

57. However, RIUS has provided the table wherein it has calculated the year-wise quantum of electricity M/s JSPL has sold which was desired from the JSPL.

58. Since after repeated directions M/s JSPL has failed to provide the information to ascertain availability of surplus power, it will be proper to analyze the data provided by the RIUS. By analysis of these data, it appears that sufficient surplus power was available to supply power to its consumers.

59. Now as the considerable time has gone since the Hon'ble ATE has passed above mentioned order wherein it has been directed to give effect the content of the order at the earliest and also, considerable time has gone since the filing of this petition.

60. Even after elapsing of so much time, JSPL has failed provide relevant information to decide the matter. Hence, it would be proper to pass this order in absence such information.

61. It is also worth to mention that Commission has issued some directions in the tariff order passed for ARR of FY 2009-10 for JSPL's licensed distribution business. Relevant portion of the direction has been reproduced as under;

"14. DIRECTIONS

(i) In accordance with the terms and conditions of the license, a separate accounting of distribution and supply business is required to be kept. This has repeatedly been brought to the notice of the licensee. The separation of accounts may be confirmed within 3 months. Failure to

comply with direction will result in reduction in tariff to Rs. 2.50 per unit as is the licensee's agreement with most consumers.”

62. Hon'ble ATE has also directed to determine the generation tariff of JSPL's CPP to book to distribution business of JSPL.

63. For determining the power generation cost of power generated from JSPL's CPP, at present, it is not possible to determine the same because of non-availability of data. Hence, Commission is directing JSPL to file an application for the same.

64. In its submission, JSPL has submitted that it has to purchase coal at a higher rate on account of situation arisen after judgment of Hon'ble Supreme Court. It is very clear issue that while determining the tariff for CPP, Commission will calculate the same complying provisions of applicable regulations which shall automatically take care of actual coal cost.

65. On the submission of the JSPL that surplus power from CPP of 325.7 MW should only be considered, it is not agreeable as if same is agreed then capacity of CPP and captive load both should be freezed to a value as on date of issue of license. In that case, there will be no issue of examining the surplus power because at that time JSPL was in comfortable position to supply power to consumers of JIP. Submission dated 15/12/2014 of RIUS has also made the same argument.

66. It has been observed that delay in submitting the information by JSPL is unnecessarily delaying the decision, hence, in the interest of justice and a view taken by this Commission that on not filing of proper segregated audited account, Commission will reduce the tariff to 2.50 per unit as is the licensee's agreement with most consumers.

67. Now that JSPL has been allowed a considerable time to file the segregated audited account but same is still to be filed. Hence, we have no option other than to reduce the tariff to Rs. 2.50 per unit.

68. Therefore, we fix a tariff of Rs. 2.50/- with effect from 1st January 2015 with terms and conditions of original agreement signed between consumers of JIP and JSPL subject to condition that same shall be adjusted retrospectively on either side after truing up of ARR on submission of proper data by the JSPL.

69. JSPL is directed to file the petition for ARR and retail tariff for FY 2015-16 along with the segregated audited account since the date of issue of the license for true up of ARR of previous years.

70. JSPL is also directed to file an application for determination of tariff of its CPP since the financial year from which it has charged the Commission's determined tariff to its consumers of JIP. We order accordingly."

45. Being aggrieved by the order dated 23.12.2014, JSPL, filed Review Petition No. 7 of 2015, which was dismissed by of the State Commission on 01.10.2015 with directions to JSPL to file a petition for determination of cost of generation of its captive power plant for the year 2009-10 and onwards at the earliest.

46. Hence the present captioned Appeal No. 100 of 2016 is filed by JSPL, challenging the Impugned Review Order dated 01.10.2015 passed in Review Petition No. 7 of 2015 along with the Impugned Tariff Order dated 23.12.2014 passed in Petition No. 12 of 2014, and further, requested for amending para21 of the said Appeal through I.A. No. 21 of 2016 dated 12.01.2016, as under:

“To declare that the Appellant’s Raigarh CPP has no surplus power available on continuous and regular basis for supplying to the industrial consumers of Jindal Industrial Park; and”

47. Separately, JSPL filed Petition No. 47 of 2015 before the State Commission for determination of cost of generation of power from its Dongamahua CPP which was dismissed by the State Commission vide order dated 21.01.2016, observing that:

“8. After hearing the petitioner on the point of admission of this case, we had passed orders on admission on 27.08.2015, in which the petitioner was directed to file complete petition for determination cost of generation tariff of all it’s captive power plants, situated at Dongamahua and Raigarh, which is according to the above referred judgment of Hon’ble APTEL.

