

**Dt. 22.12.2007:**

1. Thirteen nos of Independent Power Producers (IPPs) have signed Memoranda of Understandings with Govt. of Orissa on dtd.09.06.2006 and 26.09.2006 and have executed Power Purchase Agreements (PPAs) with GRIDCO on dtd.28.09.2006. GRIDCO has filed application for each IPP separately on dtd.28.09.2007 before OERC under Section-86 of Electricity Act, 2003 seeking the approval of the PPAs executed with the 13 IPPs for their up-coming Thermal Projects in Orissa.
2. Before hearing the matter on merit, the Commission heard the Petitioner – GRIDCO as well as the Developers on the question of admission on dtd.18.10.2006, 16.04.2007, 10.05.2007 and 06.07.2007.
3. The Commission through an interim order dtd. 27.09.2007 decided to admit the applications of GRIDCO for the PPAs of the following IPPs to undertake their projects through MoU route as the IPPs produced the requisite documents for exemption under Clause 5.1 of Tariff Policy.
  - (i) M/s Navabharat Power (P) Limited, Hyderabad,
  - (ii) M/s GMR Energy Limited, Bangalore,
  - (iii) M/s VISA Power Limited, Kolkata,
  - (iv) M/s LANCO Group Limited, Hyderabad
  - (v) M/s KVK Nilachal Power (P) Limited, Hyderabad
  - (vi) M/s Monnet Ispat & Energy Limited, Raipur
4. The Commission through an Interim Order dtd.27.09.2007 decided not to admit the PPAs of the following IPPs to undertake their projects through MoU route as the IPPs could not produce the requisite documents for exemption under Clause 5.1 of Tariff Policy.
  - (i) M/s Jindal Photo Limited, New Delhi
  - (ii) M/s Essar Power Limited, Mumbai
  - (iii) M/s CESC Limited, Kolkata
  - (iv) M/s Bhusan Energy (P) Limited, New Delhi
  - (v) M/s Mahanadi Aban Power Company Limited, Chennai
  - (vi) M/s Sterlite Energy Limited, Mumbai
  - (vii) M/s TATA Power Company Limited, Mumbai

The Commission directed GRIDCO – the Petitioner to intimate the above named IPPs the aforesaid decision of the Commission for further necessary action in the matter.

For growth of generation in the State/Country, the Commission directed in the interim order dtd. 27.09.2007 that this shall not be a bar for IPPs whose names are mentioned above for implementation of their power projects in terms of MoUs executed between the Govt. of Orissa and the Developers. Power to be availed by GRIDCO from these IPPs can be sold or traded by GRIDCO following the provisions of Electricity Act, 2003 and Rules/ Policies framed there under.

5. The Commission directed to take the documents filed by the aforesaid IPPs into records and posted to 29.10.2007 for hearing on merit. Due to pre-occupation of the Commission on dtd. 29.10.2007, the notices have been issued to all the Developers, State Government and GRIDCO to attend the next hearing on dtd. 22.12.2007. The IPPs were directed to come up for hearing to address the following issues in addition to any other issue that may come up during the process of hearing.
  - (a) Their acceptance of the tariff set by CERC under Section 79 (1) (b) read with Section 62 of the Act to be applicable to these IPPs in respect of the power ear-marked under the PPAs.
  - (b) Whether some of the IPPs who want to set up power projects in Orissa under Merchant Route will supply 25% Orissa share of power to GRIDCO under Section 63 of the Act.
  - (c) Whether the interpretation of Para 5.1 of the National Tariff Policy given by the Ministry of Power, Govt. of India, in Letter No. 45/2/2006-R&R dtd. 28.03.2006 can be considered as an amendment to the National Tariff Policy and whether the Govt. of India should take steps for relaxation of datelines fixed so as to encourage generation as policy directions should not act as a constraint when the Act envisages unhindered growth of generation.
6. During hearing on 22.12.2007, Mr A C Mallick Director (Commerce) is present on behalf of the petitioner GRIDCO.

