IN THE APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 226 OF 2015 & IA NO. 371 OF 2015

Dated: 28th May, 2020

Present: HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL MEMBER

HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER

IN THE MATTER OF

M/s Bhushan Power and Steel Limited
Office at F-Block, 1st Floor,
International Trade Tower Nehru Place,
New Delhi – 110 019 **..... Appellant**

VERSUS

1. **GRID Corporation of Odisha Limited**
Janpath, Bhubaneshwar – 751 022,
Represented through its Managing Director,
Kolkata – 700 106
..... Respondent No.1

2. **Odisha Power Transmission Corporation Limited**
Janpath, Bhubaneshwar – 751 022
Represented through its Managing Director **..... Respondent No.2**

3. **Odisha Electricity Regulatory Commission**
Bidyut Niyamak Bhavan,
Unit –VIII, Bhubaneshwar – 751 012
Odisha
..... Respondent No.3

Counsel for the Appellant … Mr. Buddy A Ranganadhan
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Ms. Himanshi Andley for Res. 1

Mr. Rutwik Panda
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J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER

1. This matter was heard and reserved for judgment prior to restrictions being imposed due to National Lockdown for containing spread of coronavirus (Covid-19).

2. The appellant M/s Bhushan Power & Steel Limited maintains and operates a 100 MW Captive Generation Plant (*"CGP"*) alongside its Integrated Steel Plant located in District Sambalpur in the State of Odisha. It appears that it had supplied surplus power available with it to first respondent Grid Corporation of Orissa Limited (*"State Gridco"*) through second respondent Odisha Power Transmission Corporation Limited (*"State Transco"*) during the period in dispute i.e. March to December, 2009, purportedly pursuant to directions under Section 11(1) of the Electricity Act, 2003, the billings for the said supply of electricity having resulted in payments being made treating it as *"firm power"*. Subsequently, however, the respondent State Gridco, revised its position and decided to treat the said supply as *"inadvertent"* or *"intermittent power"*, it admittedly having not been *"scheduled day ahead"*, thereby claiming refund/adjustment on the ground of excess payment.

3. Against the above backdrop, the appellant raises the question as to whether such supply as aforesaid in terms of directives under Section 11(1) of the Electricity Act, 2003 can be treated as *"inadvertent power"* so as to reduce the price already paid thereby denying its claim of adverse financial impact required to be *"offset"* also pressing in aid the rule *of estoppel*. In this context, question is also raised as to whether the Grid Code permitting deviation from the scheduling norms in case of deficit conditions would allow zero scheduling.

4. It must be mentioned here itself that the appellant had not raised the claim of any compensatory relief in terms of Section 11 (2) of the Electricity Act, 2003 before the third respondent i.e. Odisha Electricity Regulatory Commission (hereinafter variously referred to as *"OERC"* or "*State Commission*"), its other contentions in the nature mentioned above, however, not having been accepted by the order dated 04.07.2015 passed in case No. 54/2011 which is challenged by the appeal at hand.

5. A power and jurisdiction of wide amplitude is conferred, *inter-alia*, upon the State Government (*"appropriate government"*) by Section 11 of the Electricity Act, 2003, which reads thus:

> *"11. (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."

6. It is very clear from the plain reading of the statutory provision quoted above that the extraordinary power is given to the executive branch of the State (the Government) to meet the eventualities arising from extraordinary circumstances. The expression *"natural calamity" used in explanatory clause* is followed by the words or *"such other circumstances"* which, by the very context, would include conditions of flood, drought etc., such conditions having a direct bearing on the generation or availability of electricity as also demand for its supply. The key words in this enabling power are *"public interest"* serving which has to be the main objective for such *"directions"* as may be issued. It is also clear from the legislative scheme that the directions that can be issued by the State Government, under Section 11(1), are to be directed against a "*generating station*" with regard to its operation and maintenance. It is inherent in this that a generator may be directed to operate and maintain its generating station, in case of shortage of power, faced by the State so as to produce electricity at the optimum level and also to mandatorily share it with the State Utilities for distribution and consumption within the State.

7. Whilst a direction by the State Government to such effect as above is binding on the concerned generator(s), its breach possibly inviting penal action, there is a corresponding duty placed on the Electricity Regulatory Commission, by sub-section (2) of Section 11, to adopt such measures as would *"off-set the adverse financial impact"* of such mandate on the generating

company, the objective being not to penalize the latter, it essentially being the responsibility of the State to bear the burden flowing from extraordinary circumstances.

