

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

**IA No. 2025 of 2022 in Appeal No. 438 of 2022,
IA No. 2035 of 2022 in Appeal No. 439 of 2022,
IA No. 2028 of 2022 in Appeal No. 440 of 2022,
IA No. 2031 of 2022 in Appeal No. 441 of 2022,
IA No. 2042 of 2022 in Appeal No. 442 of 2022,
IA No. 2039 of 2022 in Appeal No. 443 of 2022,
&
IA No. 2045 of 2022 in Appeal No. 444 of 2022**

Dated: 17.03.2023

**Present: Hon'ble Mr. Justice Ramesh Ranganadhan, Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

In the matter of:

Jindal Steel and Power Limited

.... Appellant(s)

Versus

**Chhattisgarh State Electricity Regulatory Commission
& Anr.**

.... Respondent(s)

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Ms. Juhi Senguttuvan For R-2

Ms. Anshu Mahajan For R-3-7

Mr. Pradeep Misra
Mr. Manoj Kr. Sharma
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ORDER

IA No. 2025 of 2022 in Appeal No. 438 of 2022,
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IA No. 2039 of 2022 in Appeal No. 443 of 2022,
IA No. 2045 of 2022 in Appeal No. 444 of 2022
(For Interim Relief)

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. The captioned appeals have been filed by the Appellant namely Jindal Steel & Power Limited (in short "Appellant" or "JSPL-D") under section 111 of the Electricity Act, 2003 (hereinafter "EA 2003"), assailing the order dated 28.11.2022 (hereinafter referred as "Impugned Order") passed by the Chhattisgarh State Electricity Regulatory Commission (hereinafter "State Commission" or "CSERC") in Petition No. 14 of 2021, which was filed by the Appellant for determination of Annual Revenue Requirement (in short "ARR") and retail tariff for FY 2021-22, for its Distribution Business.

2. The Impugned Order was passed by the State Commission in the remand proceedings in compliance with the judgment dated 06.05.2022 rendered by this Tribunal in appeals nos. 72 of 2016 and 100 of 2016.

3. Separately, RIUS, the contesting Respondent filed an appeal before Hon'ble Supreme Court challenging the aforesaid judgment dated 06.05.2022, however, the said appeal was dismissed vide order dated 03.11.2022 by holding that there is no ground for interference.

4. The Petition Nos. 62 of 2018, 33 of 2020, 7 of 2021 and 46 of 2022 filed separately by the Appellant for the determination of tariff for different relevant financial years (in short "FY") were also clubbed together with the Petition No. 14 and the common Impugned Order has been passed by the State Commission.

5. Being aggrieved by the Impugned Order, the captioned appeals have been filed by the Appellant raising the following contentions that the State Commission has erred in observing that:

- (i) the Appellant itself has given an undertaking to the State Commission in its licence application that it would use the surplus power from JSPL's captive generating plants i.e., Raigarh Captive Power Plant (in short "RCPP") and Dongamahua Captive Power Plant (in short "DCPP") to meet its power requirement for supply to the consumers in his area of supply;

- (ii) the RCPP and DCPD have surplus power which can be supplied to its consumers in OP Jindal Industrial Park (in short "OPJIP") in terms of its licence despite the fact that power from RCPP of JSPL-D has been found to be infirm and intermittent not fit for supply; and
- (iii) there is a revenue surplus of Rs. 1246.31 Crores from FY 2011-12 to FY 2020-2021 due to availability of surplus power available which otherwise should have been supplied to the consumers and thus required to be adjusted while approving the actual purchase cost of power.

6. The Appellant through the Interlocutory Applications, is seeking a stay on the aforesaid adjustment of alleged surplus from RCPP and DCPD, so that the Appellant is entitled to charge the aforesaid determined tariff/ ACoS of Rs. 5.44 per unit from consumers of OPJIP, as a provisional tariff till the disposal of the main appeals.

7. The Appellant argued that for the purpose of interim relief, it has to merely demonstrate that the impugned orders have been passed, prima facie, contrary to the above judgment dated 06.05.2022.

8. The Appellant, Jindal Steel & Power Limited, is a distribution licensee within the OPJIP area of supply and has captive generating plants of capacity of 284 MW ("Raigarh CPP") at Patrapali Village, Ghargoda Tehsil, Raigarh District Raigarh and 540 MW ("DCPD") at Dongamahua, Chhattisgarh.

9. Respondent No. 1 – Chhattisgarh State Electricity Regulatory Commission was constituted by the State Govt. of Chhattisgarh (“State Government”) vide Notification No.3190/S/E/2002 dated 23.08.2002 read with Notification No. 432/R/353/03 dated 11.05.2014 and discharges functions enjoined upon it under Section 86 of the Electricity Act, 2003.

10. Respondent No. 2 - Raigarh Ispat Udyog Sangh (“RIUS”) is an association comprising of members who are mainly engaged in business relating to steel production and having their industrial units in OPJIP.