The following persons are present for Respondent Private Power Developers:-

Mr. P N S Bhasker Rao, Sr. VP (F) and Mr M T Srinivas, Vice-President (P) for Navabharat Power Pvt. Ltd., Mr R K Patra, Project Coordinator for TATA Power Company Ltd., Mr M S Parija, Resident Representative for Jindal Photo Ltd., Mr K V V Rao, Director for GMR

Energy Ltd., Mr. N Venkatraman, Vice-president for Essar Power Ltd., Mr S K Banarjee, V.P. for VISA Power Ltd., Mr Pradip Lenka, CEO, for LANCO Group Ltd., Mr Dharam Paul, V.P for Mahanadhi Aban Power Co. Ltd., Mr B N Mohanty, Advocate for Sterlite Energy Ltd., Mr P C Agrawal, A.V.P for Monnet Ispat & Energy Ltd., Mr R C Mahapatra, Director for KVK Nilachal Power Pvt. Ltd., Mr Sabyasachi Samal, Resident Representative for CESC Ltd., and Mr P C Biswal , AGM (Liaison & Admn.) for Bhusan Energy (P) Ltd.

Mr. S C Mohanty, Law Officer, Deptt. of Energy represented for the Government of Orissa during hearing.

Mr. Ramesh Ch. Satpathy, Secretary of National Institute of Indian Labour who has been allowed as an intervener in all the above mentioned cases is present.

7. During the hearing the Commission requested the representatives of GRIDCO, the State Government and the Private Power Developers to submit their views/comments/suggestions on the specific issue mentioned in Para 6 (c) of the interim order dtd. 27.09.2007 which is mentioned at Para 5 above.
8. Mr A C Mallick, Director (Commerce) on behalf of GRIDCO submitted that the Indian Power Market driven by market forces, as envisaged in the Act, is yet to materialize. The power market will function effectively in the manner envisaged in the Act only when availability of power will be nearly matching the demand. It is a fact that there has been very little capacity addition in the country through private participation. DISTCOMs who have gone for procurement of power through competitive bidding process have not yet been able to succeed in this regard. The capacity addition envisaged in X Plan period has fallen short by a great margin and unless private generators who are interested to come through IPP route are encouraged, the capacity addition during XI Plan period will be very difficult to meet. In fact Ministry of Power, Govt. of India is in the process of down sizing its target. In the view of large gap between demand and availability of power, it will be appropriate to encourage private participation in capacity addition by the way of development of power projects through MOU route, which would ensure market for the IPPs. For the purpose, GRIDCO vide letter No. 5938 dtd.01.11.2007 has requested Govt. of Orissa to move Govt. of India, in the Ministry of Power to relax the deadline up to March 2008 for filing of PPAs before appropriate Commissions for supply of power to Distribution Licensees.

He prayed before the Commission to reconsider admitting the cases filed for approval of the PPAs of the following IPPs on grant of further relaxation to the dateline imposed at Clause-5.1 of the Tariff Policy dtd. 06.01.2006 by Ministry of Power:

- i. M/s. Jindal Photo Ltd., New Delhi.
- ii. M/s. Essar Power Ltd., Mumbai.
- iii. M/s CESC Ltd., Kolkata.
- iv. M/s. Bhusan Energy Ltd., New Delhi.
- v. M/s. Mahanadhi Aban Power Company Ltd., Chennai.
- vi. M/s. Sterlite Energy Ltd., Mumbai.
- vii. M/s. TATA Power Company Ltd., Mumbai.

He requested the Commission to advise Govt. to take steps to amend the National Tariff Policy to the effect that the deadline of 06.01.2006 imposed therein for appraisal of the power projects by relevant financial institutions and off-take arrangement by Licensees is extended to 31<sup>st</sup> March 2008.

