

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

Appeal Nos. 141, 142 of 2011 & 10 of 2012

Dated: 3rd October, 2012

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

Appeal No. 141 of 2011

In the matter of:

Himatsingka Seide Limited,

10/24, Kumara Krupa Road,

High Grounds, Near Sindhi

High School,

Bangalore-560 001

(Represented by its Authorized Signatory,

Mr. K.P. Pradeep)

... Appellant

Versus

1. **Karnataka Electricity Regulatory Commission,**

6th & 7th Floor, Mahalaxmi Chambers,

No. 9/2, M.G. Road,

Bangalore-560 001

(Represented by its Chairman)

2. **Government of Karnataka,**

Department of Energy,

Vikasa Soudha, Vidhana Veedhi,

Bangalore-560 001

(Represented by its Principal Secretary)

3. **State Load Dispatch Centre**

For Karnataka; Operated by

Karnataka Power Transmission

Corporation Limited,

No. 28, Race Course Road,

Bangalore-560 001

(Represented by its Chief Engineer)

4. **Chamundeshwari Electricity Supply**

Corporation Limited, No. 927, L.J. Avenue

New Kanth Raj URS Road,

Saraswathi Puram,

Mysore-575005

(Represented by its Managing Director)

5. **Bangalore Electricity Supply Company Limited Corporate Office,**
K.R. Circle, Bangalore-560 001
(Represented by its Managing Director)
 6. **M/s. J.K. Cement Works,**
Muddapur-587 122 Bagalkot District
(Represented by its Managing Director)
 7. **M/s. Falcon Tyres Limited,**
K.R.S. Road, Metagalli,
Mysore-570 016
(Represented by its Managing Director)
 8. **M/s. Sathavahana Ispat Limited,**
No. 169/11, Grand Trunk Road,
Near RTO Office, Cantonment,
Bellary-583 104
(Represented by its Managing Director)
 9. **M/s. Hare Krishna Metallics,**
No. 20, Kasan Kandi Road,
Hirebaganal Village & Post
Koppal District-583 228
- ... Respondents

Appeal No. 142 of 2011

In the matter of:

M/s. J.K. Cement Limited,

Having its Registered Office at
J.K. Cement Ltd., Kamala Tower,
Kanpur-208 001

Having one of its units at Muddapur-District
Bagalkot, Karnataka

(Rep. by its Unit Head Mr. S.Khan)

... Appellant

Versus

1. **Karnataka Electricity Regulatory Commission,**

6th & 7th Floor, Mahalaxmi Chambers,
No. 9/2, M.G. Road,
Bangalore-560 001
(Represented by its Chairman)

2. **Government of Karnataka,**

Department of Energy,
Vikasa Soudha, Vidhana Veedhi,
Bangalore-560 001
(Represented by its Principal Secretary)

3. **State Load Dispatch Centre**
For Karnataka; Operated by
Karnataka Power Transmission
Corporation Limited,
No. 28, Race Course Road,
Bangalore-560 001
(Represented by its Chief Engineer)
4. **Power Company of Karnataka Limited**
KPTCL Building, Kaveri Bhavan,
Bangalore-560 009
(Represented by its Managing Director)
5. **Hubli Electricity Supply Company Limited,**
Navanagar, Hubli-560 025,
(Represented by its Managing Director)
6. **Bangalore Electricity Supply Company Limited,**
K.R. Circle,
Bangalore-560 001
(Represented by its Managing Director)
7. **Mangalore Electricity Supply Company Limited,**
Paradigm Plaza,
A.B. Shetty Circle,
Mangalore-575 001
(Represented by its Managing Director)
8. **Gulbarga Electricity Supply Company Limited,**
Station Road,
GULBARGA-585101,
(Represented by its Managing Director)
9. **Chamundeshwari Electricity Supply
Corporation Limited,** No. 927, L.J. Avenue
New Kanth Raj Urs Road,
Saraswathi Puram,
Mysore-570 009
10. **M/s. Himatsingka Siede Limited,**
10/24, Kumara Krupa Road,
High Grounds, Near Sindhi
High School,
Bangalore-560 001
(Represented by its Managing Director)

11. **M/s. Falcon Tyres Limited,**
K.R.S. Road, Metagalli,
Mysore-570 016
(Represented by its Managing Director)
12. **M/s. Sathavahana Ispat Limited,**
No. 169/11, Grand Trunk Road,
Near RTO Office, Cantonment,
Bellary-583 104
(Represented by its Managing Director)
13. **M/s. Hare Krishna Metallics,**
No. 20, Kasan Kandi Road,
Hirebaganal Village & Post
Koppal District-583 228
... Respondents

