

**THE APPELLATE TRIBUNAL FOR ELECTRICITY  
AT NEW DELHI**

**(APPELLATE JURISDICTION)**

**APPEAL NO. 355 OF 2018 &  
IA No. 1721 OF 2018 & IA No. 2179 OF 2019**

**Dated: 6<sup>th</sup> November, 2020**

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson  
Hon'ble Mr.S. D. Dubey, Technical Member**

**In the matter of:-**

**M/s JSW Energy Ltd.**

JSW Centre,  
Bandra Kurla Complex,  
Bandra (E)  
Mumbai-400051.

**.... Appellant**

Versus

1 The Secretary,  
**Karnataka Electricity Regulatory Commission**  
No.16, C-1,  
Millers Tank Bed Area, Vasanth Nagar,  
Bengaluru-560052

2 The Managing Director  
**Power Company of Karnataka Ltd.**  
Room No. 501, 5<sup>th</sup> Floor,  
KPTCL Building, Cauvery Bhavan, K.G.Road  
Bengaluru-560009

3. The Managing Director  
**Hubli Electricity Supply Company Ltd.**  
P.B. Road, Navanagar  
Hubballi-580025

4. The Managing Director  
**Mangalore Electricity Supply Company Ltd.**  
MESCOM Bhavana, Kavoor Cross Road,  
Bejai, Mangaluru-575004

5. The Managing Director  
**Chamundershwari Electricity Supply Corporation Ltd.**  
No. 29, Kaveri Grameena Bank Road,  
Vijaynagar, 2<sup>nd</sup> Stage, Mysuru-570019

6. The Managing Director  
**Gulbarga Electricity Supply Company Ltd.**  
Station Road, Kalaburgi-585102

7. The Managing Director  
**Bangalore Electricity Supply Company Ltd.**  
K.R. Circle, Bengaluru- 560001

**... Respondents**

**Counsel for the Appellant(s)** : Mr. BasavaPrabhu Patil, Sr. Adv  
Mr. Aman Anand  
Mr. Aman Dixit  
Mr. Abhimanyu Maheshwari

**Counsel for the Respondent(s)** : Mr. Sri Ranga  
Mr. Balaji Srinivasan  
Ms. Pallavi Sengupta  
Ms. Anini Desbarma for R-2, 4 & 7

**JUDGMENT**

**(PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON)**

1. This Appeal has been preferred by the Appellant-JSW Energy Limited challenging the Common Order dated 05.12.2017 passed by the Karnataka Electricity Regulatory Commission in the Original Petition Nos. 36/2017,

38/2017, 39/2017, 40/2017 and 43/2017, whereby the said Petitions have been rejected.

2. The Appellant-JSW Energy Limited is a generating company. Respondent Nos. 3 to 7 are the distribution companies in the State of Karnataka. Respondent No. 2-JSW Power Trading Company Limited, a trading licensee (for short "JSWPTCL") is the nodal agency for Respondent Nos. 3 to 7 in Karnataka.

3. The facts that led to filing of the instant appeal in nutshell are as under:

i) Pursuant to a bidding process for purchase of short-term power initiated by Respondent No. 2 on behalf of Respondent Nos. 3 to 7, the Appellant-JSW Energy through Respondent No.2-JSWPTCL has entered into a Power Purchase Agreement ('PPA') dated 31.08.2015 with Respondent Nos. 3 to 7, for supply of 250 MW of power from the Generating Station of the Appellant for the period 25.08.2015 to 31.08.2015; and for supply of 300 MW of power for the period 01.09.2015 to 31.05.2016. The tariff payable was fixed at Rs. 5.08/unit.

ii) The Appellant, through Respondent No.2-JSWPTCL had also earlier entered into PPAs with the Distribution Licensees of the State of Andhra Pradesh and Telangana in the year 2014 for supply of power for the period

29.05.2015 to 26.05.2016. The tariff under the said PPA's was higher than Rs. 5.08/unit.

iii) Apparently, The Government of Karnataka, exercising emergent powers under Section 11 of the Act, issued a Direction dated 16.09.2015 (herein after referred to as "**Section 11 Direction/Section 11 Order**") directing all the Generating Companies in the State of Karnataka to operate and maintain their Generating Stations to maximum exportable capacity, and the tariff stated in the Section 11 Direction was Rs.5.08/unit. However, the said Section 11 Direction was withdrawn by the Government of Karnataka on 31.05.2016.

iv) Admittedly, for the period between August/September 2015 to 31.05.2016, the Appellant-JSW Energy was supplying power from its Generating Station to the State of Karnataka under a short term PPA; to the Discoms in the States of Andhra Pradesh and Telangana under medium term PPAs and to the State of Karnataka pursuant to Section 11 Direction.

v) The Appellant submits that it performed all its obligations arising under the various PPAs and Section 11 Direction in accordance with law. However, Respondent Nos.3 to 7 failed to make timely tariff payments in terms of the PPA dated 31.08.2015 and Section 11 Direction.

vi) On 18.09.2015, the Appellant issued a letter informing Respondent Nos. 3 to 7 that Respondent No.2 would be raising invoices for the energy delivered pursuant to Section 11 Direction. On 22.09.2016, the Appellant through Respondent No.2 requested Respondent nos. 3 to 7 to pay the outstanding principal amount towards the energy supplied pursuant to and during Section 11 direction period.

vii) On 06.10.2016, Respondent No.2 issued a letter to the Appellant claiming compensation and notifying some adjustments. The case of the Appellant is that approximately an amount of Rs. 90.89 Crores was notified and adjusted by Respondent No.2 against the pending dues of the Appellant for the power supplied by it to Respondent Discoms under various short-term PPA's and pursuant to Section 11 Direction, for the period 16.09.2015 to 31.05.2016, stating the following as reasons:

- i. The Appellant has received a sum of approximately Rs 90.89 Cr from the Discoms of Andhra Pradesh and Telangana as compensation for backing down under the short-term and medium-term PPA's between the Appellant and the Discoms of Andhra Pradesh and Telangana.
- ii. During the subsistence of the Section 11 Direction these backed down units under the PPA's with the Andhra Pradesh and

Telangana Discoms, were injected into the Karnataka State Grid for which full tariff (as fixed by the State Government) was paid to the Appellant.

- iii. The Appellant has therefore unjustly enriched itself and the compensation from Andhra Pradesh and Telangana be passed on to the Respondent Discoms.
- iv. Thus, the amount as stated in (i) above be adjusted from the dues of the Appellant.

viii) However, by letter dated 02.11.2016, the Appellant denied the claims made by Respondent No.2 and protested the unilateral adjustment made by the Respondents. Aggrieved by the said illegal adjustment made by Respondent-Discoms, the Appellant approached the State Commission by filing Petition Nos. 36/2017, 38/2017, 39/2017, 40/2017 and 43/2017. According to the Appellant, the State Commission had rejected the compensation claim of the Respondents on the grounds as stated in the letter dated 06.10.2016. However, instead of allowing the petitions of the Appellant by order dated 05.12.2017 has erroneously concluded as under:

- i. "The period of supply to the Discoms in Andhra Pradesh and Telangana under their PPA's overlapped with the period when the Section 11 Direction was in force in Karnataka.

- ii. During this overlapping period, taking advantage of the Section 11 Direction, the Appellant operated its station to full capacity, in spite of there being backing down instructions from the distribution licensees of Andhra Pradesh and Telangana.
- iii. Andhra Pradesh and Telangana backed down power during off-peak hours and this backed down power was injected into the Karnataka Grid.
- iv. This injection of backed down energy could not have been treated as injection of energy under the Section 11 Direction.
- v. The injection of energy by the Appellant in the Karnataka Grid during the Section 11 period is 'infirm power'.
- vi. Infirm power supplied during off-peak hours does not fetch value of firm power and it is the difference in value of infirm power supplied during off-peak period and firm power supplied during normal period which is to be awarded as compensation to the Respondents.
- vii. The power exchange rates during the off-peak period and peak period would normally be in the ratio of 2:3. Therefore, the price of infirm power supplied during off-peak period can be estimated at 80% of the price payable for firm power.