11. The Appellant prayed that the State Commission, in the light of aforesaid reasons, has proceeded to adjust a portion of the alleged surplus for the retrospective period, thereby reducing the Average Cost of Supply (in short “ACoS”) to Rs. 4.15/ kWh as against the determination of the ACoS as Rs. 5.44/kWh for the Appellant. Hence the captioned appeals.

12. The Appellant submitted that the State Commission has passed the Impugned Order in direct contravention to Section 61(d) of the EA 2003, inasmuch as the State Commission under the guise of safeguarding consumer interest by providing lower tariff has miserably failed to ensure recovery of actual cost of supply of power by the Appellant which mandates that “**61(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;**”.

13. It was also added that the State Commission, while determining the ARR, has erroneously considered that there is surplus power of RCPP and DCPP, which ought to have been supplied.

14. The Appellant is also being aggrieved by the decision of the State Commission giving the Appellant only a period of 3 (three) days to implement the Impugned Order, thereby attempting to tie the hands of the said Appellant from approaching this Hon'ble Tribunal, and therefore, pleaded that the said conduct of the State Commission have far reaching consequences in the event the Impugned Order is not immediately stayed by this Hon'ble Tribunal to the extent that the ACoS of Rs. 5.44/kWh as determined by the State Commission is allowed as a provisional measure till the disposal of the main appeals.

15. The Appellant also submitted that the State Commission has adjusted a revenue surplus of Rs. 175 Crores for FY 2022-23, out of the total revenue surplus of Rs. 1246.31 Crores for the FY 2011-12 to FY 2020-21, and thereby, fixing the ARR at Rs. 736.39 Crores, with the condition that the balance amount shall be adjusted in the subsequent financial years, such adjustment has resulted in reduction of the ACoS to Rs. 4.15/ kWh as against the determined ACoS in the Impugned Order as Rs. 5.44/ kWh.

16. Consequently, as submitted, the Appellant has suffered a huge financial impact of Rs. 1246.31 Crores, excluding the loss incurred on account of the claimed tariff by the Appellant for FY 2011-12 FY 2020-21, which is in addition to a loss of around Rs. 125.3 crores in the current financial year till November, 2022, by considering actual cost incurred in arranging power as against the tariff of Rs. 4.20/ kWh, which was prevalent prior to the passage of the Impugned Order, additionally, in the event, the Appellant must supply power to the consumers at a tariff of Rs. 4.15/ kWh as per the Impugned Order, then the average daily loss would amount to Rs. 98.33 Crores up till March, 2023.

17. It is important to note here the factual matrix of the case alongwith the past proceedings related to the issue.

18. The present case relates to various litigation continuing for past many years, resulting into repeated remands to the State Commission to determine the tariff for the OPJIP supply area. The latest remand judgment dated 06.05.2022 was rendered by this Tribunal in Appeals Nos. 72 of 2016 and 100 of 2016 challenging the Orders dated 23.12.2014, 01.10.2015 and 21.01.2016 passed by the State Commission.

19. Separately, the State Commission also issued a direction to JSPL-D on 31.03.2016 to file a tariff petition for determination of tariff after complying the directions given by this Tribunal in its judgement dated 07.03.14 in Appeal No. 89 of 2012 and order dated 23.12.14 passed in Petition No.12 of 2014(T) by the Commission.

20. Additionally, writ petitions being WP 921, 940 and 1002 of 2016, were also filed by certain consumers before the High Court of Chhattisgarh, challenging the aforesaid direction vide letter dated 31.03.2016 of the State Commission, wherein the High Court passed an interim order dated 13.04.2016, staying the letter dated 31.03.2016 with the direction that JSPL-D would be paid for electricity supplied at Rs. 4.20/- per unit as an interim arrangement.

21. Another writ petition being WPC No. 1009 of 2016 was filed by RIUS before the High Court of Chhattisgarh, challenging disconnection of electricity

by JSPL-D, which was withdrawn and was allowed by the High Court by order dated 04.07.2016, subsequently, RIUS filed petition no. 4 of 2017 before the State Commission requesting to enforce its order dated 23.12.2014 and direct JSPL-D to ensure uninterrupted power supply, the State Commission disposed of this petition on 30.05.2018 directing JSPL-D to implement and comply order dated 23.12.2014 and provide uninterrupted power supply.

22. Thereafter, the High Court vide order dated 24.07.2018 disposed of WPC No. 1595 of 2018 filed by JSPL-D challenging the above order dated 30.05.2018 passed by the State Commission alongwith WP No. 921, 940, 1002 of 2016 holding that it may not enter into the dispute since the parties have entered into amicable settlement and resolved their disputes amicably.

23. Thereafter, High Court by order dated 31.10.2018 dismissed the Writ Appeal No. 758 of 2018 filed by the State Commission before the Division Bench challenging the above order dated 24.07.2018 praying that the tariff cannot be subject matter of private negotiation, which was challenged further through Special Leave Petition being SLP No. 8566/2019 (DY No. 7553/2019) in the Supreme Court of India by the State Commission wherein Hon'ble Supreme Court vide order dated 01.04.2019 directed this Tribunal to decide Appeals 72 of 2016 and 100 of 2016, expeditiously.