8. The events build up by which forms the backdrop of the dispute need to be taken note of in their chronology.

9. It appears that the appellant had been earlier selling its surplus power against off-take arrangements with certain beneficiaries. The State Load Despatch Centre (SLDC) and Odisha Power Transmission Corporation Limited (Transco), however, declined open access to the appellant with effect from 01.01.2007. It is the case of appellant that against such backdrop it had started selling its surplus power to State Gridco and, for such purposes had entered into a Power Purchase Agreement (PPA) with it, the validity of which PPA concededly came to an end on 31.10.2008.

10. The State of Odisha suffered severe heatwave conditions and early withdrawal of monsoon in the year 2008, the water level in the reservoirs having become inadequate, this resulting in acute shortage of electricity, the generation of hydro-power being not optimum. Amidst the scenario of such conditions developing, coupled with certain other factors, the Department of Energy of the Government of Odisha initiated a Draft Policy Paper on *"Harnessing of surplus power from captive generating plants".* Upon the matter being brought to the State Commission, it decided to proceed to *"determine the price of surplus power"* of Captive Generation Plants (CGPs) through a consultative process. Thus, the deliberations before the Commission were

taken up in a matter that came to be registered as case no. 72 of 2007, the first effective order passed wherein is dated 14.03.2008.

11. An action plan was mooted for voluntary participation by CGPs in sharing their surplus power with the State Gridco or distribution companies (DISCOMs). The Commission proceeded on the premise that the supply of surplus electricity by CGPs would be on voluntary basis. However, while formulating the policy for tariff determination for such supply it classified the generators broadly into three categories i.e. those providing *"firm power"*; those supplying *"non-firm power"*; and, the supply of *"inadvertent power"*.

12. Taking note of the National Electricity Policy, National Tariff Plan and other statutory provisions, it was decided by the State Commission that those captive generators who give a *"commitment for supply of power for a period of* more than 3 months *& upto 1 year"* shall be considered as a *"supplier of firm power of electricity"* from their Captive Generating Plants. Similarly, the Commission decided that such captive generators as were *"capable of giving day ahead schedule but are not in a position to give supply continuously a period upto three months"* shall be treated as *"non-firm supplier of electricity."* The expression *"inadvertent power"*, in contrast, was defined to exclude those falling in the category of *"firm"* or *"non-firm"* power, it being explained as *"any kind of injection by the Captive Generating Plants to the State Grid".* While supply of *firm power* or *non-firm power* was to result in payments at different (comparatively higher) rates, for purposes of *"inadvertent power"* it was

unambiguously ruled that it would be *"priced equal to the pooled cost of hydro power of the State".*

13. It appears that in the wake of the order dated 14.03.2008 in case no. 72 of 2007, the State Gridco moved certain applications before the State Commission for procurement of surplus power from CGPs. The appellant concededly was respondent in one of the said applications (case no. 14/2009), the said batch of applications (case no. 6 to 20/2009) culminating in order dated 28.02.2009 passed by the State Commission, it being termed as an *"interim order",* representing an arrangement in the nature of *"Interim Implementation Plan"* made operative from 01.03.2009.

14. In the background facts noted by the State Commission in its order dated 28.02.2009, it is mentioned that the State Gridco had approached it in the matter expressing the emergent situation faced by it necessitating "*immediate harnessing of surplus power from the Captive Generating Plants of the State*", it being stated that out of the then prevailing scenario of "*indifferent hydro stations*", the Gridco was procuring high cost UI power sometimes even by paying Rs. 8/unit or more. It was also stated that the CGPs that were impleaded as respondents had been called upon to participate in a bid quoting their lowest price inclusive of 10% over the cost of generation, quantum and period of supply and, in that context, it is mentioned that the appellant herein had offered to sell 20 MW of electricity during September, 2009 to March, 2010 quoting the price of Rs. 5.50/kWh. The directions, which were given by the

Commission, by its order dated 28.02.2009, relevant for present purposes, (as at internal pages 22-23) included:

> *"i) Keeping in view the number of CGPs in the State and their large variations in size/capacity and usage of fuel it is difficult for both CGPs and GRICDO to adopt the competitive bidding route. The verification of costs and determination of prices, given the manner in which costs are allocated as between the main product and captive power generated, is going to be a cumbersome and long drawn affair. Considering the incongruent nature of different CGPs and Co-generating plants, the Commission examined and decided to adopt a simple approach and mechanism by which GRIDCO can procure power from CGPs in and around a reference point of the highest generation cost, currently being procured by GRIDCO.*
>
> *ii) Because of the nature of generation by CGP and captive generators with surplus power are at liberty of selling power, even for a short duration in the Power Exchange, it is not necessary in the interim to have a dividing line between short-term and long-term power. Power that can be scheduled on a day ahead basis can be absorbed in the system and can be programmed for full procurement by GRIDCO. CGPs Co-generating plants who are capable of giving day ahead schedule should be, for the time being, treated as suppliers of firm power. Power injected by the CGPs/Co-generating plants without giving day ahead schedule would be treated as injectors of inadvertent power.*
>
> *iii) For supply of power by the CGPs Co-generating plants to GRIDCO for sale to DISTCOs meant for consumption by the consumers in the State, the procurement price of firm power from the CGPs as indicated at (ii) above will be Rs. 3.00/KWh with effect from 01.3.2009. However to encourage co-generation as is mandated under the Electricity Act, 2003 the power generated by co-gen. plants e.g. sponge-iron plants such as NINL, Arati Steel, Tata Sponge, etc. may be given an incentive and shall be paid @ Rs. 3.10 per/KWh with effect from 01.3.2009. The procurement price of Rs. 3.00/KWh for all power meant for sale to Discoms is considered just and reasonable keeping in view the current cost of Rs. 2.76/KWh of the highest cost of generation from a TPS in the Eastern Region. A premium of about 10% (ten percent) on this price is considered appropriate as a stimulous to the harnessing of bottled up capacity with the CGPs.*
>
> *iv) In order to encourage the CGP/Co-generating plants to fully utilize their bottled up capacity for generation of captive power/Co-generation*

power and to enable GRIDCO to access power from different sources including CGPs/Co-generating plants for meeting the demands in the State and making available a good quantum of power for trading, GRIDCO should offer a remunerative price to the CGPs in respect of power used for trading. Keeping in view the prevailing rate in the power exchanges, UI rate and price quoted in the bidding it would be just and equitable for GRIDCO and the CGPs and Co-generating plants to have an indicative rate of Rs. 3.50 per KWh for procuring surplus power meant for trading. This is merely and indicative price suggested by the Commission. However, individual CGPs/Cogenerating plant and GRIDCO, if, they so like, may enter into further negotiation for an agreed price above this indicative rate. However, the procurement price by GRIDCO from the Captive Generating Plants/Co-generating plants for the purpose of trading should not unduly vary from the indicated price of Rs. 3.50 per Kwh now being suggested by us as an interim measure. This is necessary for the benefit of the consumers of the State because the profit earned by GRIDCO from the trading will be taken as 'other receipt' to meet its revenue requirement and bridge the gap in the ARR. After bridging of the gap in the ARR, the balance of surplus gained on account of trading of CGPs/co-generation power may be shared with the CGPs/Co-generation plants at the year end.

v) In respect of injection of inadvertent power the payment would be equal to the pooled cost of hydro power of the State during 2008-09 and 2009-10 as the case may be depending on the period of supply.

vi) The rate of power indicative in (iii), (iv) and (v) will also be applicable with effect from 01.3.2009 to those CGPs/co-generating plants having subsisting contracts/agreements with G RIDCO. This will be without any prejudice to the outcome of any dispute/arbitration pending in any court of law or any authority and will have no retrospective effect whatsoever.

vii) GRIDCO will devise a mechanism to decide on the quantum of energy to be procured for the Discoms and the quantum to be traded at the higher price of procurement. A transparent and simple accounting method must be maintained to obviate any dispute with CGPs/Co-generation plants. The accounts must also clearly show how the gap in the GRIDCO's ARR is being bridged and how the remaining surplus is being shared with the CGPs/Co-generation plants to the extent of power traded. The Commission hastens to state that they do not wish to prescribe a price at which the quantum being traded should be procured. We are only indicating a price around which procurement may be done for trading.

