Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 47 of 2011 &
I.A. No. 73 of 2011

Dated: 17th April, 2012

Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial Member

In the matter of:

Chhattisgarh State Power Distribution Co. Ltd.,
Daganiya, Raipur,
Represented by its Superintending Engineer
(RAC) ... Appellant

Versus

1. **ISA Power Pvt. Ltd.,**
   Plot No. 1071, Road No. 44,
   Jubilee Hills, Hyderabad-500 033
   with power plant at Village: Banjair,
   Kurud, Distt. Dhamtari,
   Chhattisgarh

2. **Chhattisgarh State Electricity Regulatory Commission**
   Irrigation Colony,
   Shanti Nagar,
   Raipur-492 001 ... Respondents

Counsel for the Appellant(s): Mr. K. Gopal Choudhary

Counsel for the Respondent(s): Mr. Challa Kodandaram, Sr. Adv. with
Mr. Mullapudi Rambabu,
Mr. Challa Gunaranjan for R-1

Mr. M.G. Ramachandran,
Mr. Anand K. Ganesan &
Ms. Swapna Seshdari for R-2

JUDGMENT

HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

This appeal has been filed by Chhattisgarh State Power Distribution Co. Ltd. challenging the order of the Chhattisgarh State Electricity Regulatory Commission ("State Commission") dated 03.12.2010. ISA Power Pvt. Ltd., a generating company operating a biomass fuel based power plant, is the first respondent. The State Commission is the second respondent.

2. The facts of the case are as under:

2.1. The first respondent set up a 8 MW biomass based power plant in Chhattisgarh. A Power Purchase Agreement ("PPA") dated 30.7.2004 was entered into between the 1st respondent and the erstwhile State Electricity Board for sale of power from the power plant of the respondent no. 1. The PPA stipulated

that the energy imported by the 1st respondent from the grid of the Electricity Board for start-up purposes would be liable to be billed at temporary tariff, if HT connection is not availed of for that purpose.

2.2. After the State Commission's order dated 11.1.2005 in the matter of tariff and related dispensation for purchase of power by the distribution licensee from biomass based power generating projects, another PPA dated 4.11.2006 was entered into between the appellant and the first respondent. The said PPA dated 4.11.2006 did not have any provision for start up power.

2.3. The first respondent intimated to the Electricity Board by a letter dated 28.6.2006 that they did not require start-up power connection as they were going to install a 1000 kVA generator to meet their start-up

power requirements. On 8.8.2006, the Electricity Board approved of the synchronization of the power plant of the respondent no. 1 with the Board's grid without availing of HT connection for start up power. However, in this letter the Electricity Board communicated that the power drawn by the appellant's power plant from the Electricity Board would be billed at tariff applicable to temporary connection.

2.4. The power plant of the 1st respondent was synchronized with the grid on 19.8.2006. For initial start-up and thereafter for such purpose, the first respondent availed power supply time and again from the Electricity Board's grid. Such power consumed by the respondent no. 1 from the grid was billed from time to time at Temporary HT supply tariff at 1.5 times

the applicable tariff for "HV-6: Other HT Industries tariff" as per the tariff order dated 15.06.2005.

2.5. The State Commission issued a tariff order dated 13.09.2006 for the FY 2006-07 with effect from 1.10.2006, which provided for a specific start-up power tariff. The start up tariff was applicable to those entities who opted for it. However, the appellant continued to bill the first respondent at temporary HT supply tariff at 1.5 times the applicable tariff for "HV-5: Other HT Industries". The State Commission passed the tariff order dated 22.10.2007 for the FY 2007-08 effective from 1.11.2007, wherein also a separate tariff category for start-up power was provided. Consequently, the power consumed by the first respondent was billed from time to time at temporary HT supply tariff at 1.5 times the applicable tariff for HV-8: Start-up power.

2.6. The premises of the power plant of the first respondent were inspected by the Superintending Engineer (Vigilance) of the Electricity Board on 17.3.2008, pursuant to which a supplementary bill dated 30.7.2008 for Rs. 3,74,274/- was raised for the period 1.11.2007 to 4.4.2008 treating the first respondent's drawal of power from the Electricity Board during the said period in the category of "Other HT Industries tariff". This amount was paid by the first respondent.