24. The appeals nos. 72 of 2016 and 100 of 2016 were heard and decided by this Tribunal vide Judgment dated 06.05.2022 with the directions that:

“100. We are again directing the State Commission to determine the surplus capacity as available from the Appellant’s CPP in a

real time mode along with its pattern immediately and analyse it whether it can be supplied to the industrial consumers.

106. *The State Commission is directed to immediately:*

- i. determine the available surplus capacity and its pattern;*
- ii. carry out technical analysis for supply of surplus power for the distribution business from the Raigarh CPP and Dongamahua CPP;*
- iii. allow JSPL to procure required quantum of electricity through competitive bidding for long term;*
- iv. determine the tariff for the Distribution Licensee i.e. JSPL from the FY 2011-12, on the basis of already available data and data further furnished by JSPL or otherwise gathered suo moto by the Commission.”*

25. Therefore, the State Commission ought to have complied with the above directions in the process of determination of tariff / ACoS for the distribution licensee i.e. JSPL-D.

26. It is also important to note the directions as given by the earlier judgment(s) of this Tribunal.

27. This Tribunal vide judgment dated 07.03.2014, in Appeal No.89/2012 filed by RIUS challenging the tariff order dated 08.02.2012 passed by the State Commission, set aside the said tariff order, and remanded the matter with the direction to the State Commission with the following directives: -

“64. Summary of our Findings

*(a) The first issue relating to surplus power from the Captive Power Plant of Jindal Steel is decided in favour of the Appellant. The State Commission is directed to re-determine the power purchase cost **as per the directions given in Paragraph-23 of this Judgment.***

(b) The Second Issue regarding delay in filing the tariff petition is allowed in favour of the Appellant Appeal No.89 of 2012 with the directions to the State Commission not to pass on the burden on account of delay in filing of the tariff Petition by Jindal Steel to the consumers in the form of increase in tariff due to carrying cost.

(c) The third issue regarding segregated accounts is also decided in favour of the Appellant with the directions to the State Commission not to entertain any Petition of Jindal Steel for enhancement of tariff in the event of failure to submit the segregated accounts as per the directions of the State Commission in future.”

28. However, in the para 23 of the judgment dated 07.03.2014, this Tribunal has made certain remarks regarding the availability of surplus power, as reproduced below:

“23. In view of the above, we are constrained to conclude that the State Commission’s finding on this issue is wrong and the same is

*liable to be set aside. **The State Commission should have examined the pattern of surplus power available from the captive power plant after meeting the requirement of captive load of the Steel Plant and load pattern in the licensed area of Jindal Steel and should have considered part of energy supplied in the licensed area from the Captive Power Plant of Jindal Steel. Unfortunately, this has not been done.** Therefore, we remand the matter with directions to the State Commission to carry out the exercise and evaluate the energy from the Captive Power Plant that should have been booked to distribution business of Jindal Steel at the cost of the generation tariff of Jindal Steel's Captive Power Plant. The consequential relief may be passed on to the Appellant and other consumers. The State Commission should also facilitate increasing the contract demand of Jindal Steel from 1 MW to 80 MW from CSPDCL as sought by Jindal Steel for meeting the increased load of Jindal Steel. This will help in availability of continuous and sustainable supply from the Captive Power Plant to Jindal Industrial Park in future."*

29. The issue of surplus capacity and its pattern was again emphasised in the judgment dated 06.05.2022, in fact, the State Commission, on 12.06.2014, issued Tariff Order in Petition Nos. 5-8 of 2014 for Chhattisgarh State Power Distribution Company Limited (in short "CSPDCL") for FY 2014-15 and final true-up for Previous Years of CSPGCL, CSPTCL, SLDC and CSPDCL, wherein, the State Commission also observed that the load curve prepared by SLDC depicts that the injection pattern of the power supplied by

JSPL to CSPDCL has wide variation, supply from JSPL is varying frequently and it is unstable / non-firm power.

30. Further this Tribunal vide Judgment dated 26.05.2016 in Appeal Nos. 41 of 2015 and 67 of 2015, has observed as under:

“10. (A)

(vii) We are of the considered Opinion that injection pattern of such unstable power supply causes even commercial implications, besides creating disturbance in the demand supply balance. Since the surplus power supply from JSPL has been fluctuating in nature and unstable the purchase price of non firm power cannot be equated with purchase price of firm power and has to be given treatment as in the case of purchase of infirm power and the purchase cost of such type of power has to be significantly lower than the cost of firm power. We are in agreement with the findings of the Impugned Order of the State Commission on this issue and decide this issue against the Appellant.”

31. From the above, it is clear that the intermittent power cannot be considered safe for the grid security but also bound to have commercial implications, OPJIP is a small distribution area with very low inertia, injection of intermittent power in such a scenario can create large disturbances in the distribution grid adversely affecting the supply in the licenced area of JSPL-D.

