into account the costs incurred by the Appellant. There was no occasion for the State Commission to institute an enquiry

regarding the status of the 50 MW unit in the remand proceedings.

(ii) Even if it is accepted that the 50 MW unit of the Appellant is a CGP, when the entire power output of the 50 MW plant of the Appellant was consumed by GRIDCO there was no question of applying the generic tariff applicable for purchase of surplus power from the CGP to be made applicable for the power taken by GRIDCO that too without any agreement and after unlawfully denying open access to the Appellant. The State Commission should have determined the tariff on the cost plus basis taking into consideration the capital cost of the 50 MW plant, actual landed cost of coal and fuel oil and operational and financial parameters as per its Tariff Regulations.

- (iii) In view of above, the impugned order is set aside and the matter is again remanded to the State Commission to determine the tariff as per the directions given by the Tribunal within three months of date of communication of this judgment.
36. The Appeal is allowed and the impugned order is set aside. The State Commission is directed to pass consequential order as per the directions given in this judgment. No order as to costs.
37. Pronounced in the open court on this 17th day of October, 2014.

(Justice Surendra Kumar)
Judicial Member

(Rakesh Nath)
Technical Member

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REPORTABLE/NON-REPORTABLE
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