2.7. The first respondent requested the appellant and entered into an HT power supply agreement for availing the start-up power from the Electricity Board with a contract demand of 820 kVA w.e.f. 4.4.2008 in terms of the start-up power tariff determined by the State Commission by the tariff order dated 22.10.2007 for the FY 2007-08.

2.8. Upon unbundling of the Electricity Board by the State Government notification which became effective from 1.1.2009, the appellant became the successor by operation of law of the erstwhile Electricity Board in respect of distribution of electricity.

2.9. The appellant, upon further examination of the issue, raised another supplementary Bill dated 8.12.2009 for Rs. 30,56,238/- for the period from 19.8.2006 to 4.4.2008 treating the first respondent's drawal of power from the Electricity Board during the said period in the category of "General Purpose Non-Industrial". The first respondent paid the supplementary bill dated 8.12.2009 under protest. Subsequently, the first respondent put in a grievance against the supplementary bill dated 8.12.2009 before the Electricity Consumers Grievances Redressal Forum. By an order dated 14.5.2010, the Forum

disposed of the grievance suggesting that the first respondent may approach the State Commission.

2.10. Thereupon, the first respondent filed Petition no. 32 of 2010 dated 9.6.2010 under Section 142 of the Electricity Act, 2003 before the State Commission and also for refund of the excess amount billed by the appellant. The State Commission disposed of the petition by the impugned order dated 3.12.2010. In the impugned order the State Commission decided not to initiate any action under Section 142 of the Act. However, the State Commission proceeded with the petition under Section 86(1)(f) of the Act and decided the applicability of tariff for the start-up power drawn by the first respondent from the Electricity Board's grid. Aggrieved by the impugned order of the State Commission dated 3.12.2010, the appellant has filed this appeal.

3. The learned counsel for the appellant has raised the following issues:

3.1. The petition before the State Commission was filed under Section 142 of the Act. The State Commission, having found that there was no Regulation or directive of the State Commission which was violated, ought to have discharged the notice of the proceedings and closed the case. The State Commission ought not to have converted such a proceeding for adjudication of a dispute under Section 86(1)(f) or otherwise which is entirely of a different nature, course and scope.

3.2. The dispute was in respect of consumption of electricity by the first respondent acting as the consumer of the licensee and hence adjudication of the

dispute by the State Commission under Section 86(1)(f) was without jurisdiction.

3.3. The proposition in the impugned order that all types of disputes between the generator and the licensee can be adjudicated upon by the Commission under Section 86(1)(f) cannot be sustained. Only the disputes arising out of the performance by the generating company of its duties under Section 10 of the Act would fall within the scope of Section 86(1)(f).

3.4. The first respondent had explicitly stated that it did not require start-up power in its letter dated 28.06.2006 and consequently there was no obligation for the appellant to supply any power whatsoever, and the first respondent had no right to draw any such power.

3.5. The appellant's letter dated 8.8.2006 makes provision only for any inadvertent flow of power to the first respondent which could not be prevented absolutely. The appellant's letter dated 8.8.2006 cannot be construed as a permission to consciously and deliberately draw any amount of power for any purpose.

3.6. The State Commission was not correct in holding that the first respondent would fall within the tariff category of "Other HT Industries". The start-up power tariff would also not be applicable to the first respondent under the various tariff orders applicable from time to time as the same had to be specifically opted for and a supply agreement had to be entered into. The appellant was, therefore, correct and justified in revising the billing under the "General

Purpose – Non-Industrial" category for the period from 19.8.2006 to 4.4.2008.

3.7. The State Commission was not correct in holding that the first respondent was a consumer of appellant merely because its power plant was connected to the appellant's system. The first respondent sought connection for the purpose of evacuation of power and not for the purpose of receiving supply.

3.8. The State Commission was not correct in applying the period of limitation under Section 56(2) to the demands made upon the first respondent by treating the first respondent as a consumer. Since the first respondent is not a consumer, Section 56(2) is not applicable in this case.

