

ODISHA ELECTRICITY REGULATORY COMMISSION
BIDYUT NIYAMAK BHAWAN
UNIT-VIII, BHUBANESWAR - 751 012

Present : Shri S. P. Nanda, Chairperson
Shri K. C. Badu, Member
Shri B. K. Misra, Member

Case No.113 of 2011

In the matter of: **An application under Section 86 of the Electricity Act, 2003 read with Section 21 of the Orissa Electricity Reform Act, 1995 and other enabling provisions for approval of Power Purchase Agreement executed between OPGC and GRIDCO for purchase of power from Unit 3 and 4 of OPGC.**

GRIDCO Ltd., **Petitioner**

Vrs.

(1) The Managing Director, OPGC
(2) DoE, Govt. of Odisha
(3) OPTCL, Bhubaneswar **Respondents**

For the Petitioner: Shri Ranjit Das, Sr. G.M.(PP), GRIDCO.

For the Respondents: Shri Sukanta Pradhan, Joint Secretary, DoE, GoO, Shri Sakya Singha Chaudhuri, Advocate on behalf of OPGC, Shri Ramesh Chandra Satpathy & Shri R. P. Mohapatra.

ORDER

Date of Hearing: 17.02.2012

Date of Order: 04.04.2012

1. Director (Com.), GRIDCO filed an application on 30.12.2011 under Section 86 of the Electricity Act, 2003 read with Section 21 of the Orissa Electricity Reform Act, 1995 and other enabling provisions for approval of Power Purchase Agreement (PPA) executed between OPGC & GRIDCO for purchase of power from Unit #3 and Unit #4 of OPGC. The salient features of the PPA are as follows:-
 - (a) The PPA shall become partially effective from the date of execution and the same shall be in force up to completion of 25 years from the date of commercial operation of the last unit of the project.

- (b) The agreement shall be completely effective upon fulfillment of certain Conditions Precedent viz. receipt of forest clearance for the Captive Coalmine and the MGR, receipt of all project consents, receipt of Interim Coal Linkage and execution of FSA for the same, achievement of Financial Closure of OPGC etc.
- (c) The parties have signed the PPA on 04.01.2011, keeping in view of the cutoff date allowed by the relevant provisions of the National Tariff Policy for execution of PPA for new projects for determination of tariff by the Commission. However, there is a Miscellaneous Provision in the PPA that the Agreement can be effective only after approval by respective Boards of OPGC and GRIDCO.
- (d) On fulfillment of the above said Conditions Precedent OPGC shall notify the effective date. If the said conditions are not fulfilled within a period of 18 months from the date of execution of the arrangement either party shall have the right to terminate the arrangement.
- (e) OPGC shall develop the project as a Base Load Power Station with adoption of Super Critical Technology and of capacity 1320 (2X660) MW.
- (f) Out of the total capacity, 50% shall be allocated to GRIDCO, subject to the condition laid out in the said Government Notifications.
- (g) **GRIDCO shall be responsible for evacuation of its allocated capacity from the power station bus as per its own arrangement with the CTU/STU.**
- (h) The scheduled commercial date of operation of #3 and #4 is 48 months and 54 months respectively from the date of Financial Closure.
- (i) Although separate letter of credit mechanism is to be provided for the expansion project, the Escrow Mechanism for the same shall be implemented through the existing Escrow Mechanism (provided for #1 & #2). GRIDCO and OPGC shall have to sign a Supplemental Escrow Agreement so as to give effect to the said provision.
- (j) GRIDCO shall file the PPA before OERC for approval of the same and OPGC shall file the tariff petition before OERC and the tariff norms and parameters shall be as per the guidelines of CERC Tariff Regulations as may be notified from time to time.

- (k) Some provisions /terms and conditions of the PPA dated 04.1.2011 required approval of the State Govt. and thus the PPA was filed for approval after due concurrence by the State Govt.
- (l) For effectiveness of the agreement there is provision at Clause (e) of Article 2A (Conditions Precedent Payment) regarding receipt of approval of Govt. of Odisha to provisions under Annexure-D to Schedule 4 in the matter of payment of deemed generation by GRIDCO to OPGC in the event of delay in commercial operation of the Captive Coalmine and the MGR. This provision has been included in the PPA with a condition precedent that the consent of Govt. of Odisha is required in this regard for making the agreement effective.
- (m) Both parties (OPGC & GRIDCO) should agree that the decision of the State Government would be final and binding on the issues stated above.

In view of the above, the petitioner GRIDCO prays

To approve the PPA executed between GRIDCO and OPGC for purchase of power from the 3rd and 4th units of OPGC.