32. This Tribunal in its judgment dated 06.05.2022 dealt with the above issue of whether the Appellant is bound to supply power from the Raigarh CPP even if no surplus capacity is available or the surplus capacity available is erratic and fluctuating in nature. In para 76, this Tribunal has held as under:

*“76. We are of the firm opinion that the Appellant is bound by the provisions of the Act 2003 and the conditions of the Licence as granted by the State Commission. Any provision of the MoU, if it is inconsistent with the provisions of the Act 2003 and the Licensing conditions stands annulled. **Therefore, the Appellant shall supply the surplus power from the Raigarh CPP to the extent it is available and is firm power.**”*

33. In paras 91 to 93 of the aforementioned judgment, it was observed that:

*“91. We felt that it is important to take a note of it as the State Commission has totally failed in complying with our directions for examining the quantum and pattern of surplus power availability from the Raigarh CPP owned by the Appellant. There cannot be any dispute that the opinion of this Tribunal was reiterated time and again, a fact which effects the present Appeal also however, **the State Commission is still grappling to find the information. It is one of the major issues in dispute i.e. the pattern and quantum of surplus power available from Raigarh CPP.**”*

92. The State Commission should have obtained the information directly from the SLDC as any power generated by a CPP and its

consumption by the captive user is precisely monitored in compliance with the provisions of the Electricity Rules, 2005, for determining the captive status of a power plant.

93. Even after a gap of eight years, the State Commission is still struggling to get this information, **it is beyond our understanding even to the fact that the SLDC submitted information for examining the pattern of surplus power before the State Commission, on which the State Commission made the following observation vide its order dated 12.06.2014:**

“Commission’s View:

The load curve prepared by the SLDC shows that the injection pattern of the power supplied by JSPL to CSPDCL has wide variation. Supply from JSPL is changing frequently and it is unstable / non-firm power. To check sanctity of the fact, the Commission has done detailed analysis of the power supplied by JSPL.

In the judgment passed by Hon'ble APTEL in the Appeal No.89 of 2012 dated 07th March 2014, JSPL itself has submitted that surplus power at different times of the day was dependent on the actual computation of steel plant which varied frequently....

It is amply clear that power supplied by JSPL to CSPDCL is fluctuating in nature. In such a case, it is very difficult

for CSPDCL to manage its load-generation balance and some time it may have to over draw/ under draw from grid for which heavy penalty is required to be paid. The CSPDCL has signed power purchase agreement with JSPL for RTC power supply and not for non-firm power. It is also seen that CSPDCL has not taken any corrective steps to overcome this situation and continued purchasing such power of poor quality. The Commission takes serious note on the same and directs CSPDCL for not to purchase unstable / non-firm power which creates disturbance in demand supply balance.”

34. Failure of the State Commission, in carrying out its statutory functions though it has enough powers to do so under the law, is disconcerting.

35. The State Commission in its compliance report submitted that it has addressed two separate communications dated 16.06.2022, directing JSPL-D to file petitions for determination of ARR for the control period 2022-23 to 2024-25 and truing up for the period from FY 2011-12 to 2020-21 for the two CPPs of JSPL and for the distribution business of JSPL-D, including therein the full particulars of the electricity generation and supply to various sources, however, claiming that JSPL-D did not file the truing up petitions for generation cost of its two CPPs for the period from 2011-12 to 2020-21.

36. Also, vide letter dated 26.07.2022 sought the details as under from JSPL for the purpose of determining the surplus power of Raigarh CPP and Dongamahua CPP:

- *the daily data of Unit-wise generation from Raigarh CPP and Dongamahua CPP from April 1, 2011 to March 31, 2021 in MS Excel*
- *the daily data of Unit-wise captive consumption from Raigarh CPP and Dongamahua CPP from April 1, 2011 to March 31, 2021 in MS Excel*
- *the daily data of energy sold to different entities from Raigarh CPP and Dongamahua CPP from April 1, 2011 to March 31, 2021 in MS Excel*

37. In response, JSPL submitted monthly data on the actual generation and utilization of energy in kWh from Raigarh and Dongamahua CPPs instead of data on 15 minutes time block basis, half hour basis or daily basis.

38. Thereafter, the State Commission vide letter dated 27.06.2022 and 25.07.2022 directed CSLDC to provide the following information/ data:

- *Unit wise installed capacity of CPP along with the date of commercial operation of JSPL*
- *Daily generation in kWh (daily) by CPP of JSPL from FY 2011-12 to FY2020-21*
- *Electricity consumed in kWh (daily) by captive loads of JSPL from FY 2011-12 to FY 2020-21*
- *Details of electricity sold (daily) in kWh from CPP of JSPL from FY2011-12 to FY 2020-21 to other than consumer at O.P. Jindal Industrial Park*

- *Total electricity consumed (daily) in kWh in O.P. Jindal Industrial Park from FY 2011-12 to FY 2020-21*

39. However, CSLDC also failed to provide the daily generation in kWh by the CPPs of JSPL from FY 2011-2012 to FY 2020-2021 and several other details called for, declaring that it is not available with them.

40. Even the Chief Electrical Inspector also submitted the month wise details of power generation, auxiliary consumption, captive consumption, and power sold in respect of Jindal Steel and Power Ltd in kWh terms only as against the information sought for.