3.9. The Commission was not correct in assuming that any amount is refundable by the appellant to the first

respondent and directing payment of interest at the prime lending rate of the State Bank of India. Section 62(6) mentions only the "bank rate" and this term refers to the rate of interest charged by the Central Bank on its lending to the commercial banks. Thus, the applicable rate of interest could only be the "bank rate" notified by the Reserve Bank of India on its lending to the commercial banks.

4. The first respondent in its counter affidavit has submitted the following:

4.1. Even though the petition before the State Commission was filed under Section 142 of the Act, the State Commission has rightly proceeded to admit the petition under Section 86(1)(f) and proceeded to adjudicate the same. Mere non-mentioning of the relevant provision of the statute in the petition, if the

authority otherwise is vested with such power, the proceeding per se cannot be declared as without authority and jurisdiction. In the present case, the State Commission, having regard to the pleadings in the petition and the nature of relief claimed, has taken up the petition exercising powers under Section 86(1)(f).

4.2. The appellant had chosen to contest the matter on merits without disputing the jurisdiction of the State Commission and objecting on the maintainability of the petition.

4.3. The proceedings before the State Commission is not governed by the provisions of C.P.C., therefore, the procedure and technicalities that apply to the proceedings under CPC cannot be extended to those before the State Commission. The State Commission

has to discharge its functions having regard to the scheme of the Electricity Act, 2003 and the regulations made thereunder and the State Commission is justified in proceeding with the claim petition filed by the first respondent on merits of the case.

4.4. The relationship between the respondent no. 1 and the appellant being that of a generating company and licensee, all disputes between them have to be necessarily adjudicated by the State Commission alone as per Section 86(1)(f) of the 2003 Act.

4.5. The appellant granted approval for synchronization in its letter dated 8.8.2006 subject to the condition that the power drawn from the appellant should be billed at the tariff applicable to temporary connection. Hence, any power availed from the

appellant for start-up should be billed at the tariff applicable to the temporary connection.

4.6. The appellant itself in the letter of approval dated 8.8.2006 allowing synchronization had stipulated the condition that the respondent no. 1 could draw power from the appellant and the same would be billed at the tariff applicable to temporary connection. Thus, drawal of start-up power by the generator could not be construed as unauthorized usage.

4.7. The State Commission has correctly held that the respondent no.1 is a consumer within the meaning of Section 2(15) of the Electricity Act, 2003 and the limitation provided under Section 56(2) shall apply.

5. We have heard the learned counsel for the appellant and respondent nos. 1 and 2.

6. After considering the contentions of the parties, the following questions would arise for our consideration:

i) Whether the State Commission could invoke its jurisdiction under Section 86(1)(f) of the Electricity Act, 2003 to adjudicate in a dispute between a generator and licensee when the petition was filed by the respondent no. 1 before the State Commission under Section 142 of the Act?

ii) Whether the provisions of Section 86(1)(f) would be attracted in the facts and circumstances of the case?

iii) Whether the State Commission was correct in holding that the first respondent was a consumer within the definition of Section

2(15) of the Act and therefore, the period of limitation under Section 56(2) of the Act was applicable?

iv) Whether the State Commission was correct in holding that the drawal of power by the respondent no. 1 from appellant's grid was not unauthorized, even though it was drawn without any power supply agreement, and should be billed at "Other HT industries" tariff?

v) Whether the State Commission was correct in directing payment of interest to the respondent no. 1 at the prime lending rate of the State Bank of India?

7. The first and the second issues are inter-connected and, therefore, we shall take them up together.

8. Admittedly, the respondent no. 1 had filed the petition before the State Commission under Section 142 of the Electricity Act, 2003 for violation of Rules and Regulations formulated by the State Commission and under Section 44 of the Conduct of Business Regulations. However, the issue raised in the petition was regarding change in tariff category applied to the respondent no. 1 with request for directions to the appellant for refund of the excess amount of Rs. 33.39 lakhs recovered by the appellant together with interest. Merely because the petition for the relief claimed by the respondent no. 1 was made under a wrong section, it does not take away the right of the

State Commission to exercise its jurisdiction under the relevant section of the Act in order to settle the matter.