- viii. Thus, the compensation payable to the Respondents by the Appellant shall be 20% of the ordinary Section 11 tariff on 1051.97 MU's of energy supplied during the Section 11 period.”
- ix) It is the further case of the Appellant that the State Commission by impugned order granted liberty to the Respondents to deduct a further sum of Rs.18 Crores over and above the sum of Rs.90.89 Crores, which has already been adjusted by the Respondent-Discoms.
- x) Aggrieved by the Impugned Order, the Appellant in the first instance approached the Hon'ble High Court of Karnataka in Writ Petition No. 56389/2017. The Hon'ble High Court had passed interim orders on 14.12.2017 which stood modified by the Division Bench vide order dated 25.04.2018. It is stated that the Division Bench categorically protected the Appellant against any further recoveries by the Respondents.
- xi) However, in view of a specific objection on the availability of an alternative remedy before this Tribunal, the Appellant has withdrawn the Writ Petition with the liberty to approach this Tribunal so also the extension of interim protection vide order dated 19.11.2018.
- xii) In view of the liberty granted by High Court of Karnataka, the Appellant has approached this Tribunal by filing the present Appeal challenging the Impugned Order dated 05.12.2017 passed by Karnataka Electricity



Regulatory Commission in Petition Nos. 36/2017, 38/2017, 39/2017, 40/2017 and 43/2017 praying for the following reliefs:

- a) "Admit the present Appeal; and
- b) Set aside the Impugned Order dated 05.12.2017 passed by the Respondent No. 1 Commission to the extent impugned in the present Appeal; and
- c) Set aside the illegal adjustment made by the Respondent Nos. 3 to 7 and as notified vide letter dated 06.10.2016; and direct the Respondent Nos. 3 to 7 to make payment of outstanding amount of Rs. 90.89 crore to the Appellant along with interest @ 15% per annum; and
- d) Restrain the Respondent Nos. 2 to 7 from making any unilateral adjustments/deductions from the pending or future monthly tariff bills raised/ to be raised by the Appellant; and/or
- e) Direct the Respondent Nos 2 to 7 to make payment towards the quantum of energy backed down during section 11 period."

**4.** Denying the allegations made by the Appellant, Respondent No.2 has filed its reply, which in brief is as under:

i) On 16.09.2015, Government of Karnataka issued Section 11 Direction. The Appellant through Respondent No.2-JSWPTC had agreed to supply the electricity generated at its plant to the distribution companies in Telangana and Andhra Pradesh on short term basis. The said quantum of power had been agreed to be supplied at delivery point on Firm Basis from the Appellant's Toranagallu plant in Karnataka for the period from 29.5.2015 to 26.05.2016 through Respondent No.2-JSWPTC. To meet the said contractual obligation, Respondent No.2-JSWPTC had obtained Medium Term Open Access from Power Grid. JSWPTC had supplied power to Telangana & Andhra Pradesh DISCOMs under short term open access for the months of September 2015 and October 2015. In the interregnum, the Appellant through Respondent No.2- JSWPTC had also agreed to supply 250/300 MW of power to Discoms of Karnataka for the period from 25.8.2015 to 31.5.2016 against the bid Notification invited by Respondent-2, wherein 707 MW was tied up with the various generator including Appellant.

ii) Pursuant to the Section 11 Direction of the State of Karnataka, the Appellant supplied energy to state grid that was backed down by the State of Andhra Pradesh and Telangana. The backed down energy under short term tied up by the State of Andhra Pradesh and Telangana was supplied to State grid without informing SLDC or ESCOMs of Karnataka. According to the Appellant, it supplied energy under Section11 from its Toranagallu Plant

from 16.09.2015 to 31.05.2016.

iii) Apparently, the State of Andhra Pradesh and Telangana issued instructions to the Appellant through Respondent No.2-JSWPTC to revise the scheduled quantum based on their requirement. The full quantum approved under MTOA was not scheduled by the DISCOMs of Andhra Pradesh and Telangana. The energy which was backed down by Telangana and Andhra Pradesh was supplied by the Appellant to the ESCOMs of Karnataka under Section 11 Direction. Andhra Pradesh and Telangana have off taken only 70.56%, 46.74% and 73.56% respectively as against the guaranteed off take of 85% as per the terms of the contract / LOA. As per the Contract between the Appellant and the State of Andhra Pradesh and Telangana, in the event of agreed quantum being not off-taken, the other party being Respondent No.2-JSWPTC, which was sourcing power from the Appellant is entitled to be compensated as per Clause (d) of the Purchase Order. The case of the Respondents is that as a result of such backing down instructions, the Appellant is entitled for compensation from Telangana and Andhra Pradesh for lesser off take of quantum. In such a situation, taking advantage of Section 11 Direction, the Appellant-JSW supplied the energy not off-taken by the Telangana & AP DISCOMs to the ESCOM's of Karnataka. For the energy so supplied, ESCOMs of Karnataka had paid Rs. 5.08 /unit as fixed by Government of Karnataka. As a result, the Appellant earned more than their

due by taking dual benefit from the Section 11 imposition and compensation for the same energy accrued on account of lesser scheduling by Telangana and Andhra Pradesh DISCOMs. Therefore, JSWPTC would be entitled for compensation by Andhra Pradesh and Telangana Discoms amounting to Rs. 90.89 Crores, which is as under:

<b>Name of the supplier</b>	<b>Compensation amount in Rs. @ 20% of the quoted tariff as per the purchase order</b>
M/s. JSWPTC Andhra Pradesh	219250887
M/s. JSWPTC, Telangana 150/200 MW	559081268
M/s. JSWPTC, Telangana-150Mw	130604000
<b>Total</b>	<b>908936155</b>

In view of the above, Respondent No. 2 addressed a letter dated 06.10.2016 to the Appellant informing that the compensation entitled to be received by the Appellant from the State of Andhra Pradesh and Telangana ought to be passed on to Respondents 3 to 7. Further, pursuant to the letter dated 06.10.2016, the ESCOM's have adjusted the sums mentioned in the letter against the bills of the Appellant. Aggrieved by the same, the Appellant

approached the Respondent No.1 under Section 86(1)(f) of the Electricity Act 2003 seeking for a direction that compensation amounting to Rs 91,04,05,403/- along with interest be directed to be paid by setting aside the letter dated 06.10.2016 issued by Respondent No. 2 and seeking for a direction to pay Rs 1,15,48,435/- along with interest and surcharge, amongst other consequential reliefs.

iv) Respondent-Commission after hearing all the parties has come to the conclusion that no material has been produced by the Appellant to show that backing down power was not supplied under Section 11 order. Even otherwise, the State Commission held that any such backing down instructions could only have been issued by the SLDC in order to maintain Grid Frequency. In fact, an observation has been made that from the backing down register produced by the Appellant, such instructions were given during off peak hours when frequency of the grid was very high. Hence, it concluded that the same was issued to ensure stability and discipline of the grid. Based on the same, the State Commission has clarified that the Appellant cannot have any claim insofar as return of adjusted amount is concerned. Aggrieved by the same, the Appellant filed Writ Petition No. 56389/2017 before the Hon'ble High Court of Karnataka. On 19.11.2018, the Appellant withdrew the said Petition to pursue the alternate remedy available before this Tribunal.

v) Denying the allegations made by the Appellant, it is submitted that under Section 11 Direction, the tariff of Rs.5.08/- fixed by the Government of Karnataka was only provisional, which would be subject to final determination of tariff by the State Commission. In furtherance to the same, the State Commission undertook the exercise of determining the adverse financial impact suffered by the generating companies during the tenure of the Section 11 order, as mandated under Section 11(2) of the Electricity Act 2003. The State Commission published public hearing Notices inviting comments from stake holders and general public and also held public hearing on 20.4.2016. At that time, the Appellant did not inform about backing down power supplied under Section 11 imposed by Government of Karnataka. After hearing all the stakeholders, the State Commission by order dated 18.08.2016 has determined the tariff for supplies made under Section 11 Direction as 4.67/-. The said tariff was fixed after taking into account weighted average rates of Short-term RTC power in the bilateral trade through traders, as published by the Central Electricity Regulatory Commission (CERC), and allowed additional 5% over and above the short-term rates etc., for the said period and covered all supplies made during the tenure of the Section 11 order. The Appellant having supplied energy to the State Grid during the Section 11 tenure is therefore only entitled to the said tariff, as determined by the State Commission.