9. *Despite the order, the petitioner has not complied the order and therefore, a reminder no. 1696 dated 28.09.2015 was sent to the petitioner with direction to comply with the order positively by 16.10.2015.*

10. *Though, the reminder has been received by the petitioner, no step has been taken for compliance of the order. In this situation, we have decided on 04.12.2015 to issue last reminder to the petitioner. Accordingly, last reminder no. 2130 dated 05.12.2015 has been served upon the petitioner with direction to comply the order dated 27.08.2015 within 15 days with a warning in case of default, it shall be presumed that the petitioner has nothing to say on the matter and we proceed accordingly.*

11. *The last reminder was served upon the petitioner on 07.12.2015, but till the date the petitioner has not filed complete petition for compliance of the order dated 27.08.2015. However, the petitioner, vide letter dated 21.12.2015, has informed that the petitioner has preferred an appeal against the order dated 01.10.2015, passed by the Commission in petition no. 07 of 2015(M), in which the directions, given in order dated 27.08.2015 in petition no. 47 of 2015(M) and 48 of 2015(M) has been reiterated. The appeal is listed for hearing by the APTEL on 02.02.2016. With the letter the petitioner has also enclosed order dated 07.12.2015 of the Court-II of the APTEL. It is observed from perusal of the order, no stay has been granted by the APTEL against the proceedings pending before this Commission. It is also appeared that delay in filing appeal is yet to be condoned and*

the appeal is not admitted yet. In this situation, it would not be appropriate to defer the proceedings of this case till the disposal of the said appeal.

12. We feel that, despite given several opportunities, the petitioner has failed to file complete petition as directed by us, in accordance with the Hon'ble APTEL's judgment in appeal no. 89 of 2012. Grant of further opportunities or deferment of the proceedings, on the basis of an unadmitted and unregistered appeal, would amount destruction of principles of natural justice, hence, we are constrained to dismiss the petition for non-prosecution."

48. JSPL challenged the order dated 21.01.2016 passed in Petition No. 47 of 2015 through the captioned Appeal No. 72 of 2016.

49. During the pendency of the dispute, the supply to the industrial consumers was disconnected, accordingly, the State Commission issued Notice dated 13.04.2016 to JSPL on RIUS's representation dated 07.04.2016 seeking JSPL's response / report with respect to disconnection of power supply at JIP without following the laws and rules for disconnection of power supply by a distribution licensee.

50. Meanwhile, some settlements were arrived at by the parties and approached the High Court of Chhattisgarh, which in turn was challenged by the State Commission citing that the issue of determination of retail tariff for the consumers is vested solely with the State Commission.

51. M/s Tirumala Balaji Alloys Pvt. Ltd., M/s. Vandana Energy & Steel Pvt. Ltd. and Ajay Ingot Rolling Mills Pvt. Ltd. approached the High Court of Chhattisgarh by way of Writ Petition Nos. 921, 940 and 1003 of 2016, challenging the State Commission's letter dated 31.03.2016 wherein JSPL was requested to file a petition for determination of tariff.

52. On 13.04.2016, the High Court passed its interim order in W.P. Nos. 921 and 940 of 2021 and noted that as agreed by the petitioner consumers, power supplied to the petitioner consumers will be charged at Rs. 4.20 per unit, subject to final adjudication by this Tribunal, as under:

"Heard on interim prayer too.

... If electricity is not restored, the industry shall also suffer closure and may turn sick. The order dated 31.03.2016 though has taken into note that it will have impact on the consumer but the perusal of the documents would show that the consumer i.e. the petitioner and the other persons were not heard before passing such order. The petitioner contended that presently they are ready and willing to pay the electricity @ Rs.4.20 per unit to revive the industry as it is completely closed.

Considering such submission as an interim measure, it is directed that the effect and operation of the order dated 31.03.2016 (Annexure P/14) shall remain stayed till the final adjudication of this petition.

It is observed that, the petitioner as offered shall be obliged to pay the electricity charges @ Rs.4.20 per unit, which would be subject to the final adjudication before the appellate authority.

It is further observed that Jindal Steel and Power Limited be entitled to supply the electricity to the petitioner from Dongamauha power plant without prejudice to their right. It is expected that restoration of power shall be done expeditiously as possible.”

53. RIUS also filed Writ Petition No. 1009 of 2016 before the High Court and raising its concern regarding disconnection of power by JSPL, however, the same was withdrawn after negotiating and finalising an agreement with JSPL for supply of power from Dongamahua CPP at the rate of Rs. 4 per unit and the supply of power to the members of RIUS was commenced from 22.04.2016 onwards, however, RIUS vide letter dated 21.09.2016, filed complaint with the State Commission that JSPL is disobeying the Impugned Tariff Order dated 23.12.2014 and charging a tariff of Rs. 4.00 per unit instead of Rs. 2.50 per unit for supply of power to its consumers in JIP from April 2016 onwards.