9. Learned counsel for respondent no. 1 has referred to the findings of the Hon'ble Supreme Court in Civil Appeal No. 2195 of 2000, decided on 11.7.2007 in the matter of Ram Sunder Ram vs. Union of India and Ors. as under:

> *"It is well settled that if an authority has a power under the law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law. Thus, quoting of wrong provision of Section 20 in the order of discharge of the appellant by the competent authority does not take away the jurisdiction of the authority under Section 22 of the Army Act".*

10. In the present case the State Commission decided not to initiate any action under Section 142 of the Act as the respondent no. 1 had not identified violation of any regulation or direction of the State Commission by the appellant, but proceeded with the petition under Section 86(1)(f) of the Act to settle the prayer made by the respondent no. 1 regarding refund of excess amount charged by the appellant through a supplementary bill.

11. It is admitted that respondent no. 1 is a generating company which has entered into a PPA with the appellant for sale of energy from its bio-mass based power plant at a tariff determined by the State Commission. The power drawn by the respondent no. 1 from the grid of the appellant is for start-up purpose which is utilized only when the generating plant is under outage. There is no other use of electricity in

the plant. It is also noticed from the impugned order that the Superintending Engineer (Vigilance) in its report dated 17.03.2008 on inspection of power plant of the respondent no. 1 has also not mentioned about any other type of load at the power plant. Till the FY 2005-06, there was no specific tariff for start-up power. The Electricity Board vide its letter dated 8.8.2006 also communicated to the respondent no. 1 that the power drawn by the power plant of the respondent no. 1 from the Electricity Board's grid would be billed at the tariff applicable for temporary connection.

12. However, the State Commission by its order dated 13.09.2006 for the FY 2006-07 with effect from 1.10.2006 specified specific start-up power tariff. In the subsequent FY 2007-08, also the State Commission by its order dated 22.10.2007 applicable

from 1.11.2007 continued the specific start-up power tariff. However, the start up power tariff was applicable to those generators who opted for it.

13. The learned counsel for the appellant has referred to the decision of this Tribunal dated 24.05.2011 in Appeal No. 166 of 2010 in the matter of State Power Transmission Co. Ltd. vs. M/s. R.R. Energy Ltd. & Anr. which is reproduced as under:

> *"In light of above discussions a generator requiring 'startup up power' from the grid cannot be termed as a consumer".*

The start-up power is drawn by the respondent no. 1 from the grid as a generator for running the station auxiliaries for starting the plant.

14. Learned counsel for the respondent no. 1 has referred to findings of the Hon'ble Supreme Court in the matter of Gujarat Urja Vikas Nigam Ltd. vs. Essar

Power Limited reported as AIR 2008 SC 1921. The same findings have been referred to by the State Commission in the impugned order for considering the petition under Section 86(1)(f) of the Act. The relevant extracts are as under:

> *"57. However, since the Electricity Act, 2003 has come into force w.e.f. 10.6.2003, after this date all adjudication of disputes between licensees and generating companies can only be done by the State Commission or the arbitrator (or arbitrators) appointed by it. After 10.6.2003 there can be no adjudication of dispute between licensees and generating companies by anyone other than the State Commission or the arbitrator (or arbitrators) nominated by it. We further clarify that all disputes, and not merely those pertaining to matters referred to in Clauses (a) to (e) and (g) to (k) in Section 86(1), between the licensee and generating companies can only be resolved by the Commission or an arbitrator appointed by it. This is because there is no restriction in Section 86(1)(f) about the nature of the dispute".*

Thus in view of the above judgment, all disputes between the licenses and the generating company can only be resolved by the State Commission or an arbitrator appointed by it.

15. In the present case the dispute is relating to application of tariff category for use of start-up power by the generating company. This Tribunal in the matter of Uttar Gujarat Vij Company Ltd. vs. Gujarat State Electricity Regulatory Commission reported in 2011 ELR (APTEL) 0799, has decided as under:

> *"16(ii) The function of change of such category by interpretation of Tariff order or by amendatory process rests with the Commission as it is intrinsically related to Section 61 (a) of the Act".*

16. In this case when the issue was raised before the Consumer Grievance Redressal Forum by the respondent no. 1, it directed the respondent no. 1 to file a petition before the State Commission.