41. We are concerned with the situation prevailing in the Chhattisgarh power sector, as no statutory authority or the government/private utilities are able to provide the requisite information, in case the metering arrangement is in place as mandated under the law i.e. compliance of Central Electricity Authority (Installation and Operation of Meters) Regulations, 2006 including amendments thereunder, the information as sought for must have been readily available.

42. It is the statutory duty of the State Commission to ensure compliance of law by the power sector utilities operating in the State, however, it has preferred even not take any cogent action or to comply with the repeated directions given by this Tribunal on this issue.

43. At this stage, we are not inclined to agree to the submission of the State Commission that JSPL-D has not adhered to its directions by not providing the

daily data as called upon and also confirming that the same is also not available with the CSLDC beyond the JSPL-D's interface with the State Transmission Utility, therefore, the State Commission proceeded to determine the retail supply tariff for the distribution business of JSPL on the basis of available data furnished by JSPL.

44. Further, the submission of the State Commission that the tariff including the surplus has been determined based on the data furnished by JSPL as the Petitioner and which was also provided by the CEI, we find it appropriate to direct the State Commission to determine the surplus capacity afresh with its pattern, whether intermittent in nature and to which extent, so that the surplus capacity which can be supplied to the grid without affecting its security can be determined.

45. We agree with the contention of the State Commission that it has carried out the exercise to best of understanding and the State Commission is required in law to proceed with the best available data, however, such an exercise cannot determine the useful surplus capacity, as pattern of electricity generated/ consumed / or injected cannot be determined on the basis of monthly data.

46. We decline to agree to the fact that the State Commission has determined the firm surplus power, in compliance with the directions given through various judgments of this Tribunal, considering the monthly data furnished and available with the State Commission and deciding that there was firm surplus power available and duly taken into account in the tariff determination process, including the past period i.e. from 2011 onwards.

47. At this stage we are not taking up the issue of determination of surplus capacity alongwith its pattern as available from DCPD as the Appellant under its licence condition is not bound to supply from DCPD as already decided vide judgment dated 06.05.2022.

48. It cannot be disputed that as per existing law, every distribution licensee/ network and the generators including the captive generators are bound to follow the directions as issued by the State Commission and also can be monitored through the meters as installed as per CEA Regulations in a time block of 15 minutes, therefore, we are not convinced by the contention of the State Commission submitting that JSPL transmission and distribution network is not directly connected to the Chhattisgarh State Power Transmission Company Ltd. (CSPTCL), also, the power received by consumers of the JSPL-D is not transferred through the network of State Transmission Utility i.e. CSPTCL, additionally, the power injected into the grid by JSPL is for supply to entities other than the captive use and consumers of industrial park,

49. Therefore, we reject the defence taken by the State Commission by clarifying that the State Commission has taken a possible view based on the data available with it in response to the observation of this Tribunal in para 6 of the interim order dated 10.01.2023 wherein it was held that the State Commission has not complied with the directions for determining the surplus capacity along with the pattern of injection of such surplus capacity into the grid.

50. We find it most inappropriate for the State Commission to argue that the grounds of challenge by JSPL-D are also not that the State Commission ought

to have taken daily data and not monthly data for determination of the surplus, therefore such a ground would also beg the question as to why JSPL-D has not provided the data on daily basis, it is the State Commission to find out an answer to it.

51. Further, the submissions of the State Commission on “monitoring of the systems of JSPL under the Electricity Act” shall be dealt in detail while hearing the main appeal as section 32 of the Act read with section 33 provides that SLDC shall have all the powers vested in it in exercising monitoring, supervising and controlling of all the licensees, generating stations, sub-stations, and any other person connected with the operation of the power system including the transmission of electricity whether through the State owned transmission system or through the transmission system owned by the private developers.

52. The Respondent No. 2, RIUS has also objected to the captioned interim application for stay filed by the Appellant, in terms of which the Appellant has sought stay against adjustment of Rs. 1246.31 Crores and sought a provisional direction to charge a tariff of 5.44 per unit from its consumers.

53. It is submitted by RIUS that in light of the findings in the Judgment dated 06.05.2022 and the Impugned Order, the Appellant is not entitled to any interim relief for the reasons that the Appellant failed to fulfil the triple test i.e. to make out a *prima facie* case, balance of convenience and irreparable loss, in addition to its failure to fulfil its obligations as a distribution licensee to ensure continuous supply of power to its consumers, further, the objections taken in the present appeal were not raised before CSERC and it has not objected to consideration of surplus from Dongamahua CPP, additionally, it has not

complied with the directions of CSERC in providing the required data/information.

54. It is argued that the interim relief sought by the Appellant is same as the final relief prayed since the Appellant has only impugned computation of surplus power, therefore, grant of interim relief will result in allowing the main appeal itself which is impermissible in law, on the other hand, the Appellant has failed to fulfil its statutory obligation of ensuring supply of 100% power to the consumers.