54. We fail to understand that once the issue was under examination by the State Commission, the RIUS should not have compromised with JSPL, and once settled for an agreement, it cannot be considered to be arrived at under threat.

55. The action by the State Commission can also be questioned here regarding its lethargic response in the matter and allowing the high handedness, if any, by the distribution licensee.

56. In response to State Commission's notice dated 13.04.2016, JSPL submitted its report before the State Commission on 25.04.2016, stating that:

- (i) The failure to supply power to its consumers in JIP was due to non-approval of power procurement by JSPL from an alternate source.
- (ii) Vide its letter dated 02.03.2015, the State Commission had also rejected JSPL's request for procurement of power through competitive bidding.
- (iii) JSPL has been advised not to make any comments or submissions in relation to the appeals pending before this Tribunal.
- (iv) Upon being approached by RIUS, the issues have been resolved and the power supply to entire JIP has been commenced from 22.04.2016.

57. It is difficult to understand, the role of Appellant on one side and the role of the RIUS, the industrial consumer association on the other hand and the statutory role played by the State Commission. We find it appropriate to add here that all the three contributed to this situation where multiple petitions, cross petitions are filed at every level.

58. Accordingly, this Tribunal vide interlocutory order dated 11.06.2021 made certain observations and issued directions for compliance:

Order dated 11.06.2021

"1. This appeal, being no. 100 of 2016, filed by Jindal Steel & Power Limited (JSPL) challenging the Order dated 23.12.2014 passed Chhattisgarh State Electricity Regulatory Commission (CSERC) has been pending since 2016. It is stated that another appeal, being no. 72 of 2016, is also connected and is similarly pending. The order primarily challenged by the first

said appeal is the Tariff Order passed by CSERC determining the tariff of Rs 2.50/kWh which is expected to be charged by JSPL from its consumers which include the members of Raigarh Ispat Udyog Sangh (RIUS), the first respondent in the appeal. The appeal is presently listed on 10.12.2021, it having been adjourned over the past several dates of hearing primarily by the Court Master under the administrative instructions due to limited working of this Tribunal in the pandemic conditions, neither side in the said matter(s) having moved this Tribunal for urgent hearing all along.

2. When this Vacation Bench assembled today to hear the matters listed for the day, learned counsel, Mr. Vishrov Mukherjee, representing RIUS (first respondent) mentioned the matter requesting for his applications (IA no. 903 and 904 of 2021) to be taken up for urgent hearing today, his submission being that on account of certain dispute between the parties, the members of RIUS (an association) were facing threat of disconnection of the electricity supply by the appellant JSPL (distribution licensee). Having heard the learned counsel and Ms. Divya Chaturvedi who appeared, on advance notice, on behalf of the appellant (non-applicant), we directed that this matter shall be taken up at the end of the board and that it be included in the supplementary list that may be issued.

3. Before we took up the matter at the end of the board, some of the relevant papers relating to the captioned matter have been placed before us through One Drive in the form of digital documents.

4. It needs to be briefly noted at this stage that the appellant is the distribution licensee for a limited area developed as OP Jindal Industrial Park in Raigarh, Chhattisgarh, the members of RIUS having set up their respective industrial units in the geographical area where the appellant, as the distribution licensee, is obliged to serve and cater to them by providing electricity. The issue of tariff, as mentioned earlier, had come up before the State Commission and it had determined the same at Rs. 2.50/kWh w.e.f. 01.01.2015, the counsel on either side being not clear as to the control period to which the said order pertained.

5. The appellant, the distribution licensee, on whose petition the said tariff had been determined, was aggrieved it claiming a higher level of tariff. It, thus, filed the present appeal (A.no. 100 of 2016). The other appeal (A.no. 72 of 2016) is stated to be pertaining to the order determining generation tariff.

6. While the appeal was pending, the distribution licensee (i.e. the appellant herein) and the consumers (i.e. the members of first respondent RIUS) are stated to have entered into a compromise on 30.06.2018. It appears that by that time several other litigations had been initiated, this including Writ Petition (C) No. 1595 of 2018 with a batch of Writ Petitions bearing nos. 921, 940 & 1002 of 2016, all before High Court of Chhattisgarh at Bilaspur.