Appeal No. 10 of 2012 &
I.A. Nos. 15 & 16 of 2012

In the matter of:

MPPL Renewable Energy Pvt. Limited,

Through its Chairman,
1st Floor, Maliks Building,
No. 29, Hospital Road,
Bangalore-560 001,
Karnataka

Versus

1. **Mangalore Electricity Supply Company Limited,**
Through its Managing Director
4th Floor, Paradign Plaza,
A.B. Shetty Circle,
Mangalore-575 001
2. **Karnataka Power Transmission Corporation Limited,**
Through its Managing Director,
Kaveri Bhavan,
Bangalore-560 009
3. **Karnataka Electricity Regulatory Commission,**
6th & 7th Floor, Mahalaxmi Chambers,
No. 9/2, M.G. Road,
Bangalore-560 001
... Respondents

Counsel for the Appellant(s): Mr. Sridhar Prabhu &
Mr. G. Joshi in Appeal Nos. 141 &
142 of 2011
Ms. Radhika Kolluru
in Appeal No. 10 of 2012

Counsel for the Respondent(s): Mr. Raghavendra S. Srivatsa,
Mr. Venkat Subramaniam,
Mr. Sriranga S., Mr. Vivek

JUDGMENT

MR. RAKESH NATH, TECHNICAL MEMBER

The above Appeals have been filed against a common order dated 24.3.2011 passed by the Karnataka Electricity Regulatory Commission (“State Commission”) fixing price for supply of power by the generating stations to the distribution licensees in Karnataka in compliance with the directions of the State Government u/s 11(1) of the Electricity Act, 2003 during the period 8.4.2010 to 30.6.2010. As the same impugned order is being challenged in all the three Appeals, a common judgment is being rendered.

2. The Appellants in Appeal nos. 141 of 2011 and 142 of 2011 are companies having Captive Power Plants with co-generation. The Appellant in Appeal No. 10 of 2012 is a bio-mass generator having a PPA with the distribution licensee for supply of power.

3. The facts of the cases are as under:

3.1 The State Government by an order dated 1.4.2010 approved purchase of power by the distribution licensees as short term arrangement for the period from April to June, 2010 from co-generation sugar factories at a provisional rate of Rs. 5.50 per unit during the months of April and May 2010 and Rs. 5/- per unit in June, 2010, for generators who did not have or had Power Purchase Agreements with the distribution licensees, subject to the approval of the State Commission. The State Government noted the report of the Commissioner, Cane Development that

owing to shortage of bagasse, it would not be possible to generate power from bagasse and the use of coal was inevitable. The distribution licensees were directed to seek the approval of the State Commission for suspension of PPAs during the above period and for procurement of power at the rates provisionally approved by the State Government.

3.2 The State Government issued similar order on 6.4.2010 for procurement of power from biomass based generating companies at Rs. 5.00 per unit.

3.3 The State Government issued another order on 3.4.2010 in exercise of powers u/s 11(1) of the Act directing all the generating companies in the State to operate and maintain their units at maximum exportable capacity and supply all exportable electricity to the State Grid till further orders.

Subsequently, the State Government by an order dated 30.6.2010; limited the operation of the order till 30.6.2010.

3.4 The State Government by an order dated 1.8.2010 fixed a provisional rate of Rs. 4/- per unit for the power supplied by a number of co-generation units and other captive generators who had supplied power in compliance of its directions.

3.5 Thereafter, the various generators and the distribution licensees filed petitions before the State Commission to approve the rates for bagasse/bio-mass plants as provisionally fixed by the State Government in orders dated 1.4.2010 and 6.4.2010 and also determine the rate for supply of power by Captive Power Plants.

3.6 The State Commission considered all the petitions together and passed a common order on 24.3.2011 fixing a rate of Rs. 5 per KWh for all categories of generators for the entire period.

3.7 Aggrieved by the above order, the Appellants have filed this Appeal.

4. The submissions made in the Appeal nos. 141 of 2011 and 142 of 2011 are similar and are described as under:

4.1 “The Appellants were constrained to supply power to the State Grid in pursuance to the Government directive. The State Government having given the direction u/s 11(1) should have decided the rate so that the payment could be made by the distribution licensees within 15 days from the date of export of power, as is made in the case of projects having PPAs.