9. Mr M S Parija, Resident Representative on behalf of Jindal Photo Ltd., submitted during the hearing that they support the views of GRIDCO and the date line may be extended upto 31<sup>st</sup> March 2008. The Commission specifically asked whether the interpretation of Para 5.1 of the National Tariff Policy given by the Ministry of Power, Govt. of India, in Letter No. 45/2/2006-R&R dtd. 28.03.2006 can be considered as an amendment to the National Tariff Policy, Mr Parija said that they accept the interpretation to the aforesaid policy as stated by Ministry of Power.
10. Mr. N Venkatraman, Vice-president on behalf of Essar Power Ltd., submitted during the hearing as under:
  - (a) The Power purchase Agreement (PPA) has been executed between Essar Power Ltd. and GRIDCO on dtd. 28.09.2006 wherein it is stated clearly that GRIDCO is the nominated agency of the Government of Orissa vide GoO's Resolution no 7947 dated 17.08.2006 for purchasing (i) 25% of the power (ii) infirm power & (iii) power above 80% PLF, generated from the proposed Power Plant of Essar Power in Orissa.
  - (b) He draws the attention of the Commission to Section-14 of the Electricity Act 2003, wherein it has been provided that "where an appropriate Government transmits or distributes electricity or undertakes trading in electricity, whether before or after the Electricity Act, such Government shall be deemed to be a Licensee for sale and purchase of Electricity".

He further submitted that GRIDCO by virtue of the GR 7947 has been empowered to procure power under the above provision acting in the capacity of nominee of the Government. It is relevant to note that GRIDCO has not executed the PPA on behalf of the Distribution Licensee.

- (c) With response to the specific query of the Commission, he cited the relevant extract of the Clause-5.1 of the National Tariff Policy notified on dtd.06.01.2006 by Government of India, which reads as under “All future requirement of power should be procured competitively by Distribution Licensees....”

The operative word in the above Clause is “Distribution Licensee”. Plain reading of the Clause shows that the Tariff Policy is applicable if and only if the Power Procurement is to be carried out by a “Distribution Licensee”. In other words, if the Power Procurement is to be carried out by any other Licensee, then the Tariff Policy is not attracted.

He, therefore, submitted that since in the case of their PPA with GRIDCO wherein GRIDCO is not acting in the capacity of a “Distribution Licensee”, therefore the Tariff Policy is not applicable and consequently the issue of producing relevant documents for seeking exemption under the Tariff Policy does not arise.

- (d) He further submitted that the above misconception has perhaps come up from the perception that as per the Tariff Policy, all power generated by an IPP is to be sold to a Distribution Licensee. In this context he submitted that the Appellate Tribunal’s orders on the Appeal No. 228 of 2006 & 230 of 2006 dtd. 23.11.2006 between PTC and CERC may kindly be referred to where the Appellate Tribunal has clearly ruled that an IPP cannot be compelled to sell all power to any Distribution Licensee and that the IPPs are free to contract with any other Licensees also, such as Trading Licensees and have upheld PTC’s appeal against CERC which had earlier ruled that the IPP (Essar Power Ltd. in this case) should sell 85% power directly to a Distribution Licensee and can only sell 15% power to a trading Licensee.

- (e) Mr. Venkatraman further submitted that both Section-62 and Section-63 under the Electricity Act, 2003 are relevant. He submitted the observation by the Appellate Tribunal also in the above mentioned case, which inter alia states that the Policy Guidelines cannot override an Act. Section-62 empowers the appropriate Commission to determine the Tariff for supply of Electricity by a Generating Company. Section-63 allows acceptance of the Tariff determined through a competitive bidding process.

In the light of the above submission Mr. Venkatraman requested the Commission to reconsider the relevance of the Clause-5.1 of the National Tariff Policy with respect to the PPAs executed between GRIDCO and the IPPs and specifically requested the Commission to admit their PPA with GRIDCO.

11. Mr Sabyasachi Samal, Resident Representative on behalf of CESC Ltd. requested the Commission to admit their PPA with GRIDCO as they have furnished the requisite documents in support of the financial appraisal and off-take of power prior to 06.01.2006 to stake their claim for exemption under Clause – 5.1 of Tariff Policy. To the specific query of the Commission, Mr Samal requested the Commission to grant some more time to file the views of CESC Ltd.
12. Mr P C Biswal , AGM (Liaison & Admn.) on behalf of Bhusan Energy (P) Ltd. (BEPL) submitted that through affidavit dtd.20.12.2007, BEPL had filed a copy of the PPA with Reliance Energy Trading Ltd. (RETL) on dtd. 30.09.2006 for sale to the extent of 1200 MW of power from April, 2008 to March, 2018 at the delivery point which shall be the point of inter-connection of Orissa Grid with ER ISTS or with any of the neighbouring States.