7. By the Agreement dated 30.06.2018, the parties i.e. the distribution licensee (appellant) and the aforesaid consumers (RIUS) agreed between themselves to waive the rights

declared in their favour or against them by the State Commission, this Tribunal or the High Court, in relation to supply of electricity, any time in the past and further confirmed not to assert for enforcement of any such judgment/order/direction/decision. It appears that by the said agreement, the said parties also inter-alia decided to seek withdrawal of the cases, amongst others, the two appeals mentioned above pending before this Tribunal and the Writ Petitions referred to earlier. By the said agreement, the parties also agreed and decided that the tariff payable by the said consumers shall be as agreed upon and as reflected in the Term Sheet which was made part of the agreement, it being the published tariff of Chhattisgarh State Power Distribution Corporation Limited (CSPDCL) applicable for similar industrial consumers less 25% (on demand and normal energy charge) subject to a minimum tariff of Rs. 4.00 per kWh after all adjustments.

8. The parties i.e. distribution licensee and the group of consumers (the applicant herein) moved the Chhattisgarh High Court by an Interlocutory Application (IA) which was considered on 24.07.2018. A copy of the Order passed by the High Court of Chhattisgarh by learned Single Judge on that date reveals that the State Commission had made a submission that the agreement is “contrary to law”. The High Court declined to enter into that controversy and treated the writ petition as closed, the lis brought before it having come to an end as a result of the compromise placed before it. Noticeably, the High Court did not examine the legality or

otherwise of the said agreement dated 30.06.2018 nor made any comment thereupon.

9. The CSERC challenged the aforesaid order of the learned Single Judge by Writ Appeal No. 758 of 2018 which was not entertained by the Division Bench and disposed of on 31.10.2018. It appears that the State Commission then brought the matter to the Hon'ble Supreme Court by SLP (C) No. 7553 of 2019. While issuing notice on the said SLP, by Order dated 01.04.2019, the Hon'ble Supreme Court directed that in the meantime this Tribunal hear and decide the pending IAs in the two appeals, as mentioned earlier, the date of hearing then being 09.04.2019.

10. On our query, learned counsel on both sides submitted that the two appeals (Appeal nos. 72 of 2016 and 100 of 2016) were at the relevant point of time pending before the Coordinate Bench (Court-I) and that the hearing could not take place because the Technical Member then part of that Bench retired and, thereafter, the matters got dislocated and though allocated to this Bench (Court-II), have remained pending due to the pandemic condition mentioned earlier.

11. The submission of the learned counsel for the applicant/first respondent (RIUS), as indeed of the appellant, have brought out that the parties herein have on their own regulated the business of sale and purchase of electricity in terms of the tariff they had agreed upon by the compromise entered into on 30.06.2018. It has been submitted that a joint application for withdrawal of this appeal connected with appeal

no. 72 of 2016 was moved in terms of the agreement dated 30.06.2018 but then it was withdrawn primarily because the first respondent opted out, its submission being that uninterrupted power supply was not ensured. On the other hand, it is the submission of the appellant that the joint application was withdrawn because the State Commission was opposing it.

12. Be that as it may, the fact remains that the appeal at hand is still pending with the connected appeal.

13. The current controversy leading to the prayer for urgent listing and interim relief has come up against the backdrop pleaded in the application for directions as under:

“2. RIUS is filing the present application for interlocutory orders as JSPL has terminated supply of power to several members of RIUS and JSPL is proposing to terminate supply to the other consumers as well, which will cause irreparable injury to such members of RIUS. JSPL has already:-

(a) Issued illegal disconnection notices issued by JSPL to members of RIUS (dated 16.04.2021), demanding charges which are over and above the tariff fixed by the Ld. Chhattisgarh State Electricity Regulatory Commission (“Ld CSERC”) and the tariff agreed between RIUS and JSPL in the Agreement dated 30.06.2018; and

(b) Addressed subsequent written and oral instructions issued to certain consumers to shut down their High Tension (HT) power supply.

3. Any disconnection of power supply by JSPL will be in violation of: (a) Directions of Ld. CERC in the Order dated 30.05.2018 in Petition No. 4/2017(M), wherein JSPL was directed to ensure uninterrupted continuous power supply to the consumers of JIP. This Order of Ld. CERC was never challenged by JSPL and the same has attained finality. (b) Terms of the Agreement dated 30.06.2018 signed by JSPL and RIUS [Third Recital read with Article 8]. ...”

14. The prayer in the application is set out as under:

“22. In view of the aforesaid submission, it is most respectfully prayed that this Hon’ble Tribunal may be pleased to:

(a) Direct Appellant to not disconnect the High Tension power supply to the consumers in Jindal Industrial Park including the members of Raigarh Ispat Udyog Sangh;

(b) Direct Appellant to restore connection and resume supply to units where supply has been interrupted; and

(c) Pass such other Order(s) as this Hon’ble Tribunal may deem just in the facts of the present case.”