However, no payment was made to them after export of power to the grid. Therefore, the Appellants approached the State Commission for payment of Rs. 6.50 per unit during the period April-June, 2010.

4.2 The State Commission erred in deciding the rate on the basis of market rate without taking into consideration the cost of generation of the Appellants. The State Commission should have determined the cost of generation for each generator and the compensation required for each generator instead of deciding a common rate for all.

4.3 The State Commission having recorded that the average price of short term power transacted through traders during the period was Rs. 5.68 per unit in April, Rs. 6.26 per unit in May and Rs. 5.57 per unit in June, 2010, decided the compensation at

Rs. 5.00 per unit after discounting for marketing expenses and transmission charges. The State Commission should have determined the marketing expenses and transmission charges and then decided the rate for each month. The rate could not be uniform for all the three months after discounting for marketing expenses and transmission charges as the average rate for traded power in the three months varied from Rs. 5.57 to Rs. 6.26 per unit.

4.4 The State Commission determined the compensation at the rates prevailing in the market during the relevant period erroneously assuming that the captive plant would sell the excess power in open market ignoring the fact that had market rate at any point of time been less than the cost of production and reasonable return on investment, the Appellant would not have sold power in the market. However, the

Appellant had to maintain its plant to maximum capacity by using imported coal in view of State Government's order u/s 11(1) of the Act.

4.5 The Appellants are also entitled to interest for late payment of charges by the distribution licensees”.

5. The Appellant in Appeal no. 10 of 2012 has made following submissions:

5.1 “Even though the Appellant had a PPA with the distribution licensee, the PPA did not prescribe any minimum electricity supply obligation. As and when the bio-mass generator generated the electricity, it was supplied to the distribution licensees.

5.2 The State Government order prescribed a temporary tariff of Rs. 5/- per unit for biomass generator which reflected the true cost of production

based on existing biomass costs. This rate was higher than the PPA tariff of Rs. 3.85 per unit.

5.3 Even though the petition was filed by the Appellant before the State Commission in May, 2010, the matter was decided only in March, 2011 by which time the Appellant had performed its obligation under the State Government order. The order of the State Government under Section 11(1) for statutory directions of the generation of electricity to produce electricity and to the distribution licensees to pay at the rate of Rs. 5/- per unit could not have been altered by the State Commission to the disadvantage of the generator.

5.4 The State Commission has passed the impugned order without considering the documents and

averments of the Appellant regarding cost of production placed before the Commission.

5.5 Assuming for the sake of arguments the normal PPA obligation could be assumed for assessing the adverse financial consequences under Section 11(2), the method of computing the same ought to have taken into account the declining exports of the generator due to unviable rate provided for in the PPA. Taking the actual average quarterly supply for the year 2010-11 would be more equitable and fair way to calculate normal PPA obligation.

5.6 The State Commission while passing the order u/s 11 (2) of the Act could not have exercised power of tariff determination u/s 62 of the Act”.

6. Thus, in Appeals 141 and 142 of 2011 the Appellants are aggrieved by fixation of Rs. 5.00 per

unit by the State Commission without considering their actual cost of production which according to them is Rs. 7.60 per unit and Rs. 6.50 per unit respectively. On the other hand, in Appeal no. 10 of 2012, the Appellant with a Bio-mass based generating unit having an existing PPA with the distribution licensees, is aggrieved by the impugned order as according to them, they are entitled to be paid at the rate of Rs. 5/- per unit fixed by the State Government for the entire energy supplied during the period April-June 2010.

7. On the above issues, the learned counsel for the Appellants made detailed submissions. We have also heard learned counsel for the Respondent distribution licensees who supported the findings of the State Commission which we will elaborate while considering the various issues.

8. Based on the contentions of the parties, the following questions would arise for our consideration:

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?

9. The first and second questions are interconnected and are being taken up together.

9.1 According to the learned counsel for the Appellants the State Commission should have also considered the actual cost of production of electricity before deciding the rate.

9.2 According to learned counsel for the Respondents, the State Commission has correctly noted that the offers received from the traders included a guaranteed price of only Rs. 5/- per unit in case of some of the parties before it. Therefore, the State Commission has correctly arrived at the price of Rs. 5/- per unit. If the generating companies were

offered a guaranteed price of Rs. 5/- per unit during the relevant period, there could be no grievance against the orders of the State Commission. It is further pointed out that the Appellants have also not incurred any loss at the energy rate of Rs. 5/- per unit fixed by the State Commission.