vi) It is submitted that when the entire capacity of the Appellant generators was tied up with contracts, the backed down energy could not legally have been treated as injection of energy under Section 11 Order. In such an event, the Appellant had a duty to inform the Respondents that they were injecting the backed down energy, but the Appellant did not do so. On the other hand, the Appellant intend to treat the injection of backed down energy during off-peak hours on par with the energy injected during peak hours. In the event of backing down instructions, the seller becomes entitled for compensation for such quantum not off taken. Therefore, the Appellant is entitled to receive compensation from the DISCOMs of Andhra Pradesh and Telangana for the energy not purchased by them. The electricity supposed to have been supplied to them was instead sold to the State of Karnataka. For the very same power, the Appellant has also received compensation from the DISCOM's of Andhra Pradesh and Telangana. The entire rationale behind the award of compensation is that the generator ought not to suffer loss due to the inability of the purchaser to purchase the contracted power. However, it was submitted that in the case on hand, the Appellant not only received compensation from the State of Andhra Pradesh and Telangana but also claiming payment at the tariff determined by the State Commission, amounting to making a super profit, which ought not to be permitted, is the stand of the Respondents.

vii) It is further submitted that the backed down power was in the nature of 'infirm power' and the supply was for intermittent periods in a day. The 'infirm power' supplied at intermittent periods in a day during off-peak periods does not fetch the value of 'firm power' supplied during normal period. But, the Respondents have paid the value payable to 'firm power' for such 'infirm power' supplied by the Appellant. Therefore, the difference in value of the 'infirm power' supplied during off-peak periods and the 'firm power' supplied during normal periods is to be awarded as compensation to the Respondents since the Respondents are State Entities and all expenses incurred by them are ultimately passed on to the consumers of the State. It is settled law that private interests ought to yield to public interest. Further, the Appellant cannot be permitted to unjustly enrich itself by claiming compensation from Andhra Pradesh and Telangana utilities and seek tariff determined by the State Commission, which was generic determination without giving a discount for the compensation received contractually from other State entities with regard to the same generating station pertaining to the very same power.

viii) As regards fixation of percentage of compensation derived by the State Commission at 20% of the usual tariff, it is submitted that the State Commission is the final tariff fixing authority in the State of Karnataka. Apart from this, the State Commission dealt with the question of appropriate



compensation payable for the energy supplied by the Appellant and determined the percentage to be 20%. There is absolutely no infirmity in the same.

ix) So far as the contention that the State Commission was not empowered to reduce the tariff is concerned, it is submitted that the said issue is presently under consideration in a writ appeal.

x) It is submitted by Respondents that the State Commission has exercised power vested in it under Section 86(1)(f) of the Electricity Act 2003. Thus, there is no question of the State Commission acting without jurisdiction. The State Commission is empowered to correct its mistake at any time from the date of knowledge in the interest of justice and equity to safeguard the interest of the consumer as envisaged in the preamble of the Electricity Act 2003. The Commission by its order dated 18.8.2016 determined tariff as Rs.4.67/- for the energy supplied under section 11 Direction. After considering the contracted quantum, backed down power supplied under section 11 by the Appellant, for such energy, the State Commission fixed the rate at 20% of tariff determined under section 11. Therefore, the impugned order is in accordance with law and the averment that the order is arbitrary is denied.

xi) Learned counsel further submits that the contention raised by the Appellant that there is no concept of infirm power in Electricity Act 2003 is untenable. The concept of firm and infirm power is very much prevalent and existing in the electricity Sector. This is a well-known concept and the contention that a new concept has been introduced by the State Commission is wholly erroneous.

xii) The averment that the Appellant has performed its duties under the PPA and it is the Respondents, who have failed to perform their duties and obligations arising out of the PPA is concerned, it is submitted that on the one hand, the Appellant had supplied power in pursuance of the backing down orders issued by the Andhra Pradesh and Telangana Discoms and has accordingly been compensated for the same, and on the other hand, the Appellant by way of present proceedings is unjustly trying to enrich itself by raising claims against the Respondents.

xiii) Denying the averment of the Appellant that the State Commission has erroneously set up a new defence in favour of Respondents and permitted larger amount than what was claimed, it is submitted that the State Commission has passed the impugned order only after considering all the relevant facts.

xiv) Learned counsel submits that the allegation of the Appellant that the

State Commission has acted beyond jurisdiction and in contradiction to the law laid down in order dated 18.09.2017 passed by the High Court of Karnataka in *Star Metallics and Power Private Limited vs. State of Karnataka* is denied as false and untenable. It is submitted that the order dated 18.09.2017 has been assailed before the Hon'ble High Court of Karnataka in a Writ Appeal and is pending consideration. The averment that the State Commission committed a grave illegality in reducing the tariff applicable is also denied.

xv) Another allegation of the Appellant that the State Commission has no jurisdiction to qualify the State Government directions and has created false and baseless categories of power injected into the Grid and that the State Commission did not have power under Section 86(1) of the Act to provide such relief is denied as false and untenable stating that the concept of firm and infirm power is very much prevalent and existing in the electricity Sector.

xvi) As regards the averment of the Appellant that it had no other option but to inject the power generated mandatorily into Karnataka State Grid after it was backed down by Andhra Pradesh and Telengana DISCOM, it is submitted that the Appellant supplied the energy without taking the prior approval of the Respondents herein. Therefore, Commission has compensated the Respondents at 20% of the usual tariff / price payable per

unit for the backed down energy supplied under Section 11 Order.

xvii) With regard to the averment of erroneous reduction of interest by the State Commission, it is submitted that since the Appellant did not seek prior approval to inject power, it is not eligible for the interest at the rate prescribed under Section 11 direction.

xviii) In view of the above, Respondents submit that the appeal may be dismissed with exemplary costs in the interest of justice and equity.

5. Learned counsel for the Appellant has filed rejoinder stating that the reply filed by Respondent No. 2 is totally misconceived, misleading and contains statements which are contrary to the record. Learned counsel while denying the contents of the Reply and reiterating the contents of the Appeal as being true and correct, has filed rejoinder only to the additional points urged in the Reply, which is as under:

i) According to the learned counsel, even if the statement that an appeal filed against the order dated 18.09.2017 passed by High Court of Karnataka is pending, it is nowhere stated in the Reply that the operation of the order dated 18.09.2017 has been stayed. Therefore, the position in law that the State Commission does not have any jurisdiction to downwardly revise the tariff fixed by the State Government in the Section 11 direction still prevails.

ii) It is submitted that the Respondents in the reply have referred to and relied upon the findings and the directions contained in the order dated 18.08.2016 passed by the State Commission. However, the said order has been set- aside. Therefore, the Respondents cannot rely on the same for any purpose whatsoever. Therefore, all contentions of the Respondents, based on the order dated 18.08.2016 of the State Commission are denied.

iii) As regards categorization of power injected by the Appellant as 'infirm power' and arbitrarily fixing a lower tariff for the same is concerned, it is submitted that the State Commission has no jurisdiction to create categories and fix different rates for 'infirm power' and 'firm power', in complete disregard to section 11 direction of the State Government. Moreover, this exercise could not have been undertaken by the State Commission in the proceedings initiated by the Appellant seeking recovery against the Respondents under section 86(1)(f) of the Act.

iv) As regards the contention of the Respondents that the State Commission has jurisdiction to create sub-categories and fix different rates for 'firm' and 'infirm' power, for the power supplied in terms of section 11 Direction, as the State Commission is the final tariff fixing authority in the State of Karnataka, the Appellant submits that under section 11 scenario, the State Commission's jurisdiction is limited only to upwardly revise the tariff fixed by the State Government in the section 11 direction, on a case to case

basis. The State Commission cannot resort to its jurisdiction under section 62 and section 86(1)(a) and re-determine tariff fixed by the State Government under section 11 of the Act. As such, the contention of the Respondents deserves outright rejection.

v) Further, it is submitted that the Respondents have contended that the concept of 'infirm power' is well established and in case of generation from renewable sources, all power generated is 'infirm power'; and the obligation of the ESCOMS is to purchase only when power is generated and there is no reciprocal obligation on the generating company to generate a particular quantum of power. With regard to this aspect, it is submitted by the Appellant that the issue in the instant case pertains to supply during the period when the State Government's direction under section 11 was in force, therefore, comparison with renewable sources of power under normal circumstances is fundamentally flawed. The Appellant reiterates that there cannot be categorization of 'firm' and 'infirm' power injected by the Appellant in the State Grid during the period when the section 11 direction of the State Government was in force.

vi) As regards the contention of the Respondents that the Appellant has unjustly enriched itself and has been over-compensated is concerned, it is submitted that the State Commission in the Impugned Order has specifically held that the ground of unjust enrichment cannot be a basis for awarding any

compensation to the Respondents. The Respondents have not assailed this finding of the State Commission. There is no cross-appeal/ cross-objections filed by the Respondents before this Tribunal. Therefore, this contention of the Respondents also cannot be countenanced.