viii) It will take some time for the CGPs for establishment of SCADA and PLCC, wherever not yet done, OPTCL as on date have not implemented

installation of SCADA in many grid substations. As recently stated in the tariff hearing in case No. 63/2008, OPTCL has already taken initiative for expansion of ULDC scheme for broadband connectivity. In view of the above and considering the present situation of power availability in the State the Commission directs that the provision of installation of SCADA and PLCC shall not be insisted upon for the CGPs before procuring their surplus power in the State grid as this is an emergent step taken by the Commission in an extremely difficult situation through which the state is passing through. However, the alternative mode of communication for the connectivity with the nearest SCADA interface point of the licensee i.e. telephone, fax, carrier communication broadband communication, internet other developed mode of communication should be established by the CGPs within three months from the date of synchronization with the grid.

ix) The CGPs/Co-generating plants may be paid as per the rates indicated in (iii), (iv), (v) and (vi) in the proportion of CGP/Co-generation power consumed inside the state and traded outside the state as certified by the Chief Load Despatcher of SLDC in each month.

[emphasis supplied]

15. On 07.03.2009, the State Gridco addressed a communication to the various Captive Power Generators (CGPs) including the appellant herein, referring to the afore-quoted order dated 28.02.2009. The communication would read thus:

"OERC has come out with an order on 28.02.2009 *on the matter of pricing of the surplus power of CGP to be supplied to Gridco. As per the said order Rs. 3.00/Rs.3.10 has been stipulated as the rate at which Gridco will buy power from the CGPs/Renewables. In case Gridco sales the power, an indicative rate of Rs. 3.50 P, has been given. Once the power is traded the rate of Rs. 3.50 will be apportioned among all the CGPs injecting power. Further, the profit from the power traded will be shared after meeting the revenue gap in the ARR. These rates are encouraging and close to expectation by CGPs.*

During hearing stage, CGPs have submitted before the Hon'ble Commission to support 400 MW to 600 MW of Power. It has been noticed that only additional 60 to 100 MW of power is being injected from the Captive Generating Plants.

In view of the above, you are requested to inject more and more power to the State system. A meeting has been proposed to be taken up at 11.00

AM on 13.03.2009 at the Conference Hall of Gridco to discuss the maximization of injection by CGPs to Gridco and areas where support of Gridco is required to such maximization. You are requested to send your representative for the purpose."

[emphasis supplied]

16. It is clear that the rate at which the Gridco was offering to purchase is the tariff determined by the Commission for *"firm-power"*. It is also clear that the appellant was *"requested"* to inject the maximum possible quantity of power to the State Gridco, there otherwise being no compulsion in such regard. It is admitted case of both sides that the appellant did participate in the said scheme and received payments accordingly.

17. On 22.04.2009, the Commissioner-cum-Secretary to the Government of Odisha promulgated an order under Section 11 of the Electricity Act, 2003 addressing it to various entities including all CGPs, the communication reading thus:

"I am to say that you might be aware of this year's weather condition. There is no rainfall in the State since October, 2008 as the monsoon receded early. The water level to the reservoirs is not adequate to generate hydro power at its optimum capacity/level.

2. The Elections to the Lok Sabha and State Legislative Assembly is being held on 16th and 23rd April, 2009. The process of election will be over on 16th May, 2009. The Chief Electoral Officer has instructed to ensure stable and uninterrupted power supply in the State from 12th April' 09 to 17th of May'09 so that the election can be conducted smoothly.

3. As per the metrological indications, the State may experience severe heat wave during the ensuing summer season.

4. There will be constant increase in the demand for power during the month of April to June, 2009.

5. In view of the above and in the larger public interest, it has become essential to issue a direction to the generators including captive

generation plants under Section 11 of the Electricity Act, 2003 to optimize their generation and inject power to the State Grid.

Hence under the above extraordinary circumstances, Government have pleased to order that you are required to generate power at full-exportable capacity/PLF and inject power so generated to the State grid after your captive consumption to enable the Government tide over the situation."

[emphasis supplied]

18. The above quoted directions under Section 11 of the Electricity Act, 2003 continued to operate till the said order was re-notified on 04.07.2009, it reading thus:

"Whereas due to low reservoir level, the generation of hydro power from Hydel projects had reduced to 200 MW against the installed capacity of 2085 MW.