15. Having heard the learned counsel on both sides and having gone through the limited documents that have been made available for urgent hearing today, we record a prima-facie view that the parties seem to have unauthorizedly engaged themselves in transactions which are possibly and wholly outside the law, they seemingly having usurped the jurisdiction of the Regulatory Commission by entering into the compromise agreement dated 30.06.2018 which, if so done, is

impermissible. Though, the learned counsel for the appellant submitted that the party she represents is conscious that they are obliged in law to approach the State Commission, the fact remains that as on date nothing is shown to us that the compromise agreement dated 30.06.2018 was ever taken to the State Commission for it to be adopted by the Regulatory Authority.

16. We find that the agreement dated 30.06.2018, even otherwise, was not fully acted upon, illustratively the two appeals at hand having survived, the parties not being inclined to seek withdrawal.

17. The fact remains that the question of tariff determination, as done by the State Commission, is still subject matter of appellate scrutiny by this Tribunal where the matter is pending. The parties did not even approach this Tribunal for its imprimatur – final or interim, over the determination of tariff done by them on their own by the aforesaid agreement, if that was at all permissible in law.

18. The result of the Writ Petition by the Order which was challenged now pending before Hon'ble Supreme Court, cannot come in the way of this Tribunal for examining the conduct of the parties in above light, in as much as the validity or legality of the compromise has not been examined by the Writ Court.

19. Under the regulatory regime, as we presently understand, the tariff determination is the exclusive domain of the Regulatory Commission subject, of course, to appellate

scrutiny first by us and finally by the Hon'ble Supreme Court. Prima-facie, this function cannot be taken by the parties in their own hands, not the least by a distribution licensee. We presume the obligation to abide by the tariff as determined by the Regulatory Commission is part of the conditions of license given to the distribution licensee. In the facts revealed before us, we would like to have it examined as to whether by entering into the agreement dated 30.06.2018, there has been a breach of the said conditions of distribution license granted in favour of the appellant.

20. Be that as it may, the falling apart of the compromise agreement dated 30.06.2018 entered into by the parties unilaterally, keeping aside the statutory authorities, cannot be allowed to become the subject matter of the appeals at hand wherein the questions of legality and validity of the tariff orders passed by the Commission is to be gone into. If at all, the event mentioned in the applications constitutes a cause of action which has nothing to do with the matter at hand of these appeals.

21. Therefore, while declining any direction of the nature mentioned in the captioned applications, we direct the State Commission to assist us for bringing clarity to the facts. The State Commission, through its Secretary, shall file an explanatory affidavit setting out its position vis-à-vis the compromise agreement dated 30.06.2018, also clarifying as to whether it has been privy to the tariff settled by the parties by the said agreement and whether it has been regulating the business of sale/purchase of electricity, thereby violating the

tariff determined by the Commission. Similarly, we call upon the appellant (distribution licensee), to also discover on oath supported by all relevant documents the justification in law for the acts indulged in leading to the execution of the Agreement dated 30.06.2018, also giving detailed account of the excess money collected as tariff in terms of the said agreement dated 30.06.2018 over and above the tariff determined by the State Commission.

22. The discovery shall be made by affidavit of a responsible officer of the appellant within four weeks of today. The Commission shall also file its response within the same period.

23. The applications are disposed of accordingly.

59. Accordingly, during the hearing on 28.03.2022 adjourned the matter after hearing the Ld advocates of all sides:

“We have heard learned counsel for the parties further. From the submissions made, there seems to be a possibility of some common ground being found by the parties on their own so as to resolve the inordinately delayed resolution of multiple knots in which the parties seem to have bound themselves, courtesy also some orders of the regulatory commission. The learned counsel propose to come with some possible solutions which must be submitted well in advance, after a consensus emerges, before the next date of hearing.”

60. However, the parties failed to arrive at a consensus and therefore, it was decided to hear the matter further for prosecution.

Our Observation and Analysis

61. The first issue which emerges out of the two captioned Appeals is 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.

62. It is important to note the Appellant: JSPL obtained the permission, of setting up the JIP under the Industrial Policy of the State Government and supply of power to the industrial consumers of the JIP area, under the provisions of the Indian Electricity Act, 1910. However, with the enactment of the Electricity Act, 2003, JSPL, the Indian Electricity Act, 1910 was repealed.