6. We have heard Mr. Basava Prabhu Patil, learned senior counsel arguing for the Appellant and Mr. Sri Ranga, learned counsel appearing for Respondent Nos. 2 to 7 and have perused the terms and conditions of PPA.

7. It is not in dispute that for the period between 16.09.2015 to 31.05.2016 Government of Karnataka gave a direction on 16.09.2015 in terms of Section 11 of the Electricity Act:

***“Section 11. Directions to generating companies:***

*(1) 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.”*

***“PROCEEDINGS OF THE GOVERNMENT OF KARNATAKA***

*Sub: Issue of directions under Section 11 of Electricity Act 2003 to the Generators in the State for supply of energy to the State, subject to*

determination of final tariff by Hon'ble Karnataka Electricity Regulatory Commission (KERC)

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**PREAMBLE:**

1. The electricity demand of the Karnataka State is met by Karnataka Power Corporation Limited, Hydel and Thermal generation sources, CGS allocation, NCE sources, Short term / Medium term and Long term purchases. Currently State is facing major power crisis, stemmed from a failed monsoon causing severe drought.

2. The severe drought faced by the State has enhanced the power demand of the State further adding to the deficit. During the months of Aug-2015 and Sept-2015, the earlier requirement of 156 MUs projected by SLDC is raised to 180 Mus. As such, in the current scenario the same trend is likely to continue for the ensuing months also.

3. During August 2015 the 2 units of UPCL plant with a capacity of 1200 MW were under shutdown due to problem in circulating water system and difficulty encountered in setting right the same due to high turbidity and reduced flow in sea-water intake system. One unit of UPCL of 600 MW is put back to service on 29.08.2015. During outage of both units of UPCL, the hydro generation was utilised to the maximum extent.

4. Further, the fluctuation in Renewable energy generation and outages in the state and central thermal Generating units has also forced the state to use more hydro power and as a result hydro levels in the reservoirs is fast receding.

5. The status of hydro availability, measure taken to tide over the crisis and impediments faced in meeting the demand supply gap are as detailed below:

**Hydro Availability in 3 Major Hydro Reservoirs:**

a) The availability as on 09<sup>th</sup> September 2015 in the 3 major hydro Reservoirs of the State viz. Linganamakki, Supa & Mani reservoirs is 2042 MUs(44.82%), 1313 MUs(41.56%) & 601 MUs(61.81%) respectively as against 4552 MUs(99.89%), 2458 Mus(77.81%) & 776 MUs(79.73%) respectively on the same day in 2014.

b) As on 09<sup>th</sup> September 2015, the overall major hydro reservoir availability was 3957 MU (45.54%) as against 7786 MU (89.61%) in 2014 and 8285 MU (95.35%) in 2013 on the same day (08<sup>th</sup> September 2015). There is a shortfall of 3830 MU compared to 2014 and 4338 MU compared to 2013 as on date. The



hydro availability per day will be 13.41 MU against the 26.39 MU in 2014 and 28.08 MU in 2013 which is only 50% of the previous year average availability.

**Measures taken to tide over the crisis**

a) To mitigate the crisis State has tied up power from various sources on short term/long term basis within the state and outside the state. Details as follows.

. PPA Signed by BESCO with M/s. Global Energy Pvt. Ltd, for supply of 90-133 MW for the period July to August-2015 and 135-165 MW for the period September to May-2016 through 220 KV Chikkodi-Kolhapur Interstate lines at the rate of Rs 4.85 per unit.

. Tender has been finalized for procurement of 707 MW for the period from 15<sup>th</sup> September 2015 to 31<sup>st</sup> May 2016 on short term basis at the rate of Rs 5.08 per unit (L1 price). The scheduled delivery date has been preponed from 15<sup>th</sup> September 2015 to 20<sup>th</sup> August 2015 to tide over the situation 250-300 MW of power is flowing from JSW from 26<sup>th</sup> August 2015. The details of month wise quantum tied up are as follows.

Month	Aug -15	Sep -15 (Upto 15 <sup>th</sup> )	Sep -15 (Upto 30 <sup>th</sup> )	Oct. -15	Nov -15	Dec -15	Jan -16	Feb -16	Mar -16	Apr -16	May -16
Quantum in MW	287.5	353.3	458.4	546.2	590.9	679.3	707.3	707.3	695.3	662.2	618.0

. Further additional quantum to an extent of 100 MW is being supplied by JSW to BESCO from 01.09.2015 to 15.09.2015.

. State has contracted 450 MW RTC power from Damodar Valley Corporation, on long term basis. The supply is likely to start from 01<sup>st</sup> December 2015.

**Impediments faced in procuring additional power for meeting the widened demand supply gap:**

a) Efforts are made by BESCO to buy power in Energy Exchange available at the rate of Rs.4.10 per unit on regular basis. However the exchange rates are highly fluctuating and during past 15 days a steep rise has been observed in the

*exchange rates with the average rates going up from 4.65/unit to 8.55/unit and currently peak hour Market Cleared Prices ranging between Rs.9 to Rs.10.55 per unit. Thus exchange purchases are challenged with higher rates and curtailment in volume due to corridor congestion.*

*b) To purchase power from other regions, there is corridor constraint for flow of power from other regions to southern region as seen from the application cleared by SRLDC under STOA.*

*c) It may be noted that, during 2015-16 the capacity addition to an extent of 1500 MW was supposed to be added from BTPS unit 3 and Yeramarus, but there is delay in capacity addition due to project specific issues.*

*6. From the facts indicated in the pre-paras it is evident that though all efforts are being made to pool the power from various resources demand could not be met on account of a wide gap in demand and availability owing to failed monsoon and unforeseen/foreseen outages in KPCL and CGS thermal units as well as delay in commissioning of the projects.*

*7. Currently, the state is able to meet energy requirement of 130 MU per day and maximum demand of about 5800-6000 MWs only with the available power sources. The State is forced to resort scheduled and unscheduled load shedding to an extent of 2000 MWs to operate & maintain the grid as per IEGC Regulations.*

*8. Under the above circumstances, in view of non-availability of corridor for inter-state transmission of power the only option left is to tap the power from Intra-State generators. There are many open access generators within the state who are exporting power outside the state through power exchange and short term open access, GOK has imposed Section 11 in the previous years and availed power from open access generators to mitigate the power crisis.*

*9 Section 11 of EA, 2003 provides that:*

*a) The Appropriate Government may specify that a generating company in extraordinary circumstances operate and maintain any generating station in accordance with the directions of that Government in the public interest.*

*b) 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 consider appropriate.*

*10. As a matter of policy, it is in the public interest, to mitigate severe power crisis in the State, all the Generators in the State of Karnataka have to run their plants to full exportable capacity and pump energy to the State Grid for utilisation within the State Grid to bridge the Demand supply gap. Hence, this Order.*

**GOVERNMENT ORDER NO. EN 11 PPT 2015**  
**BANGALORE, DATED 16<sup>TH</sup> SEPTEMBER 2015**

*In the circumstances explained in the Preamble and in exercise of the powers conferred under Section-11 of Electricity Act 2003, the State Government hereby issues the following directions in the public interest with immediate effect and until further orders.*

*a) All the Generators in the State of Karnataka shall operate and maintain their generating stations to maximum exportable capacity subject to following conditions:*

*i) The tariff determined for current short term procurement through bid route is Rs.5.08/unit hence for supply of energy by the Generators under Section 11 Rs.5.08/unit is fixed provisionally subject to determination of final tariff by Hon'ble KERC.*

*ii) Joint meter readings shall be basis for raising the monthly bills.*

*iii) Rebate of 2% shall be allowed on the bill amount if payment is made within 5 days from the date of presentation of bill or otherwise 1% shall be allowed if the payments are made within 30 days.*

*iv) Due date for making payment shall be 30 days from the date of presentation of the bill.*

*v) Surcharge at 1.25% per month shall be payable if the payments are made beyond due date.*

*vi) The Jurisdictional Distribution Licensee shall raise the bill for the energy imported by the Generators under Section 11.*

*vii) Energy pumped by Generators under Section 11 shall be allocated amongst ESCOMs as per Govt., Order dated 05.09.2015 as follows:*

<i>BESCOM</i>	<i>46.39%</i>
<i>MESCOM</i>	<i>07.89%</i>
<i>CESC</i>	<i>11.60%</i>
<i>HESCOM</i>	<i>19.00%</i>
<i>GESCOM</i>	<i>15.12%</i>
<i>Total</i>	<i>100%</i>

*Viii) The Generators shall raise the bills in the above proportion to respective ESCOMs.*

*b) The above tariff is provisional and is subject to approval of Karnataka Electricity Regulatory Commission (KERC)*

*c) The above proposal shall not be applicable for the Intra-State Generators who are having valid PPA's with the Distribution Licensees in the State of Karnataka.*

*d) All State Electricity Supply Companies (ESCOMs) shall submit a Memorandum on the power situation within 15 days from date of this order before the Karnataka Electricity Regulatory Commission(KERC) and request to fix the tariff for supply of energy by the Generators source-wise (i.e., Cogeneration, Biomass, Captive, IPP etc) under Section 11 of Electricity Act 2003.*

**BY ORDER AND IN THE NAME OF  
GOVERNOR OF KARNATAKA,**

**(G.N. YEDRAVI)  
DEPUTY SECRETARY TO GOVERNMENT,  
ENERGY DEPARTMENT  
080-22034680"**

**8.** Reading of this Section and the Direction indicate that all generators in the State of Karnataka shall operate and maintain respective generating stations at a maximum exportable capacity. The tariff was fixed at Rs.5.08/- per unit and the Appellant claims to have supplied approximately 1051.97 MUs in pursuance of above direction under Section 11 for the relevant period.