Whereas the monsoon is yet to set in Orissa and due to delayed monsoon and low reservoir level the generation from Hydel projects is likely to further reduce in subsequent days;

Whereas two dedicated Thermal Power Stations of the State, i.e., one unit of 210 MW of OPGC and one unit of 110 MW of TTPs have gone out of order and it will take time to restore these two units;

Whereas it is essential and priority to maintain stability in power supply to the domestic consumers as well as the general public of the State;

Now, therefore, keeping in view the above exigencies and extraordinary circumstances, the Government do hereby direct all the Captive Generating Plants u/s 11 of the Electricity Act, 2003 to generate power at full exportable capacity by optimizing their power generation and inject power so generated to the State Grid after their captive consumption to enable the State Government to tide over the situation."

[emphasis supplied]

19. Meanwhile, it may be noted, the State Gridco had approached the State Commission by a review petition (case no. 59/2009) *vis-à-vis* order dated 28.02.2009 passed in case no. 06 of 2009. The said review petition was decided by the State Commission by its order dated 27.06.2009, the directions

passed wherein to the extent relevant for present purposes may be quoted as under:

> *"The Commission has approved the rate of procurement by GRIDCO from CGPs as the rate of Rs. 3.00/3.10/kWh in order to maximize drawal from the CGPs to meet the state demand. Accordingly, the CGPs shall have to commit to inject all their surplus power to the state grid without seeking Open Access at the rate approved by the Hon'ble Commission for the period from 01.3.09 to 30.6.09. This however, is without prejudice to the existing arrangement with IMFA, NALCO and GRIDCO as agreed between them."*
>
> *[emphasis supplied]*

20. It is clear from the above chronology that the participation by the appellant in the scheme approved by the State Commission for bailing out the State from power crunch due to then prevailing conditions and pursuant to the letter of request sent by the State Gridco on 07.03.2009 was voluntary. But, it became a mandatory duty and obligation on its part after promulgation of the order under Section 11 of the Electricity Act, 2003 on 20.04.2009 which duly, courtesy the subsequent order dated 04.07.2009, would continue for the subsequent period that covers the period of dispute i.e. March to December, 2009.

21. The material placed before us reveals that the appellant had raised the energy bill for the supply of electricity to State Grid during March 2009 on 04.04.2009 claiming the charges @ Rs. 3.10 per/kW, the amount demanded being Rs. 72,54,000/-. The State Gridco, by its communication dated 13.04.2009, however, released the payment of Rs. 68,79,600/- calculated at Rs. 3/kW *"on provisional basis"* pointing out that the appellant had not

submitted any document in support of its claim to be a "*co-generation plant*", the payment tendered being "*without prejudice*" to the contentions of Gridco in the review petition (case no. 59/2009) *vis-à-vis* the interim order dated 28.02.2009 in case nos. 6-20/2009 then pending before the State Commission.

22. It is admitted on all sides that electricity continued to be supplied by the appellant and received by the State Gridco in terms of the directions under Section 11 of the Electricity Act, 2003 in the subsequent months upto December, 2009, the bills having been raised accordingly and paid on similar lines for and upto the month of October, 2009. The issue arose, however, in the context of energy bills for November and December, 2009, payment against which was made in October, 2010, though after deduction of what is described as excess payment made earlier treating the supply of electricity by the appellant to be inadvertent power, the price of which was to be 50 p/unit only, that being the price of "*pooled cost of the hydro power*" for the State.

23. It is an admitted case of the appellant that the electricity was injected by it into the State Grid during the period in question without scheduling. While it pressed for compensatory relief in terms of Section 11(2) of the Electricity Act, 2003 before the State Commission submitting that the electricity supply under the mandate issued by the State Government cannot result in adverse financial position for the generator, it is also admitted case for the appellant that at the stage of raising the energy bills from month to month, the appellant had not staked any claim of adverse financial impact to be *"off-set"*, it rather

unilaterally treating the supply made to be falling in the category of *"firm power"* in terms of the classification made by the State Commission by its orders dated 14.03.2008 and 28.02.2009.

24. The argument of the appellant, however, is that if such position as taken by the State Gridco subsequently regarding the rate at which power was to be purchased were known to the appellant, it would have stopped the injection of electricity that was commenced in the participative exercise pursuant to the request by letter dated 07.03.2009. It is also argued that the payments having been made for and upto October, 2009 treating the supplies as *"firm power"*, the State Gridco is estopped from going back from the common understanding as to the applicable tariff.