63. As per the provisions of the Electricity Act, 2003, the distribution licensee, JSPL was required to obtain the necessary Licence for distribution of Electricity from the State Commission under the provisions of section 12, 14, and 15 of the Electricity Act, 2003, and the conditions specified in the Licence shall become binding for the distribution licensee (JSPL in this case).

64. It is, thus, important to note certain relevant conditions specified in the Licence so granted by the State Commission. As part of the application filed by JSPL before the State Commission, it was submitted that:

“The power required by the Units in JIP shall be supplied by JSPL from its power plant at Raigarh-----.

[...]

10. Particulars of demand/supply

(a) *Expected demand in area of supply : 400 MVA (300 MW) on full implementation of the Industrial Park.*

(b) *Source of obtaining power :*

i. 120 MVA (90 MW) from Jindal Steel & Power Ltd., Captive Power Plant at Patrapali Village, Ghargoda Tehsil, Raigarh District.

ii. 280 MVA (210 MW) from the proposed 1000 MW capacity power plant of Jindal Power Ltd., Tamnar Village, Ghargoda Tehsil, Raigarh District.”

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.”

66. Further, certain other conditions were incorporated by order dated 29.11.2005, one of such condition was that:

“Existing tariff (Rs. 2.50 per unit) being charged from the industrial consumers in the designated area of JIP shall continue to be charged by JSPL, till the tariff for supply is determined by the State Commission.”

67. It is thus, clear that the conditions as stipulated in the MoU have been amended by the conditions as specified in the Licence granted by the State Commission. The Appellant and the Respondent RIUS are

bound by the provisions of the State Regulations and the Licensing conditions including the Tariff.

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.

70. This Tribunal on 04.10.2007, has held that:

“16. ----- Having obtained the license on the specific condition that it shall apply for determination of tariff, the appellant cannot be allowed to violate the conditions of license. Section 42 of the Act casts a duty on a distribution licensee to supply electricity in accordance with the provisions of the Act.”

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.

72. It may further be noted by the State Commission vide its order dated 27.10.2010 observed that:

“1. -----The licensee i.e. JSPL has set up the industrial area (JIP) on the basis of understanding with the State Government that industries set up would be supplied surplus power available from their captive generating plant-----.”

73. From the above, it is seen that the industries shall be supplied with the surplus capacity of the CPP only. Need not to add that any Captive Power Plant is set up by a person to generate electricity primarily for his own use. Further, the Electricity Rules, 2005 mandates that fifty one (51) percent of electricity generated shall be consumed by the captive consumer, therefore, any supply from the Raigarh CPP has to be regulated as per such provisions.

74. The Respondent RIUS submitted that the source of supply of power is already covered under the order dated 29.09.2005 whereby the State Commission granted distribution licence to JSPL. We fail to understand the reasoning given by RIUS as the order by the State

Commission has clearly mandated differently as quoted in the foregoing paras.

75. Further, the State Commission on 12.06.2014, issued Tariff Order in Petition Nos. 5-8 of 2014 for CSPDCL for FY 2014-15 and final true-up for Previous Years of CSPGCL, CSPTCL, SLDC and CSPDCL, wherein, the State Commission 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. This observation was also noted by this Tribunal while rendering the judgment dated 26.05.2016 in Appeal Nos. 41 of 2015 and 67 of 2015 for the finding that:

“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.”

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 Licencing 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.

77. The second issue which is under dispute is the tariff at which the Licensee i.e. JSPL shall supply the power to the consumers of its supply

area. There cannot be any dispute that the Appellant and the industrial consumers of JIP signed the Power Purchase Agreement (PPA) in the year 2004 wherein the sale tariff was fixed at Rs. 2.50 per unit. However, the agreement was expired after 5 years.

78. Further, the State Commission vide its order dated 29.11.2005, decided that the existing tariff of Rs. 2.50 per unit shall continue to be charged by JSPL, till the tariff for supply is determined by the State Commission. As such the tariff of Rs. 2.50 was only the provisional tariff, and not the tariff as fixed under the provisions of the Act 2003 (section 61, 62, 63 & 64).

79. Considering that the tariff of Rs 2.50 per unit for Raigarh CPP was mutually agreed tariff between the Appellant and the industrial consumers and as decided under the PPA signed amongst them with validity for 5 years, such tariff cannot be declared as tariff determined or adopted under the provisions of the Electricity Act, 2003 and the State Commission should have exercise its powers for the determination of tariff under the provisions of the relevant Regulations. However, as noted, the Appellant failed to provide information as sought by the State Commission including the audited segregated accounts.