9.3 As per Section 11(2) of the Electricity Act, the State Commission is required to offset the adverse financial impact of the directions issued by the State Government u/s 11(1) on the generating companies. Accordingly, the State Commission has decided the rate for energy supplied by the generators to the distribution licensees in compliance with the directions of the State Government. We have to examine if the rate decided by the State Commission is adequate to offset the adverse financial impact of the directions of the State Government on the Appellants.

Let us first examine the principle adopted by the State Commission in deciding the rate.

9.4 The relevant findings of the State Commission are reproduced below:

“18. We have considered the rival contentions as summarised 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 realized 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.

22. In the light of the foregoing discussion, we direct that the power supplied in compliance of the orders issued by the Government under Section 11(1) of the Act, 2003 in April 2010 by cogen power suppliers including sugarcane cogen generators and biomass based generators and also others

who do not have PPA governing supplies during the said period shall be paid for at Rs. 5.00 per kWh”.

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.

9.7 One reason for fixing the price of Rs. 5 per kWh given in the impugned order is that some of the petitioners had received offers from traders at guaranteed price of Rs. 5 per kWh. This does not seem to be a correct approach. The guaranteed price is only an indication of minimum price that the trader anticipated to fetch in the market. Since the actual average price was more than Rs. 5/- per kWh during

the period April-June, the guaranteed price offered by some of the traders on their assessment of future market prices will not be of any significance. Further such offers were available to only some generators as per the impugned order. It is also not indicated in the impugned order that the generators have signed PPA or agreed to supply power at Rs. 5/- per kWh to the traders.

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.

9.10 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.

9.15 In view of above, we direct the State Commission to determine the marketing expenses and

transmission charges and re-determine the rate of supply of power by the Appellants after discounting the above charges from the short term market rates determined by the State Commission for the months of April, May and June 2010 based on the Central Commission's statistics, after providing opportunity of hearing to the Appellants on this issue within 45 days from the date of this judgment.

10. The third issue is regarding jurisdiction of the State Commission raised in Appeal no. 10 of 2012. The jurisdiction issue was earlier raised in Appeal nos. 141 & 142 of 2011 also but was not pressed.

10.1 According to the learned counsel for the Appellant in Appeal no. 10 of 2012, the State Commission had no jurisdiction to interfere with or vary the orders passed by the State Government including the rate of supply which was to be applied

on the entire energy supplied and the interference by the State Commission almost a year later than the commencement of supply was illegal. It is further pointed out that the State Commission should have exercised powers u/s 11(2) to only offset adverse financial consequences suffered by the generating unit and not cause it to suffer financial consequences.

10.2 According to learned counsel for the Respondents the fixation of temporary tariff by the State Government was only provisional and it was expressly stated that the fixation of such tariff was subject to approval by the State Commission.

10.3 Let us first examine Section 11 of the Electricity Act, 2003:

*“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 section, 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”

Section 11(1) of the Act does not empower the State Government to determine the tariff. On the other hand, Section 11(2) empowers the Commission to offset the adverse financial impact of the Govt. direction on the generating company in such manner as it considers appropriate.

10.4 We also find that the State Government by their various orders decided a tariff for biomass generators subject to the approval by the

State Commission. Accordingly, the State Commission has exercised its powers u/s 11(2) of the Act.

10.5 Learned counsel for the Appellant has argued that powers u/s 62 cannot be exercised by the State Commission while passing orders u/s 11(2).

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.

10.7 The learned counsel for the Appellant has argued that the order of the State Commission has rendered the order of the State Government dated 6.4.2010 to nullity. She also referred to decision of the Hon'ble Supreme Court in (2000) 4 SCC 221 in the matter of Gayatri Devi Pansari vs. State of Orissa & Ors., (1989) 3 SCC 709 in Tinsukhia Electric Supply Co. Ltd vs. State of Assam and order of High Court of Allahabad reported as MANU/UP/3661/2011 in Dr. Pradeep Kumar vs. State of U.P. to press the point. She also referred to order of the High Court of Karnataka reported as MANU/KA/0200/2010 in GMR Energy Ltd. vs. Govt. of Karnataka & Others.

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.