25. We must reject the argument based on rule of estoppel for the simple reason that there is no estoppel against law. The tariff determination is an exercise undertaken by the Electricity Regulatory Commission under Section 62 of the Electricity Act, 2003, it being guided by the Tariff Regulations framed under Section 61, factors such as safeguarding the interest of the consumers at large and ensuring the recovery of cost of electricity in a reasonable manner for the generator being the hallmark. The appellant did not seek approval of tariff *vis-à-vis* the electricity supplied by it either on voluntary or participative basis or under the mandate of order under Section 11. It never entered into a Power Purchase Agreement with any State Utility. Section 62(6), even otherwise, permits recovery of money paid in excess, if any, the provision reading thus:

"If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee."

26. The State Commission has rejected the objections of the appellant by setting out its reasons as under:

"5. Further, the Commission at Para 34.1 of its clarificatory order dated 29.08.2011 in Case No. 22/2011 have indicated that,

"xxxxxxxxxx Non-firm power (power injected by CGPs/Co-generating plants before its commercial operation) Infirm (power injected without giving day ahead schedule) as well as the Inadvertent power (power injected by CGPs/Cogenerating Plants over the implemented schedule) within the Operating Frequency Band of 49.50 HZ to 50.18 HZ shall be paid at the pooled cost of the hydro power of the State i.e. 62.51 paise/Kwh for 2010-11 and 65.96 paise during 2011-12 as approved by the Commission in tariff order of respective years. The day ahead schedule given by any CGP shall be at least 1 MW and above. Any power scheduled or injected below 1 MW average (i.e.24 MWH/day) shall be treated as Non-firm power and shall be paid at the pooled cost of the hydro power. Hence, for all practical purposes the injection of infirm power and inadvertent power would be treated under the same commercial principle i.e. the rate as approved by the Commission i.e. at the pooled cost of the hydro power of the State for the respective years."

From the above orders of the Commission, it is evident that power injected by CGPs without giving day ahead schedule would be treated as inadvertent power, and will be priced at the pooled cost of hydro power of the State.

6. The imposition of Section 11 by the State Government and direction to maximize the injection of power to the grid cannot absolve the Petitioner of its responsibility of scheduling the power because it brings certainty in the injection of the same and facilitates the petitioner in scheduling the injection. During deficit scenario scheduling of power is highly essential from the view point of Grid discipline and CGPs who maximize their generation are required to adhere to it. But in the instant case the Petitioner has

failed to do so and the Commission cannot buy the explanation put forth by him due to our above observation.

7. Therefore, it is clear that injection of power by M/s. Bhushan Power & Steel Ltd. without giving any day ahead schedule or giving 'Zero Schedule', shall be treated as injection of inadvertent power and priced at the pooled cost of the hydro power of the State for the respective years."

[emphasis supplied]

27. Since the prime contention of the appellant is based on certain provisions of the Grid Code, it is essential to take note of the salient parts thereof at this stage.

28. The Odisha Grid Code (OGC) Regulations, 2006 were framed and notified by the State Commission in exercise of the powers vested in it by Section 86(1) and 181(2) of the Electricity Act, 2003. These Regulations, also known as *"Odisha Grid Code"* (in short, *"OGC"*) concededly apply to all users that are connected or utilise State transmission system including transmission licensees. The OGC lays down broad rules of discipline to be maintained *vis-à-vis* the Grid Code. The sixth Chapter of OGC deals with the subject of *"scheduling and despatch code"*. The objective of the said part of Grid Code is set out as under:

"6.2 OBJECTIVE

This code deals with the procedures to be adopted for scheduling of the State Generating Stations (SGS) including ISGS so far as injection to grid and net Drawls of concerned Users on a daily basis with the modality of the flow of information between the SGS / SLDC/Beneficiaries of the State grid. The procedure for submission of capability declaration by each SGS and submission of Drawal Schedule by each Beneficiary is intended to enable SLDC to prepare the Despatch Schedule for each SGS and Drawal Schedule for each Beneficiary. It also provides methodology of issuing real time despatch/drawal instructions and rescheduling, if

required, to SGS and Beneficiaries along with the commercial arrangement for the deviations from schedules, as well as, mechanism for reactive power pricing. The provisions contained in this chapter are without prejudice to the powers conferred on SLDC under section 32 and 33 of the Act."