17. In view of the above, we feel that the State Commission has correctly exercised its power under Section 86(1)(f) to decide the issue. Merely because the petition was filed under a certain section of the Act it can not restrict the State Commission to exercise its powers under the appropriate section of the Electricity Act, 2003 to give a finding so as to settle the issue raised by the respondent no. 1 relating to excess amount recovered by the appellant through a supplementary bill by revised application of tariff category.

18. Accordingly, the first two issues are decided against the appellant.

19. Let us now take up the third and the fourth issues which are inter-connected.

20. We notice from the impugned order that the PPA dated 30.7.2004 between the respondent no. 1 and the appellant stated as under regarding the start-up power:

> *"……………… Energy imported by company both unit in kWh and MD in KVA shall be liable to be billed at temporary tariff for start-up power purpose, if HT connection is not availed for this purpose……."*

21. This clause was not incorporated in the subsequent PPA signed on 4.11.2006. However, the Electricity Board by its letter dated 8.8.2006 while allowing synchronization of the power plant decided that power drawn from the Electricity Board shall be billed at the tariff applicable to temporary supply.

22. Further, we also noticed from the impugned order that the State Commission in its order dated 11.11.2005 passed in petition no. 7 of 2005 on the

basis of which PPA dated 4.11.2006 was executed, stated as under:

> *"………… the Commission feels that since the non-conventional power plants require power only in case of any outage for short-term duration for start-up purpose not very frequently as well as the quantum of power required is also small, the Commission is of the view that it will be appropriate to have a separate tariff for this purpose. The Commission decides to apply HV-6 tariff (for other HT industries) prescribed in the tariff order dated 15.6.2005 for the purpose of start-up power".*

In the above order the State Commission felt the need of having an appropriate tariff for start-up power by non-conventional power plants and decided to apply HV-6 tariff for "other HT industries" as per tariff order dated 15.6.2005 for this purpose.

23. Admittedly, the respondent no. 1 by its letter dated 28.6.2006 had intimated that they would be installing a diesel generator to meet their start up power requirement and therefore, did not need any connection for the purpose. However, subsequently the appellant by its letter dated 8.8.2006 allowing synchronization of the power plant with its grid intimated that the power drawn by the power plant from the Electricity Board would be billed at the tariff applicable to temporary connection. The letter dated 8.8.2006 is reproduced below:

"OFFICE OF THE CHIEF ENGINEER(COMMERCIAL)
CHHATTISGARH STATE ELECTRICITY BOARD
Post Office: Sunder Nagar, Danganiya, Raipur

No. 02-02/ACE-1/12/106/01/1733 Raipur dt.08.08.2006

The Superintending Engineer (O&M),
Chhattisgarh State Electricity Board
RAIPUR.

Sub: Synchronization & Parallel operation of Power Plant of 8 MW – M/s. ISA Power Pvt. Ltd.

Ref: 1) Your letter No. I0-20/HTC/7025 dated 27.07.06.
2) Firm's letter No. Nil dated 02.08.06.

Please refer to the letters cited under reference vide which clarification has been sought regarding synchronization of Power Plant pertaining to M/s. ISA Power Pvt. Ltd., Village Banjari, Dhamtari without availing HT connection for start up power and without installing ABT meter.

The matter has been reviewed by the competent authority and approved to synchronize the Power Plant with Board's Grid without availing HT connection for start up power and without installing ABT meter subject to the following conditions that-

(i) the power drawn from the Board shall be billed at the tariff applicable to temporary connection.
(ii) they shall supply the entire power generated to the Board only till the ABT meter is installed.
(iii) they shall give an undertaking to the above before the synchronization of the Power Plant.

It is, therefore, requested to ensure necessary action accordingly.

Sd/-
CHIEF ENGINEER(COMML.)
CSEB: RAIPUR

Copy to:

1. The Chief Engineer (T&C), CSEB, Raipur
2. The Chief Engineer (RR), CSEB, Raipur
3. The Superintending Engineer (T&C), CSEB, Raipur
4. The Sr. Accounts Officer, CSEB, Raipur
5. M/s. ISA Power Pvt. Ltd., 6-3-248/G/A1 Road No. 1, Banjara Hills, Hyderabad-34."