55. The Respondent No. 2 invited our attention to various documents in claiming that the Appellant has refused to meet its statutory obligation under Section 42(1) read with Section 43(1) of the Electricity Act, 2003 and various Rules and Regulations framed thereunder to supply 100% of the power requirement of the consumers, in fact as on date, the Appellant is only supplying approximately 50-60% of the power requirement of the consumers in the Industrial Park from 05.03.2022 onwards, further added that, the Appellant does not have contracted required power for the entire contract demand of consumers in the industrial park.

56. Further, submitted that CSERC has carried out the assessment based partly on data submitted by the Appellant and the data provided by the Chief Electrical Inspector and CSLDC, as such the direction to determine surplus capacity from Raigarh CPP and Dongamahua CPP having become final, the Appellant is precluded from contending that no power is to be supplied from Dongamahua CPP.

57. We find no merit in the above contention as this Tribunal has never ruled that the Appellant is bound to supply surplus power of the DCPD to the consumers of the OPJIP, contrary to it, this Tribunal, in its earlier findings, has evidently concluded that the Appellant, as per various agreements, is not bound to supply surplus power from DCPD, if it elects to do so.

58. It was also argued by RIUS that the data conclusively establishes the firm nature of surplus power, also the sale of this power to CSPDCL and to other consumers through open access confirms that such power is firm power and not intermittent power as such sale is possible only for firm power, therefore, the Appellant ought not to be permitted to take contradictory stands where on one hand, it submits that the nature of power from Raigarh CPP and Dongamahua CPP was infirm and fluctuating and, on the other hand, it has sold this power on firm basis through open access.

59. We decline to accept such contention of the RIUS as State Commission vide its order dated 12.06.2014 has already concluded that:

“Commission’s View:

The load curve prepared by the SLDC shows that the injection pattern of the power supplied by JSPL to CSPDCL has wide variation. Supply from JSPL is changing frequently and it is unstable / non-firm power. To check sanctity of the fact, the Commission has done detailed analysis of the power supplied by JSPL.

It is amply clear that power supplied by JSPL to CSPDCL is fluctuating in nature. In such a case, it is very difficult for CSPDCL to manage its load-generation balance -----

The Commission takes serious note on the same and directs CSPDCL for not to purchase unstable / non-firm power which creates disturbance in demand supply balance.”

60. It was further argued that as per the data supplied by the Appellant as well as the Chief Electrical Inspector and SLDC, the Appellant has been consistently selling power meant for supply to its consumers to CSPDCL and other open access consumers, thus, the Appellant has earned revenue from such sale of power at the cost of its consumers, therefore, granting relief sought by the Appellant will result in double benefit to the Appellant since it has already recovered amounts from third parties and the consumers will have to bear the additional burden of tariff.

61. We fail to understand the contention raised by RIUS as how the consumers of OPJIP shall be burdened with additional tariff, any uncontracted power sold by a generator/ captive generator to a third party cannot create any liability on the consumers of a distribution licensee as the distribution licensee is not liable to pay any charges for such a transaction.

62. It is submitted that no prejudice would be caused if the tariff as determined by CSERC is implemented pending final decision. In case the Appellant succeeds, it will be entitled to recover all amounts in true up proceedings. However, granting injunction will result in huge tariff shock to the consumers.

63. It is submitted that the Appellant will not suffer any irreparable loss if the relief sought is rejected for the following reasons: -

- (a) The Appellant has already enjoyed the benefit of the surplus in the past period.
- (b) The tariff is subject to true-up as well as appeal. The Appellant will be entitled to recover all amounts along with carrying cost in case it succeeds.

64. The above contention cannot be considered for denial of legitimate injunction as it is equally applicable for recovery from the Appellant during trueing up of accounts of the Appellant, in case the appeal is dismissed.

65. The Appellant reiterated that this Tribunal in its judgment dated 06.05.2022, has held that power from RCPP can only be supplied if there is surplus power available, after meeting captive requirements of steel unit of JSPL-D and other bilateral commitments, and the same is **firm** in nature, whereas, vide judgment dated 26.05.2016 passed in Appeal Nos. 41 of 2015 and 67 of 2015 explicitly held that surplus power from RCPP is fluctuating and non-firm in nature, which cannot be injected into the grid for supply to consumers, which is noted in the judgment date 06.05.2022.

66. It was further argued that this Tribunal in para 94 of the judgment dated 06.05.2022 firmly held that the power supplied by the RCPP to CSPDCL is fluctuating in nature resulting into grid disturbance attracting high penalties, as such it is beyond doubt that such power cannot be sourced for its distribution business, supplying power to its consumers in the distribution area, therefore,

any principle applicable to CSPDCL, shall also be relevant to JSPL-D as it is also a parallel distribution licensee alongwith CSPDCL.

67. Also submitted that it cannot be disputed that despite specific directions, CSERC went ahead to determine surplus, without determining its pattern/nature post captive consumption by the steel plant (i.e., whether power is Firm or Infirm) as directed in para 106 of the judgment dated 06.05.2022.

68. We find merit in the contention of the Appellant that CSERC has determined the surplus power on monthly basis without ascertaining its pattern of whether the same is intermittent/ fluctuating power or is firm power.