The Commission observed that BEPL has not furnished any documents in support of off-take of power by any Power Utility prior to 06.01.2006 as required for exemption under Clause-5.1 of Tariff Policy. BEPL has filed the copy of PPA with RETL which is post-dated 06.01.2006 for off-take of power from proposed 2000 MW TPP developed by BEPL in Orissa. Therefore, the PPA of BEPL with GRIDCO is not liable for admission for further scrutiny.

Mr Biswal supported the views of GRIDCO for extension of time upto 31<sup>st</sup> March 2008 to file the relevant documents required for exemption under Clause-5.1 of Tariff Policy.

13. Mr Dharam Paul, V.P for Mahanadhi Aban Power Co. Ltd. (MAPCL) submitted that MAPCL through Affidavit dtd.30.10.2007 submitted the following:
  - (a) That MAPCL had signed MoU on dtd.08.09.2006 with PTC India Ltd. for sale of about 250 MW of power from its 1030 MW Thermal Power Project in Angul District in the State of Orissa. The MoU was a period of one year initially which has been extended for another one year.
  - (b) That MAPCL has been qualified under the tariff based bidding for the supply of 250 MW Power each for Haryana and Maharashtra. MAPCL has enclosed the copies of letters dtd.03.04.2007 and dtd.10.07.2007 of Maharashtra State Electricity Distribution Company and that of 14.12.2006 of Haryana Power Generation Corporation.

The Commission observed that MAPCL has not furnished any document in support of off-take of power by any Power Utility prior to 06.01.2006 as required for exemption under Clause-5.1 of tariff policy. MAPCL has furnished the copies of PPA with GRIDCO, MOU with PTC India and copies of letters of Power Utilities of Haryana & Maharashtra which are all post-dated 06.01.2006 for off-take of power from proposed 1030MW TPP developed by MAPCL at Angul in Orissa. Therefore the PPA of MAPCL is not liable for admission for further scrutiny.

To the specific queries of the Commission, MAPCL stated that they support the views of GRIDCO for extension of time upto 31<sup>st</sup> March 2008.

14. Mr B N Mohanty, Advocate on behalf of Sterlite Energy Ltd. requested to the Commission to grant some more time to file the opinion/ comments on the issues raised by the Commission in the interim order dtd. 27.09.2007. The Commission directed the counsel to file all the relevant documents by 26.12.2007 to stake their claim for exemption under Clause-5.1 of the Tariff Policy as well as their views if any on the issues mentioned in the interim order dtd. 27.09.2007.
15. Mr R K Patra, Project Coordinator for TATA Power Company Ltd., submitted that they support the views of GRIDCO in the issues mentioned in the Commission's order dtd. 27.09.2007. Mr Patra requested to the Commission to admit their PPA with GRIDCO as they have furnished the requisite documents.

It is observed that M/s. TATA Power Company Limited, Mumbai, through affidavit dtd. 17.08.2007 furnished a copy of MoU dtd. 29.09.2006 signed between M/s TATA Power Company Limited, Mumbai and M/s TATA Power Trading Company Limited, Mumbai for off-take of 550 MW of power from their proposed 1000 MW Thermal power project at Naraj Marthapur, in the district of Cuttack in the State of Orissa which is an MoU dated after 06.01.2006. M/s TATA Power Company Limited, Mumbai earlier through affidavit dtd. 29.05.2007 had furnished a photocopy of letter from SBI Capital Markets Ltd, Mumbai dtd. 20.12.2005 in support of financial appraisal and fund arranging services of the proposed 1000 MW Thermal Power Project in Orissa. As M/s TATA Power Company Limited, Mumbai have not furnished any document in support of off-take of power by any power utility prior to 06.01.2006 as required for exemption under Clause 5.1 of Tariff Policy, the IPP is not entitled to undertake the proposed project through MoU route.

We, therefore, decided not to admit the PPA of the aforesaid IPP for further scrutiny.