10.9 The learned counsel for the Appellant also raised the issue of promissory estoppel and referred to

the decision of the Hon'ble Supreme Court in the following cases:

- i) (1979) 2 SCC 409 in Motilal Padampat Sugar Mills Co. Ltd. vs. State of U.P.
- ii) (1985) 4 SCC 369 in Union of India vs. Godfrey Philips India Ltd.
- iii) (1997) 7 SCC 251 in Pawan Alloys and Castings Pvt. Ltd. vs. U.P. State Electricity Board.

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.

11. The fourth issue is regarding the normal supply obligation of the Appellant under the PPA.

11.1 According to the Appellant the State Commission should have considered the declining trend of power supply in view of unviable PPA tariff for deciding the normal supply obligation.

11.2 According to the learned counsel for the Respondents, the formula decided by the State Commission to determine normal supply obligation is fair and just. The Appellant cannot seek to wriggle out of the terms agreed in the agreement. The term “operate and maintain” in Section 11 includes “supply”. Therefore, when the generating company is directed to supply power to the State grid by operating and maintaining its generating station to the fullest capacity, it can only seek to recover the loss, if any, suffered by it in that process. The enquiry under Section 11(2) by the State Commission is limited to that extent and obligation of the generating company under the subsisting PPA cannot be obliterated in this process. Further, the grievance raised by the Appellant was considered by the State Commission in its order dated 8.9.2011 in the review petition filed by

the Appellant and some relief was granted to the Appellant.

11.3 Let us first examine the findings of the State Commission in the case of the generators such as that of the Appellant having existing PPA:

“In the case of generators who have an existing PPA, even though the Government Orders mention the question of suspending the PPAs for the period from 29.3.2010 to 30.6.2010, no such prayer for suspension of PPAs has been made by the ESCOMs in their petitions and therefore, it is not necessary for the Commission deal with that aspect of the matter. In fact, one of the Respondents in OP 16/2010, GESCOM, has fairly submitted in reply to the Commission’s queries that “for generators having valid and subsisting PPAs with this Respondent, legal permissibility of payment of higher rates than the rates as contained in the PPA for the very quantities of power/energy covered by the PPA, as the Government Order directs so, needs to be decided by the Commission after considering the merits of the case”. The generators with existing PPAs are therefore, obliged to supply power at rates specified in the agreement to the extent of the supplies committed in the PPAs and the higher rate of Rs.

5.00 per kWh shall be applicable only if the supplies are made over and above the normal PPA obligations. For determining the normal supply obligation of such generators, we direct that the utilities shall take into account the quantum of power supplied by them during the months of April, May and June during the previous three years and any supplies made in excess of the average supply of last three years shall be eligible for payment at Rs. 5.00 per kWh determined under this order”.

11.4 The findings of the State Commission are summarised as under:

i) No prayer for suspension of PPAs during the period 29.3.2010 to 30.6.2010 been made by the distribution licensees.

ii) The generators with existing PPAs are obliged to supply power at rates specified in the agreement.

iii) Higher rate of Rs. 5/- per unit is applicable only if the supplies are made over and above the normal PPA obligation.

iv) The normal supply obligation will be quantum of energy supplied during the months of April, May and June during the previous three years and only the supplies in excess of such quantum will be payable @ Rs. 5/- per unit.

11.5 Subsequently, by the order dated 8.9.2011, in the review petition filed by the Appellant the State Commission decided that the quantum of electricity generated during the months in which Section 11 orders were in force during the year 2009 will be excluded while calculating the normal supply obligation.

11.6 Learned counsel for the Appellant has argued that there is no minimum power supply obligation as per the PPA and the generation of its biomass plant has been declining over the years due to unviable

tariffs. The Appellant has submitted the following generation data which according to her, has not been considered by the State Commission.

Energy Exported and Cost Analysis

Year	Export	BIOMASS CONSUMPTION & COST				OPERATION & MAINTENANCE		INCURRED COST (O&M+ Biomass Cost Rs/kWh)	PPA Tariff Rs/kWh
		MT	Cost	Rs./MT	Rs./kWh	Cost	Rs./kWh*		
2006-07	210,20,125	47877.881	49823752	1041	2.37	16348153	0.78	3.15	3.5856
2007-08	153,69,655	31123.989	37617902	1209	2.45	18996326	1.24	3.68	3.6520
2008-09	149,27,530	31681.722	43530590	1374	2.92	20670780	1.38	4.30	3.7184
2009-10	170,72,135	38531.318	54127099	1405	3.17	20406942	1.20	4.37	3.8512
2010-11	88,18,200	21627.210	29309879	1355	3.32	16360931	1.86	5.18	3.8512

* Note: With reduced exports, the operational costs (salaries, wages and administrative costs) in Rs./kWh increases significantly, as these costs remain fixed, irrespective of plant operation.