2. The application was registered as Case no.113 of 2011 and was last heard on 17.2.2012. The Commission heard the parties and reserved the order allowing the Petitioner and Respondents to file their written submission within fifteen days.
3. During hearing Shri R. P. Mohapatra raised certain issues relating to the PPA under consideration. He stated that even though 100% of the power generated from Unit 1 & 2 is procured by GRIDCO, the Bulk Supply Agency under the single buyer model, OPGC has continued to defy the provisions of the Electricity Act, 2003 and the directions of the Commission to file its proposal for determination of ARR and tariff for supply of power from the 2 X 210 MW Unit. He further stated that AES Transforma Inc., USA was also the Licensee of the Distribution Company, CESCO and abruptly left, leaving a lot of liabilities which are yet to be settled. The Ib Thermal Power Station was designed to have 4X210 MW Units and the common systems like the Low Water Pump House, the coal transportation system were designed for the capacity of 4 X 210 MW. After a long delay, a 2 X 600 MW Units are being planned due to which many of the common systems will become infructuous. Therefore, the cost of these common systems has to be deleted from the project cost. Nowhere in the PPA it has been mentioned as to who is the appropriate Commission to determine the tariff. That the 2 X 660 MW units do not have a composite scheme for generation and

sale of electricity in more than one State. Therefore, the CERC shall not regulate the tariff in accordance with Section 79(1)(b) of the Electricity Act, 2003. In view of this the tariff for the quantum of power to be purchased by GRIDCO from OPGC has to be determined by the Commission, who may be guided by the applicable Regulations of CERC. Therefore, this provision has to be specifically incorporated in the PPA, in Schedule-4.

4. Shri Ramesh Chandra Satpathy has stated that OPGC has not yet implemented the Govt. decision as per the Energy department Notifications dated 21.6.2008 and 12.10.2009 due to which consumers of the state are suffering a lot as the tariff of the OPGC is loaded on the consumers without any hearing. He submitted that the Commission may pass order directing the management of OPGC & GRIDCO to file the amended PPA of unit 1 & 2 before presenting the PPA for 3 & 4 units of OPGC. Otherwise the PPA for unit 3 & 4 may be rejected for greater interest of the consumers of the State.
5. OPGC has furnished the issue-wise written response to the objections raised/filed by Shri Ramesh Chandra Satpathy and Shri R. P. Mahapatra before the Commission as summarized below:-

5.1 On the issues relating to earlier PPA of OPGC with GRIDCO

- 5.1.1 One of the objections raised is that OPGC has not yet implemented the Government's decision as per the Energy Department's Notifications dated 21.06.2008 and 12.10.2009 with respect to Unit 1 and Unit 2 located at the IB Thermal Power Station Complex in Banharpalli, District Jharsuguda for which it has entered in to a separate PPA with GRIDCO dated 13.08.1996. The other objection is about non-filing of the ARR by OPGC before the Commission for Units 1 and 2.
- 5.1.1 OPGC in response to the above, submitted that the aforesaid objections are completely irrelevant in the present context where GRIDCO has approached the Commission in the present proceedings for approval of a PPA between GRIDCO and OPGC i.e., PPA 2 for sale of specified quantum of power by OPGC (50% subject to availability) from Unit 3 & Unit 4 located at the Jharsuguda Premises, under section 86 of the Electricity Act, 2003. Units 3 & 4 constitute a separate project (vis a vis Units 1 & 2) and it has a separate contractual set up in the form of PPA 2 for the sale of power. Therefore, the

approval of PPA 2 is unrelated with issues involving Units 1 & 2 or the resolution thereof.

5.1.2 OPGC further submitted that the Commission is approached only in relation to approval of PPA 2. Hence, the PPA 2 approval process need not necessarily be preceded by the approval of PPA 1 and for that matter is not conditional upon filing of ARR with the Commission for sale of power from Units 1 and 2, which is governed by a separate PPA.

5.1.3 Without prejudice to the contention of OPGC that the issues related to PPA 1 is not relevant at this stage for the purpose of present proceedings, it is respectfully submitted as follows:

- (i) Entire power generated from the presently operating Units 1 and 2 having an installed capacity of 2x210 MW is tied up for sale to GRIDCO under PPA 1. The PPA 1 was placed before the state Government of Odisha by GRIDCO for approval as the State Government was then the appropriate authority under the Electricity (Supply) Act, 1948 and it had accorded approval to the PPA 1.
- (ii) Subsequently, in the year 2001, GRIDCO submitted the PPA 1 with the Commission for approval. Further, in connection with a dispute related to maintenance of an escrow arrangement between GRIDCO and CESCO (Distribution Company) in view of an order passed by the Commission, OPGC approached the Hon'ble High Court where the above matter along with the jurisdiction of OERC in approving PPA 1 (already approved by the State Government) was taken up together.
- (iii) The Hon'ble High Court allowed PPA 1 to be scrutinized by the Commission for approval. However, the impugned order of the Hon'ble High Court was stayed by the Hon'ble Supreme Court in April, 2005.
- (iv) During pendency of the matter before the Hon'ble Supreme Court, in order to amicably settle the issues related to PPA 1 like applicability/revision of tariff norms set out therein and for

the purpose of facilitating capacity addition by setting up of Units 3 and 4, the State Government had set up a task force for resolution of issues. The task force provided certain recommendations in terms of which the Notifications were issued by the State Government which *inter alia* recommended the following:-