24. It is clear that in this case the power drawn by the generating station of the respondent no. 1 from the grid was only for start-up purpose. Even though the respondent no. 1 did not choose to avail HT

connection for start up power, the appellant allowed the drawal from the grid on the inter-connecting line at tariff applicable to temporary connection. The temporary supply tariff was 1.5 times the normal tariff applicable for that category, according to the tariff order dated 15.6.2005 prevailing at that time. The State Commission in its order dated 4.1.2006 referred to above in paragraph 22 had also directed the appellant to apply "HV-6 - other HT industries tariff" for start-up power by non-conventional energy plants as per its tariff order dated 15.6.2005. Accordingly, the appellant correctly billed the respondent no. 1 earlier at 1.5 times the "HV-6-Other industries tariff", as applicable to temporary connection in terms of the condition specified in its letter dated 8.8.2006.

25. Thereafter, the State Commission by its tariff order dated 13.9.2006 introduced a specific tariff for

start up power by generators w.e.f. 1.10.2006, applicable to those who specifically opted for it. Subsequently, in the tariff order dated 22.10.2007 for the FY 2007-08 also the start up power tariff was continued. However, the respondent no. 1 opted for the specific start-up power tariff only w.e.f. 4.4.2008 after entering into an agreement with the appellant. Therefore, till 4.4.2008 it had to pay for 1.5 times the tariff for other HT industries as applicable for temporary supply.

26. Thus, it is clear that the respondent no. 1 was drawing start up power not by a separate HT connection but through the line on which the power plant was connected to the grid and was entitled to draw power at the tariff applicable to temporary connection i.e. 1.5 times the relevant tariff, as per the letter dated 8.8.2006.

27. We feel that there is no need for the generator to take a separate connection for start up power as the same could be drawn from the interconnecting lines on which power is evacuated from the power plant. Only an agreement between the generator and the distribution licensee is required in terms of the tariff order and the applicable Rules & Regulations. In the absence of an agreement for start-up power which was eventually made applicable w.e.f. 4.4.2008 after signing of an agreement between the appellant and the respondent no. 1, the appellant was entitled to start up supply at HT temporary connection tariff i.e. 1.5 times the applicable tariff. Admittedly, the respondent no. 1 has a valid PPA for supply of its entire power output to the appellant and is sometimes drawing power from the grid only for the purpose of start-up. In our opinion, in the circumstances of the

case, the drawal of start-up power by the respondent no. 1 from the grid from the date of synchronization of its power plant till the date of entering into an agreement for start-up power could not be termed as unauthorized drawal.

28. Learned counsel for the appellant has argued that the Board's letter dated 8.8.2006 was issued for drawal of inadvertent power for contingency and not for availing start up power. We are not agreeable to the contention of the learned counsel for the appellant. The respondent no. 1 is having a generating plant and no other load is connected to it. Thus, the generating plant will draw power from the grid only for running its auxiliaries for start up purpose. There is no question of inadvertent flow which would occur if the power plant of the respondent no. 1 is also connected with a captive load, which is not the case here.

29. Let us examine the tariff applicable to the respondent no. 1 for the period of commissioning of the power plant i.e. 19.8.2006 till entering into an agreement for start-up power i.e. 04.04.2008. The appellant has raised supplementary bill on 8.12.2009 for the period 19.8.2006 to 4.4.2008 at General Purpose Non-Industrial tariff. We noticed that general purpose non-industrial tariff is applicable for supply to establishment like Railways (other than traction), hospitals, offices, hotels, educational institutions, other institutions, etc., having mixed load or non-industrial and/or non residential load. We agree with the findings of the State Commission that the tariff for "general purpose non-industrial category" could not be made applicable for start-up power drawn by the respondent no. 1 during the period 19.8.2006 to 4.4.2008. Also the State Commission had earlier by

its order dated 4.1.2006 had also directed the appellant to apply "HV-6-Other Industries tariff" for start-up power drawn by non-conventional energy plants. Thus, the State Commission has rightly held that the tariff applicable to "other HT industries" for temporary supply would be applicable to the respondent no. 1.