69. Regarding the must supply of surplus power from DCPD, as argued by RIUS, it is seen that the licence was granted to JSPL-D by CSERC vide order dated 29.09.2005 wherein JPSL-D indicated only two sources of power i.e. RCPD and power plant of Jindal Power Limited, and therefore, JSPL-D cannot be forced to supply surplus power from DCPD. This Tribunal in its judgment dated 06.05.2022 has held as under:

“65. Further, one of the conditions as stipulated in the Licence by the State Commission provides that:

“A distribution licensee may procure electricity from any source subject to the terms and conditions of his license and under the regulatory supervision of the Commission. However, the applicant’s plea has all through been supply of power from his captive power plant.”

68. From the above, it is clear that the Appellant sought permission to supply electricity from two Generating Stations namely existing Raigarh CPP and proposed 1000MW JPL IPP to a capacity of 90 MW and 210 MW without specifying the percentage share of electricity in case load requirement is below 300 MW, however, the State Commission through its order dated 29.09.2005, while granting the Licence has specified that a distribution licensee may procure electricity from any source subject to terms and conditions as specified.

69. Therefore, the State Commission allowed JSPL to procure power from any source subject to terms and conditions of the Licence. It is settled principle of law that any distribution licensee can not be bound by the terms of the Licence to procure electricity from a particular source and also any condition laid down prior to the enactment of Electricity Act, 2003 shall be bad in law if it is inconsistent with the provisions of the Electricity Act, 2003.

71. The Distribution Licensee (JSPL in this case) bound by the provisions of the Act 2003 and the conditions as laid down in the Licence granted by the State Commission. As already mentioned above, the Distribution Licensee can procure power from any source subject to transparent, economic and prudent manner under the legal provisions notified by the State Commission.”

70. Therefore, the Appellant is not bound to supply power from DCPD as argued by RIUS, as no provision under the Electricity Act fastens a distribution licensee to either identify any particular source of power or continue to supply power from any specified source for the entire period of its license, as also held vide judgment dated 06.05.2022.

71. It, certainly, in the light of the above, cannot be argued that the direction contained in para 106(ii) of the judgment dated 06.05.2022, as quoted in the foregoing paragraphs, where DCPD is mentioned qua surplus power, is for mandate for supply from DCPD also, it was merely to carry out a “technical analysis” for supply of surplus power for distribution business from RCPD and DCPD *Inter alia* for studying load pattern from RCPD/ DCPD and the industrial load and whether it is technically feasible to supply power from RCPD only after captive consumption, for distribution business.

72. As seen from the foregoing paragraphs, it can be concluded that the surplus power is the balance power available after captive consumption from RCPD, and it can only be ascertained whether such surplus can be supplied to the industries/ consumers or not, if such surplus power is available and its pattern qualifies for such supply for safe and secured supply.

73. Therefore, the pattern of such surplus power need to be ascertained by studying the 15 minute time block data at the interface point of the injection point from the CPP or drawl point of the distribution grid, which is after captive consumption, and only if, it is certified by CSLDC having full visibility through the meters in terms of the CEA Regulations, on being directed, in terms of the

order dated 10.01.2023, CSLDC, in of its Affidavit dated 13.01.2023, states that “...The quality of power injected into the state grid by Jindal Steel Power Ltd. i.e. at the interface point between JSPL and STU is usually fluctuating in nature.”, the relevant extract from the affidavit is reproduced as under:

“(i) The pattern of surplus power:

*The State Load Despatch Centre has no access on the energy meters installed at the generator terminals of the generating units of power plants of JSPL. The SLDC also does not have any access to the meters at the load centre point of the captive load of JSPL. Also, there is no facility of telemetry at the above points. In the absence of the consumption pattern of the captive load of JSPL and the generation pattern of the generating units of JSPL power plant, **SLDC is unable to determine the pattern of surplus power.***

(iii) The surplus capacity and its quality (firm or infirm/intermittent):

*According to the standard definition, infirm power means the electricity injected to the grid prior to the commercial operation of the generating station. It implies that firm power is the electricity injected into the grid after the commercial operation of the generating station. JSPL’s generating units have already started commercial operation, so as per the definition, they qualify as a firm power. **The quality of power injected into the state grid by Jindal Steel Power Ltd. i.e. at the interface point between JSPL and STU is usually fluctuating in nature.***

74. The aforesaid statement on part of SLDC is sufficient for this Tribunal to hold that the State Commission has erred in determining the surplus power available with its pattern in compliance with various judgments of this Tribunal.

75. At this stage we are refraining from making any opinion on the submissions of CSLDC, which shall be considered in detail while adjudicating the main appeal.

76. After detailed arguments, RIUS sought relief to the extent that it may be granted liberty to take supply from the other parallel distribution licensee CSPDCL in the OPJIP supply area.

77. It is unnecessary to grant such liberty as any consumer, if opts for, is free to obtain supply from any distribution licensee operating in the area where such a consumer exists, in case of any issues arising against such option, consumer can approach the State Commission.