16. Mr. P N S Bhasker Rao, Sr. VP on behalf of Navabharat Power Pvt. Ltd., in response to the query to the Commission submitted that in both National Electricity Policy as well as National Tariff Policy framed under Section 3 read with Section 86 (4) of the Act, generation has been given a thrust to bridge the demand and supply gap in the country. He submitted that although the clarification issued in MoP letter dtd 28.03.2006 is in the limit/ purview of the Tariff Policy, the Commission as per Section 86 (2) can advise the State Government to change/amend the policy and extend the date line thereof.
17. Mr K V V Rao, Director for GMR Energy Ltd. in response to specific query of the Commission submitted that the opinion of MoP communicated to CERC in letter dtd. 28.03.2006 is within the policy and is acceptable as it should be considered as an integral part of Tariff Policy.
18. Mr S K Banarjee, V.P. on behalf of VISA Power Ltd. in response to specific query of the Commission submitted that the CERC Regulations may be followed scrupulously to avoid any dispute in the matter
19. Mr Pradip Lenka, CEO on behalf of LANCO Group Ltd. submitted the following in response to the specific queries of the Commission.
  - (a) Section 3(1) of the Electricity Act, 2003 empowers the Central Government to formulate the tariff policy. Section 3(3) of the Act enables the Central Government to review or revise the tariff policy from time to time.
  - (b) The Act also requires that the Central Electricity Regulatory Commission (CERC) and State Electricity Regulatory Commissions (SERCs) shall be guided by the tariff policy in discharging their functions including framing the regulations under Section 61 of the Act.
  - (c) Section 61 of the Act provides that Regulatory Commissions shall be guided by the principles and methodologies specified by the Central Commission for determination of tariff applicable to generating companies and transmission licensees.
  - (d) Clause 5.1 of Tariff Policy says that all future requirement of power should be procured competitively by distribution licensees and no laxity is given/allowed to private developers, whereas a period of five years has been allowed as the transition period in case of Public Sector projects to switch over to competitive bidding.
  - (e) As power is a concurrent subject, the Govt. of Uttarakhand, Himachal Pradesh and Rajasthan have taken different views in the matter.



In view of the above Mr Lenka submitted that the Commission may allow minimum 15 days time to submit the views of Lanco Group in the matter.

20. Mr R C Mahapatra, Director on behalf of KVK Nilachal Power Pvt. Ltd. in response to the specific query of the Commission submitted as under:

(a) The National Electricity Policy framed by Govt. of India at Para-5.2 envisages the following:

**“GENERATION**

Inadequacy of generation has characterized power sector operation in India. To provide availability of over 1000 units of per capita electricity by year 2012 it had been estimated that need based capacity addition of more than 1,00,000 MW would be required during the period 2002-12.

The Govt. of India has initiated several reform measures to create a favorable environment for addition of new generating capacity in the country. The Electricity Act 2003 has put in place a highly liberal framework for generation. There is no requirement of licensing for generation. The requirement of techno-economic clearance of CEA for thermal generation project is no longer there. For hydroelectric generation also, the limit of capital expenditure, above which concurrence of CEA is required, would be raised suitably from the present level. Captive generation has been freed from all controls.

In order to fully meet both energy and peak demand by 2012, there is a need to create adequate reserve capacity margin. In addition to enhancing the overall availability of installed capacity to 85%, a spinning reserve of at least 5%, at national level, would need to be created to ensure grid security and quality and reliability of power supply.

The progress of implementation of capacity addition plans and growth of demand would need to be constantly monitored and necessary adjustments made from time to time. In creating new generation capacities, appropriate technology may be considered keeping in view the likely widening of the difference between peak demand and the base load.”

(b) He submitted that the tariff policy framed by Ministry of Power, Govt. of India vide their notification dated 6<sup>th</sup> January, 2006 is contrary to the very objective of National Electricity Policy frame work regarding generation capacity additions during the period 2002-12 by putting restriction on addition of generation through MOU route at

Para-5.1 of the National Electricity Tariff Policy and directing all future procurement of power by competitive bidding process. The same Notification at 5.2 states:

“The real benefits of competition would be available only with the emergence of appropriate market conditions. Shortage of power supply will need to be overcome.”