80. In case of failure of the Appellant, the State Commission can always discover the tariff under its regulatory powers by examining the technology, cost of equipment, life of the plants etc and declaring the normative costs to arrive at the most optimised solution which could have been in the benefit of the consumers. The State Commission in its order dated 05.11.2008 in Petition No. 23 of 2008 pertaining to determination of tariff for JSPL for FY 2008-09, held that:

“3. ... The Commission is inclined to agree with the request of the applicant in view of the following:

(i) Despite a lapse of three months' time from the date of application, the Commission is not in a position to proceed with the task of determine ARR and hence tariff on account of the application being incomplete.

(iii) At present, the consumers of the industrial park of the licensee are being supplied electricity @ Rs.2.50 per unit as per the agreements in force, some of which pertain to the period prior to the distribution licence was granted to the licensee. The present tariff is less than the Board's industrial tariff applicable for the similar type of consumers. Further, no representation has been received from any consumer of licensee regarding the said tariff. The Commission, therefore, would not like to interfere with subsisting agreements between consumers and the licensee.

81. Even after making such observations, the State Commission continued with its failure in determining the tariff as vested to it under the Statutory powers. The determination of tariff which was mutually agreed for 5 years cannot be continued and adopted for 25 years. Further, in case of non-compliance by the Appellant, the State Commission should have reviewed the grant of licence section 19 (Revocation of licence) of the Act, providing that:

*“19. (1) If the Appropriate Commission, after making an enquiry, is satisfied that public interest so requires, it may revoke a licence in any of the following cases, namely: -
(a) where the licensee, in the opinion of the Appropriate Commission, makes wilful and prolonged default in doing anything required of him by or under this Act or the rules or regulations made thereunder;”*

82. This Tribunal on 04.10.2007, has held that:

*“16. At the outset, we would like to point out that so far JSPL has not filed any application for determination of its tariff as directed by the CERC. The appellant, JSPL had set up the plea that it is not possible to segregate its accounts for distribution business and steel business. The contention was rightly rejected by the CERC. It is not denied that it was one of the terms of the grant of distribution license to JSPL that it shall file an application for determination of tariff. **Having obtained the license on the specific condition that it shall apply for determination of tariff, the appellant cannot be allowed to violate the conditions of license. Section 42 of the Act casts a duty on a distribution licensee to supply electricity in accordance with the provisions of the Act.**”*

83. However, the above issue is settled now as Appellant has submitted that they have segregated the accounts of the Raigarh CPP from the main business accounts and submitted the information before the State Commission.

84. We find the role of the State Commission as totally irrational and unjustified in performing their statutory duties. The directions issued by this Tribunal have not been complied with in true spirit.

85. Further this Tribunal vide order dated 04.07.2007 has held that :

“16.

Section 45 of the Act ordains that the price to be charged by a distribution licensee for supply of electricity by it in pursuance of Section 43 of the Act shall be in accordance with such tariff as is fixed from time to time by the Commission and conditions of his license. Therefore, distribution licensee is under a statutory obligation to supply electricity in consonance with the following two conditions:-

- i) supply of energy shall be as per the tariff fixed;*
- ii) supply of energy shall be in accordance with the conditions of distribution license.”*

86. It is thus clear that the tariff at which electricity can be supplied to a consumer shall be the tariff as determined by the State Commission under the provisions of the Act 2003. It is the statutory duty of the State Commission to ensure it. Section 61 of the Act 2003 provides that the State Commission shall be guided by the economic principle of safeguarding the interest of the consumer and at the same time, recovery of the cost of electricity in a reasonable manner. While granting licence the State Commission noted that:

“16. -----

More importantly, there are as many as 18 (now 24) industries, most of them power intensive which are being supplied power by him through a long-term agreement for 5 years and at a rate which is much cheaper than the rate of the CSEB for similar industries (at Rs.2.50 per unit 'as' against the CSEB's average rate of Rs.3.37 per unit). If a distribution license is denied today these consumers become unviable, as has been pleaded at least by four consumers (A-15 to 18), and will have to close down their industries....”

87. From the above, the tariff of Rs. 2.50 was fixed as provisional tariff in the benefit of the consumers, however, it is not relevant in the present scenario, as the agreement signed prescribing such tariff has since expired.

88. We are of the firm opinion that the State Commission should immediately determine the tariff of both the captive plants i.e. Raigarh CPP and Dongamahua CPP either through the information furnished by the Appellant or through the methodology adopted for deciding the Generic Tariff in case of failure of the Appellant in furnishing the information.

89. At the same time, in the process of determination of tariff, the State Commission shall endeavour to ensure safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner.