11.7 We have examined the data furnished by the Appellant and our findings are as under:

i) There is not much variation in generation of the Appellant's power station during the previous 3 years i.e. from 2007-08 to 2009-10. However, there is substantial reduction in generation during the year 2010-11 despite directions u/s 11(1) during the period April-June, 2010.

ii) There is not much variation in price of Biomass per tonne during the period 2008-09 to 2010-11 and the same varied in the narrow range between Rs. 1355 to Rs. 1405 per tonne.

iii) The specific fuel consumption for the years 2006-07 to 2010-11 computed from the data furnished by the Appellant is as under:

Computed specific fuel consumption

Year (1)	Export kWh (2)	Bio-mass consumption M.T. (3)	Computed specific fuel consumption Kg./kWh $\frac{(3) \times 1000}{(2)}$ (4)
2006-07	210,20,125	47877.881	2.27
2007-08	153,69,655	31123.989	2.02
2008-09	149,27,530	31681.722	2.12
2009-10	170,72,135	38531.318	2.25
2010-11	88,18,200	21627.210	2.45

It is seen that the specific fuel consumption during the years 2006-07 to 2009-10 when the generation was much higher compared to the year 2010-11, was in the range of 2.02 to 2.27 kg./kWh. However, the same increased to 2.45 kg./kWh due to

substantial reduction in the generation (50%) during the year 2010-11. This has resulted in increase in variable charge (fuel cost/kWh) at the power station to a high value of Rs. 3.32 per kWh even though the cost of Bio-mass fuel per tonne has reduced in FY 2010-11 to Rs. 1355 per MT.

iv) Similarly, the O&M cost per unit which appears to include the return on investment at the plant which was in the range of Rs. 1.20 per kWh to 1.38/kWh during the period 2007-08 to 2009-10 but increased to Rs. 1.86 per kWh in the year 2010-11 due to substantial reduction in generation (about 50%) during the year 2010-11.

v) We do not think that it is proper to compute the annual cost of generation for the year 2010-11 as the generation during the year 2010-11 had gone down, for the purpose of calculating the cost of

generation during the period April to June 2010, when the generation was maximized on the directions of the State Government. The period relevant here is from April to June 2010 and O&M cost per unit for the period April-June 2010 needs to be compared with the similar cost per unit for the previous years.

vi) The Appellant should have given the fuel cost and O&M cost per unit for the period of April-June 2010 for the correct assessment of cost during the period when generation was maximized in compliance of the State Government's directions. However, from the data submitted by the Appellant it could be said that the fuel cost per unit for the period April-June 2010 should be about Rs. 3 per unit.

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).

11.9 In view of above, we reject the contention of the Appellant on this issue.

12. The last issue is regarding interest for delayed payment claimed raised in Appeal nos. 141 & 142 of 2011.

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.

13. Summary of our findings:

Appeal nos. 141 & 142 of 2011

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.

Appeal no. 10 of 2012

13.3 Regarding the jurisdiction issue raised in Appeal no. 10 of 2012, we hold that the State

Commission has correctly exercised its powers u/s 11(2) of the Act to offset the adverse financial impact of the Government directions u/s 11(1) of the Act on the bio-mass power generator who have existing PPAs with the distribution licensees. The bio-mass generators having existing PPA with the distribution company are entitled to the rate determined by the State Commission for the quantum of energy in excess of the energy that they would have normally supplied to the distribution licensees under the PPA.

13.4 The State Commission was correct in deciding the quantum of energy under normal supply obligation as average of energy actually supplied during the months of April, May and June during the previous three years excluding the period in the year 2009 when they had been

directed to maximise generation by the State Government's order u/s 11(1) of the Act.

14. With the directions given above, Appeal nos. 141 & 142 of 2011 are disposed off. The State Commission is directed to pass consequential order after hearing the Appellants within 45 days from the date of this judgment. Appeal no. 10 of 2012 is dismissed. No order as to costs.

15. Pronounced in the open court on this **3rd day of October, 2012.**

**(Rakesh Nath)
Technical Member**

**(Justice M. Karpaga Vinayagam)
Chairperson**

REPORTABLE/NON-REPORTABLE

vs