78. Hon'ble Supreme Court of India, in Tata Power Company Limited v. Reliance Energy Limited & Ors., reported in (2008) 10 SCC 321 (Paras 99 & 100), has held that consumers can avail power from any of the parallel licensees, subject to payment of wheeling charges, accordingly, consumers of OPJIP can either avail power from JSPL-D or from CSPDCL through grant of open access (i.e., by using wires of JSPL-D), there is no restriction for the consumers/ RIUS in obtaining open access from JSPL-D and procuring power from CSPDCL.

79. Therefore, if JSPL-D is granted injunction as prayed for *inter alia* permitted to charge the determined tariff of Rs. 5.44/ kWh (minus adjustment), then the consumers will not be prejudiced as, by their own statement, they can procure power from CSPDCL.

80. Another contention which was raised by RIUS is that their tariff, as an interim arrangement, was fixed as Rs. 4 per unit, subsequently, revised to Rs. 4.20 per unit, it was the same which was as interim tariff by this Hon'ble Tribunal in judgment dated 06.05.2022, therefore, same may be allowed to be continued, it is important to note here that in para 107 of the judgment dated 06.05.2022, it was held as:

“107. The mutually agreed tariff fixed under the directions of the High Court shall continue to be in force till the tariff is determined by the State Commission, and will apply subject to modification / directions, if any, by the superior court.”

81. As such, the tariff fixed by the High Court was to continue only till tariff is determined by CSERC in terms of the above judgment of dated 06.05.2022, therefore, after the passage of the impugned order, no sanctity is left qua the tariff fixed by mutual consent before the High Court, further, no appeal has been filed by RIUS against the impugned order, wherein, tariff/ ACoS of Rs. 5.44/kWh is determined.

82. Considering the observations and conclusions in the foregoing paragraphs, we find that the Appellant has made out a *prima facie* case, *inter alia*, the grant of interim relief. The balance of convenience lies in favour of the

Appellant and against the Respondents. Further, in the event, the prayers as prayed for are not granted, the Appellant will suffer irreparable loss.

83. For the foregoing reasons as stated above, we are of the considered view that the present application for Interim Relief filed by the Appellant has merit and should be allowed.

84. The Impugned Order dated 28.11.2022 passed by the Chhattisgarh State Electricity Regulatory Commission in Petition No. 14 of 2021 is stayed to the extent of the Appellant is allowed to henceforth charge the aforesaid determined tariff/ ACoS of Rs. 5.44 per unit from consumers of OPJIP, as a provisional tariff, subject to the outcome of the main appeals.

PRONOUNCED IN THE OPEN COURT ON THIS 17th DAY OF MARCH, 2023.

(Sandesh Kumar Sharma)
Technical Member

(Justice Ramesh Ranganadhan)
Chairperson

pr/mkj

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

COURT-1

APPEAL NO. 438 OF 2022 & IA NO. 2025 OF 2022
IA NO. 2025 OF 2022 IN APPEAL NO. 439 OF 2022
IA NO. 2028 OF 2022 IN APPEAL NO. 440 OF 2022
IA NO. 2031 OF 2022 IN APPEAL NO. 441 OF 2022
IA NO. 2042 OF 2022 IN APPEAL NO. 442 OF 2022
APPEAL NO. 443 OF 2022 & IA NO. 2039 OF 2022
AND
IA NO. 2045 OF 2022 IN APPEAL NO. 444 OF 2022

Dated: 17.03.2023

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member

In the matter of:

Jindal Steel and Power Limited Appellant(s)
Versus
Chhattisgarh State Electricity Regulatory Commission & Anr. Respondent(s)

Counsel for the Appellant(s) : Sanjay Sen, Sr. Adv.
Hemant Singh
Chetan Garg
Alchi Thapliyal
Pranav Sood
Angad Sandhu

Counsel for the Respondent(s) : Swapna Seshadri for R-1
Damodar Solanki for R-2
Pradeep Misra
Manoj Kr. Sharma for SLDC
[In Appeal No. 438 of 2022]

ORDER

IA NO. 2025 OF 2022, IA NO. 2025 OF 2022,
IA NO. 2028 OF 2022, IA NO. 2031 OF 2022,
IA NO. 2042 OF 2022, IA NO. 2039 OF 2022
AND
IA NO. 2045 OF 2022

Order on IAs for interim relief is pronounced today and disposed of accordingly.

APPEAL NO. 438 OF 2022
APPEAL NO. 439 OF 2022
APPEAL NO. 440 OF 2022
APPEAL NO. 441 OF 2022
APPEAL NO. 442 OF 2022
APPEAL NO. 443 OF 2022
AND
APPEAL NO. 444 OF 2022

Mr. Damodar Solanki, learned Counsel for the 2nd Respondent, seeks six weeks' time to file reply. He may file the reply on or before 28.04.2023 with advance copy to the other side. Thereafter, the Appellant may file rejoinder, if any, on or before 26.05.2023 with advance copy to the other side.

After pleadings are complete, let these Appeals be included in the 'List of Finals' to be taken up from there, in their turn.

(Sandesh Kumar Sharma)
Technical Member

(Justice Ramesh Ranganathan)
Chairperson

pr/vt/dk