[emphasis supplied]

29. The clause 6.5 captioned as *"scheduling and despatch procedure"* requires, *inter-alia,* all generators to *"promptly report to SLDC, changes of Generating Unit availability or capability, or any unexpected situation, which could affect its operation."*

30. The stipulation in clause 6.6 titled as *"action required by generators"* is meant to maintain certain discipline so as not to compromise the concerns of safety and immediately inform any loss or change to the operational capability of any generating unit which is synchronized to the system as also about any change in status affecting their own ability in complying with despatch instructions, any abnormal voltage or frequency related operation to be promptly reported to the State Load Despatch Centre.

31. The appellant, however, focuses on the following clause (6.4) of the Grid Code falling in the part dealing with "*demarcation of responsibilities*":

"6.4 DEMARCATION OF RESPONSIBILITIES

"(7) While the SGS and CGP would <u>normally be</u> expected to generate power according to the daily schedules advised to them, <u>it would not be mandatory to follow the schedules tightly</u>. The SGS and <u>CGP may also deviate from the given schedules depending</u> on the plant and system conditions. In particular, <u>they would be allowed/encouraged to generate beyond the given schedule</u> under deficit conditions. <u>Deviations</u> from the <u>Ex-power Plant generation injection schedules</u> shall, however, be <u>appropriately priced through the UI mechanism</u>.

[emphasis supplied]

32. It is the argument of the appellant that the above part of the Grid Code clearly permits deviation and departure from the normal discipline required to be maintained in the particular context of "*deficit conditions*". It is the submission of the appellant that from the above clause of the Grid Code, it should be natural sequitur that the default in giving a schedule for injection of power in the given facts and circumstances wherein the endeavor was to participate in the effort of the State to meet the exigencies of inadequate electricity supply should be of no consequence, it being inappropriate, unfair and unjust to treat the supply of electricity as anything but *"firm power"*.

33. We are not impressed with the above line of argument. The sub-clause (7) of clause 6.4 of the Grid Code, as quoted above, does not conceive of there being no schedule given by the generator. Noticeably, the expressions used allowing some deviations are *"not be mandatory to follow the schedules tightly"*; *"may also deviate from the given schedules"*; and, *"generate beyond the given schedule".* For all the three eventualities, giving of schedule still remains a pre-requisite. What is permitted is departure from the schedule thus given. The last limb of sub-clause (7) strikes at from the root of the argument of the appellant *vis-à-vis* the price of power supplied by deviation from the schedule given. The *"appropriate pricing through the unscheduled inter-change"* (UI) mechanism would be in *sync* with the approach taken by the State Commission. We may recall in this regard that the State Commission in its earlier dispensation by orders dated 14.03.2008 and 22.06.2009 had made it clear that in order to be accepted as supply of "firm power" the generator

shall have to give "commitment", the duty to give schedule being directly connected to such commitment.

34. It is not correct for the appellant to argue that the payment made pursuant to the earlier energy bills at Rs. 3.00/unit would bind the State Gridco or that it would reflect the mutual understanding that the supply was *"firm power"*. This argument ignores the fact that the payments were made *"on provisional basis"* and thus cannot be treated as final dispensation. There is no merit in the submission that if the appellant knew that the payment would be at such low price, it would have stopped participation. The participation in terms of orders of the State Commission prior to promulgation of order under Section 11 was voluntary. The rules of the game had been laid down by the State Commission by its orders dated 14.03.2008 and 28.02.2009. The Appellant was well aware that in order to be treated as *"firm power"*, it was to give a commitment of supply of power for a period of more than three months and upto one year. Such supply obviously would have to be within discipline of the Grid Code and, therefore, subject to scheduling. The appellant neither gave a commitment nor abided by the discipline of scheduling.

35. The price quoted in bidding was never accepted. It is wrong to refer to it to push the argument of legitimate expectation, particularly because it is not a case covered by Section 63 of Electricity Act. In these circumstances, there is no question of it being accepted as supplier of *"firm power"*. Same discipline would endure even after the directives under Section 11 of the Electricity Act,

2003 came to apply. The injection of power under such mandate also must adhere to Grid Code discipline which cannot be compromised.

36. In above view, we do not find any error or infirmity in the impugned decision of the State Commission. The appeal is dismissed. Applications, if any pending, are rendered infructuous and stand disposed of accordingly.

PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING ON THIS 28th DAY OF MAY, 2020.

(Justice R.K. Gauba)	**(Ravindra Kumar Verma)**
Judicial Member	Technical Member

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