**9.** It is also not in dispute that when the State Commission reduced the tariff from Rs.5.08/- per unit as fixed by the State Government to Rs.4.67/- per unit, two other Generators in the State by name M/s Star Metallics Power Private and M/s BMM Ispat Limited approached the High Court of Karnataka in a Writ Petition questioning the downward revision of the tariff by the State

Commission by its Order dated 18.08.2016. However, this Appellant did not approach High Court of Karnataka, but approached this Tribunal in an Appeal No. 335 of 2016.

**10.** The High Court of Karnataka by its order dated 18.09.2017 quashed the common order passed by the State Commission revising the tariff fixed by the State Government in terms of Section 11 of the Act opining that such downward revision was not proper and further opined that the term “offset adverse financial impact on the generating companies” cannot be understood to mean that the tariff fixed by the State Government could be lowered further. They also opined that such action to compensate adverse financial impact on the generator has to be in a positive manner while compensating the generating companies. Accordingly, the following order was passed:

*“25. The words "adverse financial impact" does not include within its ambit a further loss to be caused to such power generating companies by fixation of a still lower rate by the Respondent KERC. It will be adding insult to the injury, if the power generating companies are not only first mandatorily required to generate power at full capacity of their Plants and supply the same exclusively to the State Grid only to meet the public demand and emergent situations in the larger public interest and then later on to be paid even a lesser rate than the provisional rate agreed and assured to them by the State, in the Order passed under Section 11 (1) of the Act. Therefore, the orders under Section 11(2) of the Act cannot be permitted to determine a negative or lower rate than the rate fixed and assured by the State, even though provisional in the orders passed under Section 11(1) of the Act. The terms to 'offset adverse financial impact on the generating companies'*

*cannot mean and include lowering down rates further. On the other hand, it can only result in a positive figure of compensation to be paid to the generating companies. The question of recovery upon such fixation of rates under Section 11(2) of the Act from the generating Companies cannot arise.”*

**11.** Admittedly, this Tribunal by its order dated 31.10.2017 disposed of Appeal No. 335 of 2016 in terms of the judgment of Hon'ble High Court of Karnataka in Star Metalics Power Private Limited. It is relevant to point out that Respondent-Discoms did not challenge the said judgment of the Tribunal in Appeal No. 335 of 2016. It is also seen that while disposing of the Writ Petition filed by above said two generators, the High Court of Karnataka while quashing the order of the State Commission dated 18.08.2016 remanded the matter to the State Commission for fresh consideration in accordance with law.

**12.** It is relevant to mention under what circumstances the State Commission passed order dated 18.08.2016. When Government of Karnataka issued directions in terms of Section 11 of the Act, the Discoms in the State approached the State Commission/KERC in several OPs i.e., O.P. No. 33 of 2015 and connected matters. While disposing of these petitions on 18.08.2016, the Respondent Commission passed the following order:

*“1. The generators who have supplied power to the Petitioners ( excluding the power supplied in accordance with any subsisting Power Purchase Agreement with the*

*Petitioners) during the period from September 2015 to May 2016 in terms of the directions of the Government of Karnataka vide its order dated 16.9.2015 issued under Section 11(1) of the Electricity Act , 2003, shall be paid at the rate of Rs 4.67/-(rupees four and paise sixty seven) only per KWhr with such rebate or surcharge as the case maybe in terms of the Government order.*

*2. The concerned electricity supply companies (ESCOM's) shall issue notice to recover the excess amount paid, if any. If any generating company fails to pay the excess amount received by it within 30 days from the date of receipt of the notice from the concerned ESCOM's, it shall be liable to pay interest at 1.5 % ( one point five percent) per month from the date of default till the date of payment; and*

*3. The original of this order shall be kept in O.P. No 33/2015 and a copy of each thereof shall be retained in OP 41/2015, OP 34/2016, OP 35/2016 and OP.36/2016.”*

**13.** So far as the order of the Hon'ble High Court of Karnataka in the writ petition is concerned, Writ Appeal was filed before the High Court challenging the order dated 18.09.2017. Admittedly, there was no stay of the operation of the order dated 18.09.2017 so also the orders of the Tribunal dated 31.10.2017, which was on par with the opinion of the High Court in Star Metallics Power Private Limited. It stands as it is since there is no challenge. In other words, between the Appellant and the Respondent the order of the Tribunal dated 31.10.2017 has become final.

**14.** So far as the generating plant of the Appellant, a bidding process for purchase of short-term power came to be launched by Respondent No.2 on behalf of Respondent Nos. 3 to 7. The Appellant through Respondent No.2 JSWPTCL had entered into a PPA with Respondent Nos. 3 to 7 for supply of 250 MW of power from its generating station for the period between 25.08.2015 to 31.08.2015, and further for supply of 300 MW of power for the period between 01.09.2015 to 31.05.2016. The PPA is dated 31.08.2015. The direction of the State Government under Section 11 of the Act is dated 16.09.2015. The said direction came to be withdrawn on 31.05.2016. The tariff stated in the Direction under Section 11 was at Rs.5.08/- per unit.

**15.** Admittedly, the Appellant also had entered into PPAs with the Distribution Licensees of the State of Andhra Pradesh and Telangana in the year 2014 for a period between 29.05.2015 to 26.05.2016. Admittedly, to the Appellant, the tariff under the said PPA was higher than Rs.5.08/- per unit.

**16.** Therefore, between August/September 2015 to 31.05.2016, the Appellant was supplying power from its generating station to the State of Karnataka under a short term PPA; to the Discoms in the State of Andhra Pradesh and Telangana under medium term PPA and also to the State of Karnataka in pursuance of directions of Government of Karnataka under Section 11 of the Act.



17. It is seen that when Respondent Nos. 3 to 7 failed to make timely payment in terms of PPA dated 31.08.2015 and also in terms of Direction dated 16.09.2015 by the State Government, the Appellant on 18.09.2015 issued a letter to Respondent Nos. 3 to 7 in advance informing that Respondent No.2 would be sending invoices for the energy delivered in pursuance of Section 11 Direction. According to the Appellant, Respondent No.2 replied only on 06.10.2016 intimating the Appellant that approximately a sum of Rs.90.89 Crores was notified and adjusted by Respondent No.2 against the pending dues of the Appellant for the power supplied by the Appellant to Respondent-Discom under various short term PPA and so also pursuant to Section 11 Direction for the relevant period i.e., 16.09.2015 to 31.05.2016. In the said letter, the Respondent No.2 has given the following reasons:

- i. The Appellant has received a sum of approximately Rs 90.89 Cr from the Discoms of Andhra Pradesh and Telangana as compensation for backing down under the short-term and medium-term PPA's between the Appellant and the Discoms of Andhra Pradesh and Telangana.
- ii. During the subsistence of the Section 11 Direction these backed down units under the PPA's with the Andhra Pradesh and Telangana Discoms, were injected into the Karnataka State Grid for which full tariff (as fixed by the State Government) was paid to

the Appellant.

- iii. The Appellant has therefore unjustly enriched itself and the compensation from Andhra Pradesh and Telangana be passed on to the Respondent Discoms.
- iv. Thus, the amount as stated in (i) above be adjusted from the dues of the Appellant.