30. Now the question to be decided is whether the supplementary bill should be limited to two years period prior to the date of supplementary bill i.e. 8.12.2009 by the application of Section 56(2) of the Act. Let us now examine Section 56 of the Act. Section 56 relates to disconnection of supply in default of payment. Sub-Section (2) of Section 56 reads as under:

> *"(2) Notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer, under this section shall be recoverable after*

the period of two years from the date when such sum became first due unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied and the licensee shall not cut off the supply of the electricity".

31. The State Commission has also held that respondent no. 1 is a consumer in terms of Section 2 (15) of the Act. Section 2(15) of the Electricity Act, 2003 is reproduced as under:

"2 (15) "consumer" means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be".

32. We do not agree with the State Commission that respondent no. 1 is a consumer under the definition of sub-Section (15) of Section 2 of the Act. The definition

indicates that it includes persons whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee. However, the generating company is connected to the licensees' network for supplying electricity and not for receiving electricity. If the explanation as given by the State Commission is applied, then all the generating companies will be consumers under the Act. The respondent no. 1 had also not entered into an agreement with the appellant for drawal of power for start-up purpose in terms of the tariff order of the State Commission for the FY 2006-07 and 2007-08. Having decided the dispute under Section 86(1)(f) treating the dispute between the respondent no. 1 as generator and the appellant as a licensee, the State Commission should not have allowed the relief to the respondent no. 1 under Section 56 (2) of the Act. Thus

the tariff applicable to "other HT industries" for temporary supply would be applicable to the respondent no. 1 for drawal of power from the grid from 19.8.2006 to 4.4.2008.

33. The last issue is regarding interest on excess amount charged by the appellant through the supplementary bills.

34. When the excess amount has been recovered by the appellant from the respondent no.1 unlawfully the same has to be refunded along with the interest. The State Commission has decided that interest rate should be as per prime lending rate of the State Bank of India.

35. Learned counsel for the appellant has argued that Section 62(6) of the Act mentions only the "bank rate" and this term refers to the rate of interest charged by a

Central Bank on its lending to commercial bank. Thus the Bank rate could only be the Bank rate as notified by the Reserve Bank of India on its lending to the Commercial Banks.

36. Section 62 (6) of the 2003 Act is reproduced below:

> *"(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee".*

37. We do not agree with the contention of the appellant that the bank rate as stipulated under Section 62(6) is the rate at which the Central Bank lends money to the Commercial Banks. The money that the appellant or the respondent no. 1 borrow from

a Commercial Bank will be governed by the prime lending rate of the bank. Therefore, it is logical that the money denied to the respondent no. 1 by the appellant should be linked to the prime lending rate of the Commercial Bank to its customers. Thus, we do not find any reason to intervene with the order of the State Commission to allow interest at prime lending rate of the State Bank of India.

38. The fifth issue is, thus, decided against the appellant.

39. **Summary of our findings:**

i) The State Commission has correctly exercised its power under Section 86(1)(f) of the Act to decide the issue. Merely because the petition was filed under a certain section of the Act it cannot restrict the State Commission to

exercise its jurisdiction under the appropriate section of the Electricity Act, 2003 to give a finding so as to settle the issue raised by the respondent no. 1.

ii) The drawal of start up power by the respondent no. 1 from the grid of the appellant was not unauthorized.

iii) The State Commission has correctly decided that the bill for start up power should be raised at "other HT industry" tariff for temporary supply till 4.4.2008.

iv) We do not agree with the State Commission that the condition of Section 56(2) of the Act restricting the supplementary bill to be raised for only two years period from the date of issue of bill dated 23.10.2009 would apply in the present case. The drawal of start up power by the

power plant of the respondent no.1 from the grid is liable to be billed at "other HT industry" tariff for temporary supply from 19.8.2006 to 4.4.2008.

v) The State Commission has correctly directed that the payment of interest should be at the prime lending rate of SBI.

40. The appeal is allowed only in respect of the direction of the State Commission to restrict the raising of supplementary bill for a period of two years from the date of the bill. No order as to costs.

41. Pronounced in the open court on this **17th day of April, 2012.**

(Justice P.S. Datta) **Judicial Member**	**(Rakesh Nath)** **Technical Member**

REPORTABLE / NON-REPORTABLE
vs