90. The other issue i.e. the third issue which emerges out from these Appeals is the determination of surplus capacity available from Raigarh

CPP and its pattern. This Tribunal vide judgment dated 07.03.2014, directed the State Commission to determine the surplus capacity and its pattern, as reproduced here under:

“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 Appeal No.89 of 2012 Page 23 of 39 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 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.”

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 9f 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.”

94. From the above order, it is clear that the SLDC has maintained the data bank regarding the availability of power from the Raigarh CPP, Further, the power supplied by the Raigarh CPP 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 by JSPL for its distribution business, supplying power to its consumers in the distribution area.

95. The State Commission’s order dated 12.06.2014 was upheld by this Tribunal vide Judgment dated 26.05.2016 in Appeal Nos. 41 of 2015 and 67 of 2015, noting therein 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.”

96. The State Commission also failed to submit the reason for the delay in increasing the contract demand from 1 MW to 80 MW as requested by the Appellant, which could have resulted into firm power to be supplied for distribution business.

97. From the observations of the State Commission, it is clear that the surplus capacity of the Raigarh CPP, if any, is fluctuating/ intermittent in nature and after observing the State Commission's observation, this Tribunal observed such supply causes commercial implications, besides creating disturbance in the demand supply balance.

98. The State Grid, to which the Raigarh CPP and the distribution & transmission system of the Appellant are connected, is controlled and operated by the SLDC, Chhattisgarh. Further, complete and precise data in respect of any CPP connected to the State Grid is obtained by the SLDC and the State Distribution Licensee in a real time mode of 15 minutes block period. It cannot be denied that, if, such an accurate measurement is available, the State Commission cannot obtain such an information from the concern Utilities.

99. Therefore, the State Commission ought to have determined the quantum and pattern of the surplus capacity, if found to be erratic / fluctuating as such power cannot be a supply source for the distribution business.

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.

101. It is sheer failure on the part of the State Commission that it has failed in obtaining the said information once it has not been provided by the Appellant.

102. Further, the following information as sought by the State Commission should and must have been available with the State Utilities and /or the State Commission:

- (a) Unit wise installed capacity of CPP as on 01.04.2014 along with COD.
- (b) Daily generation in kWh by CPP from FY 2010-11 onwards.
- (c) Electricity consumed in kWh (daily) by captive loads from FY 2010 onwards.
- (d) Details of electricity sold (daily) in kWh from tits CPP from FY 2010-11 to other then consumer at JIP.
- (e) Total electricity consumed (daily) in kWh in JIP from FY 2010-11.

103. We are not convinced and satisfied that the State Commission could not proceed in tariff determination/ examining the surplus capacity, in the absence of such information as not provided by the Appellant.

104. The other issue which remains unresolved is the mutually agreed tariff for the supply of the electricity by JSPL to the consumers of JIPL under the directions and approval of the High Court of Chhattisgarh. As quoted in the foregoing paragraphs, the High Court has directed that:

“It is observed that, the petitioner as offered shall be obliged to pay the electricity charges @ Rs.4.20 per unit, which would be

subject to the final adjudication before the appellate authority. It is further observed that Jindal Steel and Power Limited be entitled to supply the electricity to the petitioner from Dongamauha power plant without prejudice to their right. It is expected that restoration of power shall be done expeditiously as possible.”

105. At this stage, we are of the opinion that the directions as rendered, including the tariff provisioned, by the High Court shall continue to be in place till such the time, the tariff is determined by the State Commission. Further, opined that the tariff so determined or fixed, under the directions of the High Court, shall be considered as final during the period of its applicability without prejudiced to the rights of the parties.

SUMMARY OF OUR FINDINGS:

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.

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.

ORDER

For the foregoing reasons as stated above, we are of the considered view that the present Appeals i.e., Appeal no. 72 of 2016 and Appeal no. 100 of 2016 have merit and are allowed.

The order dated 21.01.2016 in Petition no. 47/2015(M), order dated 01.10.2015 in (Review) Petition No. 7/2015(M), and the Tariff Order dated 23.12.2014 passed in Petition No. 12/2014(T) passed by the Chhattisgarh State Electricity Regulatory Commission are set aside with the direction to pass fresh and reasoned orders in a time bound manner, but not later than four months from the date of this judgment.

In view of the disposal of the Appeals, the reliefs sought in the pending IAs, if any, do not survive for consideration and accordingly stand disposed of.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO
CONFERRING ON THIS 06th DAY OF MAY, 2022.**

**(Sandesh Kumar Sharma)
Technical Member**

**(Justice R.K. Gauba)
Officiating Chairperson**

REPORTABLE / NON-REPORTABLE

pr/mkj