**18.** This was challenged by the Appellant protesting unilateral adjustment by denying the case of Respondent No.2. This was by a letter dated 02.11.2016. The Appellant also approached the State Commission by filing several Petition Nos. 36/2017, 38/2017, 39/2017, 40/2017 and 43/2017. The claim of the Appellant was rejected refusing to pay compensation on the ground that was stated in the letter dated 06.10.2016 (by Respondent No.2). The Respondent No.1-Commission passed Order dated 05.12.2017 in the above said Original Petitions by opining as follows:

- i. "The period of supply to the Discoms in Andhra Pradesh and Telangana under their PPA's overlapped with the period when the Section 11 Direction was in force in Karnataka.*
- ii. During this overlapping period, taking advantage of the Section 11 Direction, the Appellant operated its station to full capacity, in spite of there being backing down instructions from the distribution licensees of Andhra Pradesh and Telangana.*
- iii. Andhra Pradesh and Telangana backed down power during off-peak hours and this backed down power was injected into the Karnataka Grid.*

- iv. *This injection of backed down energy could not have been treated as injection of energy under the Section 11 Direction.*
- v. *The injection of energy by the Appellant in the Karnataka Grid during the Section 11 period is 'infirm power'.*
- vi. *Infirm power supplied during off-peak hours does not fetch value of firm power and it is the difference in value of infirm power supplied during off-peak period and firm power supplied during normal period which is to be awarded as compensation to the Respondents.*
- vii. *The power exchange rates during the off-peak period and peak period would normally be in the ratio of 2:3. Therefore, the price of infirm power supplied during off-peak period can be estimated at 80% of the price payable for firm power.*
- viii. *Thus, the compensation payable to the Respondents by the Appellant shall be 20% of the ordinary Section 11 tariff on 1051.97 MU's of energy supplied during the Section 11 period."*

**19.** It is seen that this Appellant initially filed Writ Petition challenging the impugned order dated 05.12.2017, but however, after withdrawing the said writ petition with liberty to approach this Tribunal, has filed this appeal. It is seen that the High Court had passed interim orders, which were modified by the Division Bench order dated 25.04.2018 and in terms of Orders of the Division Bench further recovery by the Respondent is protected.

**20.** It is the stand of the Appellant that the issue involved in the present appeal is restricted only with regard to the dispute pertaining to units of power supplied by the Appellant in terms of direction of the State Government under Section 11 i.e., approximately 1051.97 MU and the dispute in question has no connection to the units of power supplied to the Respondent by the

Appellant in pursuance of short term PPA between the Appellant and the Respondent. During the relevant period, the Appellant was also supplying power to State of Andhra Pradesh and Telangana under different PPAs and the tariff was ranged between Rs. 5.75/- per unit to Rs. 6.54/- per unit.

**21.** The main grievance for adjustment of about 90.89 Crores of rupees by the Respondents herein was on the ground that during the period when direction of Government of Karnataka under Section 11 was in force, AP and Telangana Discoms did not off take the guaranteed 85% of the contracted energy under their contract with the Appellant, and in such an event, the Appellant is entitled to receive compensation at 20% of the tariff for the quantum of short fall below 85%. According to Respondents, the Appellant was not entitled for double benefit i.e., tariff paid for supply of power under Section 11 from the Respondents at Rs.5.08/- per unit and so also compensation from the Andhra Pradesh and Telangana Discoms, since they did not off-take the guaranteed 85% of the contracted energy in terms of PPA with the Appellant. Therefore, the amount of Rs. 90.89 Crores as compensation amount payable to Appellant by Andhra Pradesh and Telangana Discom was deducted from the amount payable to the Appellant for the supply of power during the existence of Direction of the State Government under Section 11.

**22.** Appellant filed a Petition under Section 86(1)(f) of the Act raising a dispute that Respondent-Discom was not justified in making unilateral adjustment. It is the contention of the Appellant that Respondent-Discom except taking the position which was already taken in their letter dated 06.10.2016, no other ground was raised by them. Though the State Commission rejected the said defence taken by the Respondent-Discom, but proceeded to make out a new case in defence for the Respondent- Discoms, which was neither pleaded nor proved by the Respondent-Discoms. Therefore, the impugned order deserves to be set aside, since the said order is equal to a judgment passed by Civil Court. A Civil Court is not permitted to make out a new case in the defence of the contesting parties. Since the Respondent-Commission, which is nothing but a substitute for a Civil Court, while discharging adjudicatory function cannot make out a new case, hence, the impugned order deserves to be set aside. For this, they place reliance on the following judgment:

“i) *AP Power Coordination Committee v Lanco Kondapalli Power Ltd.*  
(paragraph 29 pg 496)(2016 (3) SCC 468);

ii) *Union of India vs. EID Parry* (page 225 paragraph 4)(2000 (2) SCC 223.)”

**23.** The Appellant points out how a new case was made out by the Commission in defence of the Respondent Discoms while erroneously concluding the impugned order as under:

- a. *“It is usual that Andhra Pradesh and Telangana would back down the power during the off-peak hours in a day.*
- b. *This power was inadvertently injected into the State Grid under Section 11 during off-peak hours.*
- c. *Such back down power injected during off-peak hours is in the nature of infirm power.*
- d. *Such infirm power was supplied throughout the period under Section 11 direction.*
- e. *The infirm power supplied during off-peak period does not fetch the value of firm power supplied during normal period.*
- f. *The difference in value of infirm power supplied during off-peak periods and the firm power supplied during normal period is to be awarded as compensation to the Respondents.*
- g. *The value of infirm power is only 80% of the price payable for firm power. (i.e.,Rs. 4.06/unit)”*

**24.** Pointing out the above opinion of the Commission, the Appellant contends that in terms of direction of Section 11 while fixing tariff at Rs.5.08/- per unit, no distinction was made between power supplied during peak hours and off-peak hours. Therefore, according to the Appellant, Commission was not justified in fixing a lower tariff than the tariff fixed by the State Government. This, according to the Appellant, finds support from the judgment of the High Court of Karnataka in the case of Star Metallica, which was followed by this Tribunal in Appeal No. 335 of 2016. Therefore, according to Appellant, granting additional amount of Rs.18 Crores to the Respondent-Discoms in a Petition filed by the Appellant is erroneous and incorrect. They also contend that rate of surcharge for delayed payment @

1.25% per month as provided in the Section 11 Direction to 8% per annum is without any basis. Therefore, they sought for payment of Rs.90.89 Crores to the Appellant along with interest at 15% per annum.

**25.** According to Respondents, the Original Petitions were filed for a direction to compensate the Appellant-Generator since there was backing down instructions during the operation of the Direction under Section 11. According to Respondents, the tariff determined for short term procurement through bidding process was 5.08/- per unit, therefore, while issuing the Direction under Section 11, Government of Karnataka stated that the said tariff was provisionally fixed subject to determination of final tariff by the State Commission. It is not in dispute that the energy supplied by generating companies has to be allocated among five ESCOMS at different percentages, for which the generators could raise the bills. All the ESCOMS had to approach the State Commission within 15 days from the take-off of Section 11 Order, requesting the Commission to determine the tariff. OP No. 33 of 2015 came to be disposed of along with other Petitions by the Commission on 18.08.2016 as under:

*“1. The generators who have supplied power to the Petitioners (excluding the power supplied in accordance with any subsisting Power Purchase Agreement with the Petitioners) during the period from September 2015 to May 2016 in terms of the directions of the Government of Karnataka vide its order dated 16.9.2015 issued under Section 11(1) of the Electricity Act , 2003, shall be paid at the rate of*

*Rs 4.67/-(rupees four and paise sixty seven) only per KWhr with such rebate or surcharge as the case maybe in terms of the Government order.*

*2. The concerned electricity supply companies (ESCOM's) shall issue notice to recover the excess amount paid, if any. If any generating company fails to pay the excess amount received by it within 30 days from the date of receipt of the notice from the concerned ESCOM's , it shall be liable to pay interest at 1.5 % ( one point five percent) per month from the date of default till the date of payment; and*

*3. The original of this order shall be kept in O.P. No 33/2015 and a copy of each thereof shall be retained in OP 41/2015, OP 34/2016, OP 35/2016 and OP.36/2016.”*