- (c) He further submitted that it is now time to make a retrospect to examine whether such market conditions have been established for a competitive bidding process for procurement of power. A competitive procurement takes place when the supply of any commodity is more than the demand so that you get the same at a cheaper price. But in case of power procurement this is just the reverse situation at present. It is invariably seen that generators and traders are participating in a bidding process with so many variable factors even without a power plant in position. Further, the generator who participates in the bid does not know if the power produced by the plant will find path of evacuation to the destination of end user as he has not obtained any Long Term Open Access from the CTU. Thus without the National Grid in place it is not assured of a long term open access. Thus such bidding by the generators is hypothetical without any basis.

They just try their luck by some magical figures and if they are successful they make huge profits in such bidding process. Thus the very purpose of procurement of power at an economical price is defeated. The present power scenario in the country does not inspire confidence for procurement of power by competitive bidding. This will restrict growth of generation in the country and will negate the National Electricity Policy.

- (d) He submitted that as per the National Electricity Tariff Policy of MoP, Govt. of India, CERC have framed the detail Generation & Transmission Tariff Regulation vide their Notification No. L-7/25(5)/2003 dated 26.03.2004 as amended from time to time. CERC have prescribed the detail guide line for all parameters involved in fixation of tariff by a generator producing electricity. Thus there should not be any bar for a distribution licensee to procure power on the basis of MOU in which the regulator has a very important role in fixation of tariff of the generator wishing to supply power to any utility. In the process of competitive bidding the Regulator does not come into picture at all and can not question the price arrived on competitive bidding process.

In view of the fact that the country is facing acute power shortage and the market conditions are not geared up for creating an atmosphere of healthy competition under so many varying factors, he prayed before the Commission that it is desirable that the

practice of developing power projects through MOU route should be allowed to be continued for some more time.

21. Mr. Ramesh Ch. Satpathy, Secretary of National Institute of Indian Labour submitted during the hearing that the Govt. of Orissa have signed 13 no. of Memoranda of Understanding with Independent Power Producers / Private Power Developers on 09.06.2006 and 26.06.2006. All the IPPs have signed PPAs with GRIDCO on 28.09.2006 and the Commission has been hearing in the entire calendar year 2007 for admission of the PPAs for further scrutiny. As per the load forecast of CEA, it is known to the State Government as well as to the Commission that unless there is capacity addition, the State may have to face severe power crisis from FY 2009-10 onwards. He requested to the Commission to direct the IPPs to have their financial closure without any further delay and start the projects in the early part of the new year 2008 so that Orissa can have 25% power from such projects and can meet the demand on account of massive industrialization as well as on account of intensive rural electrification under Rajiv Gandhi Gramya Vidyut Yojana (RGGVY) at least by 2011-12 i.e. by end of XI Plan.
22. Mr. S C Mohanty, Law Officer, Deptt. of Energy on behalf of the Government of Orissa submitted before the Commission that the State Govt. has received the proposal of GRIDCO for relaxation to Caluse 5.1 of the National Tariff Policy and extension of deadline for financial appraisal and off-take arrangement to 31.03.2008 and it is now under active examination of the Govt. He requested to the Commission to grant one month time to examine and file the views of the Govt. on the aforesaid proposal of GRIDCO.

We have heard the submission of GRIDCO, the State Govt. as well as that of IPPs. We direct all who are interested to file submissions/additional submissions on the three issues mentioned under Para 6 of our interim order dtd. 27.09.2007 (reproduced in para-5 of this order) within a period of fortnight i.e. by 9<sup>th</sup> January 2008 positively. We hereby direct that Govt. of India, Ministry of Power be impleded as a party and they should file the views of the Govt. of India on the aforesaid three issues by 9<sup>th</sup> January 2008 also.

The next date of hearing will be decided later.

Sd/-  
**(K C Badu)**  
**Member**

Sd/-  
**(S K Jena)**  
**Member**

Sd/-  
**(B K Das)**  
**Chairperson**