**26.** The Respondents also bring on record the Writ Petitions filed by M/s Star Metallics and Power Private Limited, which came to be disposed of by the High Court of Karnataka quashing the order of the Commission dated 18.08.2016. Said order came to be challenged before the Division Bench of the Karnataka High Court. However, Respondents stand is that the said Order of single Judge came to be stayed by the Division Bench. Apparently, the said Writ Appeals are pending before the High Court of Karnataka. Respondents also admit the disposal of Appeal No. 335 of 2016 before this Tribunal on par with the directions issued by High Court of Karnataka by order dated 18.09.2017. According to the Respondents, the Appellant's contention that except the grounds in the letter dated 06.10.2016, no other ground was urged by the Respondents is not correct. Respondent No.2-



Power Company of Karnataka furnished data describing how power was fed into State Grid by the Appellant and so also the data placed on record clearly establish mode of power supplied by the Appellant i.e., during the off-peak hours, that too after backing down instructions from state entities in Andhra Pradesh and Telangana. Therefore, the stand of the Appellant that the State Commission has made out a new case is totally misconceived. They also argued that in the light of stay granted by Division Bench so far as Order dated 18.09.2017 in the Writ Petition, the Appellant cannot place reliance on the judgment of learned Single Judge. Since the appeal is pending before the High Court of Karnataka, the question of Respondent filing appeal against the order of this Tribunal does not arise. The data produced by Respondents that the power was fed into Grid only during off peak hours was never challenged by the Appellant. Since the Appellant was injecting the power when there was backing down of energy by Andhra Pradesh and Telangana during the off-peak hours, the Respondent-Commission was justified in passing the impugned order. They also contend that in the light of Section 62 of the Act the State Commission has the prerogative of fixing the tariff. Therefore, determination of adverse financial impact and fixing of tariff are vested with the State Commission. Since Rs.5.08/- per unit fixed by the State Government was provisional tariff, the State Commission has to finally determine the tariff. Therefore, according to Respondents, the stand of the Appellant that there has to be upward revision in the fixation of tariff is

baseless and contrary to provisions of the Act. The contention of the Appellant placing reliance on the judgment of M/s Star Metallica's case in the Writ Petition is misplaced since the order of learned single Judge is stayed in Writ Appeal No. 995 of 2018. According to Respondents, Appellant has been properly compensated on account of backing down by Andhra Pradesh and Telangana entities, which led to the fact that those entities were unable to take 85% of the contracted capacity. Therefore, the State Commission though rejected the contention of the Respondents with regard to adjustment but it did rightly observed while passing the order on 18.08.2016 that it did not consider a situation where an entity has Power Purchase Agreement with entities outside the State and the situation of backing down instructions of such state entities outside the State.

**27.** According to Respondents, the Appellant was off loading power into the Grid taking advantage of Section 11 Direction. They further contend that the Appellant is guilty of suppressing the fact that the Appellant was supplying power as a consequence of backing down instruction received from Andhra Pradesh and Telangana entities. Therefore, they contend that the impugned order is justified. Since the Appellant had also contended that deductions made by the Respondent-Discoms as untenable, and since there was a prayer for determination of rate for the energy supplied pursuant to Section 11 Direction, the Respondent-Commission was justified to evaluate the facts and circumstances based on the rival contentions raised by both the parties

by determination of the amount during the period when there was backing down instructions from Telangana and Andhra Pradesh.

**28.** It is not in dispute that when this Tribunal disposed of appeal dated 31.10.2017 filed by the Appellant on similar lines of the judgment of High Court of Karnataka in writ petition filed by M/s Star Metallics's case, there was no stay of the order of the learned single Judge dated 18.09.2017. As noticed from records, the Writ Appeal seems to have been filed during 2018 and the Tribunal had disposed of the appeal on 31.10.2017. Admittedly, Respondent Discoms did not challenge the said judgment of the Tribunal in Appeal No.335 of 2016. According to Respondents, the matter in the Writ Appeal is still pending, therefore it has not yet reached finality. This may not be correct so far as the *lis* between the Appellant and the Respondents are concerned. The Respondent-Discoms having failed to challenge the order of the Tribunal dated 31.10.2017, the judgment in the appeal so far as the Appellant and Respondents are concerned, has reached finality. In that view of the matter, in the absence of challenge by the Respondent-Discoms against the judgment of this Tribunal in Appeal No. 335 of 2016, we are of the opinion that the *lis* between the parties pertaining to impugned order dated 18.08.2016 has become final.

**29.** At the cost of repetition, it is relevant to mention the reasons stated by Respondent No.2 in its letter dated 06.10.2016, which are as under:

- i. The Appellant has received a sum of approximately Rs 90.89 Cr from the Discoms of Andhra Pradesh and Telangana as compensation for backing down under the short-term and medium-term PPA's between the Appellant and the Discoms of Andhra Pradesh and Telangana.
- ii. During the subsistence of the Section 11 Direction these backed down units under the PPA's with the Andhra Pradesh and Telangana Discoms, were injected into the Karnataka State Grid for which full tariff (as fixed by the State Government) was paid to the Appellant.
- iii. The Appellant has therefore unjustly enriched itself and the compensation from Andhra Pradesh and Telangana be passed on to the Respondent Discoms.
- iv. Thus, the amount as stated in (i) above be adjusted from the dues of the Appellant.

Above said defence was raised by Respondent No.2. This came to be questioned before the State Commission by the Appellant, since the Respondents refused to pay compensation on the grounds already enumerated in the letter dated 06.10.2016. We have also referred to the impugned order of the Commission dated 05.12.2017, wherein the

Commission has opined that the injection of energy by the Appellant into the Karnataka Grid during Section 11 period i.e., between 16.09.2015 to 31.05.2016 has to be treated as infirm power. Again, we wish to refer to the gist of order of the Commission dated 05.12.2017 passed while rejecting the claim of the Appellant.

- i. "The period of supply to the Discoms in Andhra Pradesh and Telangana under their PPA's overlapped with the period when the Section 11 Direction was in force in Karnataka.*
- ii. During this overlapping period, taking advantage of the Section 11 Direction, the Appellant operated its station to full capacity, in spite of there being backing down instructions from the distribution licensees of Andhra Pradesh and Telangana.*
- iii. Andhra Pradesh and Telangana backed down power during off-peak hours and this backed down power was injected into the Karnataka Grid.*
- iv. This injection of backed down energy could not have been treated as injection of energy under the Section 11 Direction.*
- v. The injection of energy by the Appellant in the Karnataka Grid during the Section 11 period is 'infirm power'.*
- vi. Infirm power supplied during off-peak hours does not fetch value of firm power and it is the difference in value of infirm power supplied during off-peak period and firm power supplied during normal period which is to be awarded as compensation to the Respondents.*
- vii. The power exchange rates during the off-peak period and peak period would normally be in the ratio of 2:3. Therefore, the price of infirm power supplied during off-peak period can be estimated at 80% of the price payable for firm power.*
- viii. Thus, the compensation payable to the Respondents by the Appellant shall be 20% of the ordinary Section 11 tariff on 1051.97 MU's of energy supplied during the Section 11 period."*

**30.** Apparently, it was not the defence of the Respondents that the injection of power by the Appellant during Section 11 validity has to be treated as infirm power. On going through the impugned order, we notice that the reasoning of the Respondent-Commission was not the stand of the Respondent Discoms. What was the reason to reject the claim of the Appellant by the Discoms as noted in the letter dated 06.10.2016 was apparently rejected by the Respondent-Commission.

**31.** We note from the impugned order i.e., with reference to issue No.2 that Respondent-ESCOM did claim compensation on the ground that the energy backed down by the Andhra Pradesh and Telangana entities was supplied during the subsistence of Section 11 Order of the State Government. According to the ESCOMs, the liquidated damages was quantified in the letter of Respondent No.2 dated 06.10.2016. The compensation claimed was 98,89,36,155/-. According to Respondents, before the State Commission since the entire installed capacity of the Appellant was subject matter of various contracts agreeing to supply power to the Discoms of Andhra Pradesh, Telangana and ESCOMS of Karnataka State, there was no spare capacity to supply power into Grid under Section 11 of the Order. Therefore, according to Respondent- ESCOMS, the Appellant was entitled to liquidated damages on account of backing down in terms of contract between the Appellant and respective Discoms of Andhra Pradesh and Telangana. In addition to the said liquidated damages, the Appellant was entitled to tariff

that was payable for the energy supplied under Section 11 Order. Therefore, according to ESCOMS it is nothing but an unjust enrichment accruing to the Appellant. Therefore, the liquidated damages received from the State of Andhra Pradesh and Telangana has to be made over to the ESCOMS, since the Appellant would not have earned the double benefit for the energy backed down in the absence of Section 11 Order.

32. According to them, in the normal circumstance, if there was backing down of energy by the distribution licensees, the generator has to reduce the generation of power accordingly in the absence of Section 11 Order. But the Respondent-Commission after analysing the meaning of unjust enrichment by referring to the decision of the Hon'ble Supreme Court in "***The state of Gujarat & Ors., vs. Essar Oil Limited***" (2013 (3) SCC 522) opined that the claim of liquidated damages by the Appellant, if any earned by the Appellant-Generator, cannot be treated as unjust enrichment. They further said since the said enrichment was not at the instance of the Respondent ESCOMs, therefore, ESCOMs were not entitled to any benefit of liquidated damages.

33. The Respondent-Discoms also contended that the Appellant-Generator had suppressed the fact of supply of back down energy under Section 11 supply, therefore, they contended that if such fact was made known to the Commission at the earliest, the Commission would not have allowed the tariff as was allowed to other generators of the State. This was

also not accepted by the Respondent-Commission on the ground that the amount earned towards liquidated damages was not one of the relevant fact to be considered for determination of the tariff. Therefore, the Appellant-Generator getting lesser tariff than the others would not arise at all since it cannot be part of tariff determination exercise.

**34.** They also opined that in terms of contract, if the procurer fails to avail the contracted capacity and proceeded to back down the power, which resulted in payment of capacity charge to that extent, which is termed as liquidated damages in the PPA. Whenever backing down of power occurs, since the generator has opportunity to sell that un-availed power to any third party at the rate agreed between them, it does not amount to unjust enrichment. Even otherwise, in terms of tariff policy, Gain/benefit realised by sale of such un-availed power has to be shared between the procurer and the generator. In the absence of tariff policy or any other acceptable tariff determination procedure that such benefit should be shared between the subsequent purchaser of un-availed power and the generator, the Respondent ESOCMs are not entitled for such benefit as subsequent purchasers. Therefore, the Respondent-Commission opined that the liquidated damages payable to the Generator for un-availed contracted capacity, which represents notional payment towards the capacity charges, such profit may not be a relevant factor to determine the tariff payable for the supply of power under Section 11 Order. Therefore, the subsequent



purchaser is not entitled for such benefit was the opinion of the Respondent-Commission.

**35.** The State Commission further opined that even if it was known that the back down power was supplied under Section 11 Order and even if generator derived certain benefit, still it cannot be a relevant factor to reduce the tariff for the energy supplied under Section 11 Order or while determining the adverse financial impact in terms of Section 11 (2). Therefore, the Respondent-Commission rejected the grounds urged by the Respondent-ESCOM so far as unjust enrichment or suppression of fact by the Appellant generator.

**36.** They also note that the Appellant had to operate the generating stations to the full extent, even if there was backing down instructions from the distribution licensee of Andhra Pradesh and Telangana, since Section 11 Order was in force. The Respondent-Commission opines that this power, which was inadvertently injected into the state Grid during backing down of the power and during off-peak hours has to be taken as supply of power under Section 11 Order during off-peak hours. But, they opined that it becomes infirm power, and the entire power supplied throughout the subsistence of Section 11 Order, becomes infirm power. Though the Respondent-Commission says irrespective of indicating injection of energy during Section 11 Order, which was as a result of backing down power by

Andhra Pradesh and Telangana entities, and in such situation, if the generator could sell such un-availed power to others but proceeded to treat the said power as infirm power. According to us, this opinion of the Commission has no rationale behind it because under what provision such distinction being made by the State Commission creating separate categories to fix tariff rate for “infirm power and firm power” are not placed on record. Though the Commission opines there was no need to indicate injection of power into Grid by the Appellant, which was backed down by entities of Andhra Pradesh and Telangana while dealing with the issue of unjust enrichment, when it came to finding fault with the Appellant for treating the injection of power as infirm power, it says Appellant ought to have informed such injection of power due to backing down of power by other entities. This opinion of the Commission is like blowing hot and cold at the same time. It is also noticed from the impugned order that in the Petition filed by the Appellant, the Commission went on to decide the claim of the ESCOMs in their favour indirectly by treating the number of units supplied by the Appellant as infirm power. At no point of time, this was the stand of the Respondents. The Respondent-State Commission totally ignored the fact that the Appellant had no option than to operate its Plant to the full exportable capacity on account of Section 11 Direction. In other words, the Respondent-Commission tried to meddle with the decision of this Tribunal in Appeal No. 335 of 2016, which has reached finality since no challenge was made by the

ESCOMs against this Judgment of the Tribunal. In this judgment, the Tribunal virtually followed the opinion of the High Court of Karnataka that there has to be upward revision of tariff which was fixed by the Government of Karnataka i.e., Rs.5.08/- per unit. This was not the defence or the reason raised by the Respondent-ESOCMs either in the letter dated 06.10.2016 or in their defence before the Respondent-Commission. The State Commission though opined that the generator is entitled for liquidated damages and so also tariff amount for supplying such un-availed power to third parties, but when it comes to the Respondent-ESCOMs it says that it is infirm power, which was not case of the Respondent-ESCOMs.

**37.** We fail to understand the reasoning of the Respondent-Commission to treat the said power supplied as 'infirm power' though it accepts that the un-availed power could be sold by the generator, if procurer backs down any power, and also opines that in such event, liquidated damages has to be paid to generator in terms of contract, but again it proceeds to treat the said power as infirm power, which does not stand to any reasoning apart from not being the defence raised by the Respondent-ESCOMs.

**38.** We have to point out here that in the light of existence of Section 11 Order, the question of Appellant-Generator not generating power to the full extent of the Plant would not arise. The generator is under an obligation to operate its Plant to full extent, if the Plat is operated to its full extent and if all

the procurers had availed power in term of respective contracts, admittedly no power was available to supply under Section 11 Order. There was no option for the Appellant-Generator not to generate power to its full exportable extent in the light of existence of Section 11 Order, whether there was backing down power by the procurer or not, the generator has to operate its Plant to its full extent. Therefore, we fail to understand, in such circumstance, how it becomes infirm power. If the plant was expected to operate to its full extent, whether some procurer availed or un-availed the power, the un-availed power automatically gets into Grid. The Appellant-Generator could not have stopped generation of power, even if there was backing down of power by Andhra Pradesh and Telangana state entities, in the light of existence of Section 11 Order. If the Respondent-Discoms are not entitled for sharing the liquidated damages or receiving compensation claimed by them on the ground of unjust enrichment, the Respondent-Commission could not have assigned altogether different reasoning in the impugned order to reject the claim of the Appellant by referring to new ground of infirm power, which was not the defence of the ESCOMs. Whether the Respondent-Commission could take the responsibility of defending the Respondent-ESCOMs holding Vakalat for ESCOMs? Such act of the Commission deserves to be deprecated. This is the settled position of law in the light of the following judgments:

“i) *AP Power Coordination Committee v Lanco Kondapalli Power Ltd.*  
(paragraph 29 pg 496)(2016 (3) SCC 468);

ii) *Union of India vs. EID Parry* (page 225 paragraph 4)(2000 (2) SCC 223.)”

**39.** The State Commission is expected to be a neutral entity. In the light of disposal of Appeal No. 335 of 2016, which has reached finality between the parties and in the light of our observation that the Respondent-Commission ought not to have taken the Vakalat of Respondent-Discoms, we are of the opinion that the impugned order deserves to be set aside so far as the direction of the Respondent-Commission to determine the value of power supplied during existence of Section 11 Order as infirm power. Further, we also opine that the Respondent-Commission ought not to have directed additional payment of Rs.18 Crores, over and above the unilateral adjustment of a sum of Rs.90.89 Crores made by the Respondent-ESCOMs. This exercise was uncalled for. Therefore, we are of the opinion that the adjustment of amounts by the Respondent-Discoms ought to have been set aside by the Respondent-Commission. Therefore, we are of the opinion that the appeal deserves to be allowed and accordingly we allow the appeal by setting aside the impugned order. We further direct the Respondent-Discoms to make payment of outstanding amount of Rs. 90.89 Crores to the Appellant along with interest @ 9% per annum and further we direct the Respondent-Discoms to make payment of bills, if pending towards the supply of power during operation of Section 11 Order.

40. There shall be no order as to costs. All the pending IAs, if any, shall stand disposed of.

41. Pronounced in the Virtual Court on this 6<sup>th</sup> day of November, 2020.

**(S.D. Dubey)**  
**Technical Member**

**(Justice Manjula Chellur)**  
**Chairperson**

✓  
**REPORTABLE / NON-REPORTABLE**

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