- (a) PPA 1 would be amended as stated in the notification and with said amendment the tariff parameters would be frozen till validity of amended PPA 1 notwithstanding modifications of tariff norms by CERC. It was further stated that the amended PPA1 shall be filed before the Commission for consent / approval and amendment would take effect from 01.04.2007.
- (b) The share of power of GRIDCO from OPGC's proposed Units 3 and 4 will be 50% of its capacity. Such power has to be tied-up through a PPA (i.e, PPA 2) providing for fixation of tariff as per norms and parameters as may be notified by the CERC and the PPA would be subject to approval of the Commission.
- (v) While both OPGC and GRIDCO have acted upon the amendment from the stipulated date i.e., 01.04.07 and are in process of completing necessary formalities for carrying out the amendments in the PPA 1 and the agreement executed among OPGC, GRIDCO and the State Government dated 18.10.1998 ("**Tripartite Agreement**").
- (vi) OPGC is willing to withdraw SLP before the Hon'ble Supreme Court after execution of amendment to the PPA 1 and amendment of power sharing clause of the Tripartite Agreement in terms of settlement stipulated in the Notifications.
- (vii) OPGC is not inclined at this stage to get into the issue of requirement of filing PPA 1 and ARR with the Commission for approval.

5.1.4 Both GRIDCO and OPGC would be approaching the Commission to seek approval of the PPA 1 after execution of amended PPA 1 and Tripartite Agreement and withdrawal of SLP from Hon'ble Supreme Court. The concerned objectors who have raised objections should not have any apprehension about OPGC's commitment for resolving issues with regards to Units 1 and 2. Further, these issues can be separately considered and it would not be prudent to associate such issues with the approval of the PPA 2 at this stage.

5.2 On the issue of Common Facilities

- Regarding the cost of common facilities, it is submitted by OPGC that facilities like raw water system, filtered and potable water system, part of the DM plant facility, LDO unloading system etc. will continue to be used in the proposed Units 3 & 4. However, additional capacity / facilities will still be needed due to increased capacity addition and use of super-critical technology.
- It is clarified by OPGC that the expenditure of Rs.75 crores has already been incurred towards creation of the common facilities, and will form part of the cost of Units 3 and 4, which is also as per the Tripartite Agreement.

5.3 On the issue of cost of coal and supply of power generated from the cheaper coal to the State Government

As regards cost of cheaper coal to be applied to the tariff for the power sold to GRIDCO from Units 3 & 4, it may be noted that cost of coal is a pass through under the cost – plus regulated tariff. Coal for Units 3 & 4 is proposed to be supplied from OPGC's captive mine and the cost of production of such coal, as approved by the appropriate Regulator/authority, shall apply to the tariff.

5.4 On the issue of determination of tariff under the PPA 2

5.4.1 With respect to the submission that tariff setting shall be done by OERC, for the 50% power to be sold to GRIDCO, it may be noted that OPGC proposes to sell the balance 50% power from Units 3 and 4 outside the state through a mix of sale through Case I bids, Traders and through Exchanges.

5.4.2 The PPA 2 is placed before the Commission for vetting and approval which would facilitate financing of the Units-3 & 4. It is pre-mature at this stage to debate on the requirement of determination of tariff or tariff setting authority for which tariff application, if required, would be filed 6 months prior to commercial operation date (CoD) of the proposed units as per applicable CERC Regulations.

5.4.3 In any case, PPA 2 has been finalized in compliance with the State Government's direction as set out in the Notification dated 21.06.2008 requiring the norms of tariff for sale of power under the PPA 2 to be aligned with CERC notified tariff norms and parameters. Excerpt of the relevant direction is set out below:

"The PPA for the power made available to the State/GRIDCO shall be subject to approval of OERC and the tariff norms and parameters shall be as per the tariff norms as may be notified by CERC from time to time."

5.4.4 In any case, it would be prudent to resolve the issue related to tariff norms and determination of tariff at an appropriate later stage. The Commission is requested to allow the approval process of the PPA 2 to conclude at the earliest in view of expediting process of achieving financial closure for Units 3 and 4.

6. GRIDCO, the petitioner has responded to the objections raised by Shri Ramesh Satpathy and Shri R. P. Mohapatra. Responding to the objections raised by Shri Satpathy GRIDCO has stated that :-

- Joint action has been taken by both the Petitioner Gridco and the Respondent OPGC to implement the directions stipulated in the Govt. Notifications dated 21.06.2008 and 12.10.2009.
- Further, the draft amendment to the PPA dated 13.08.1996 have already been finalized between the parties incorporating the modifications as recommended by the Task Force vide its two notifications dated 21.06.2008 and 12.10.2009 and the agreed draft amendment to the Tri-Partite Agreement has been forwarded to the Department of Energy, Govt. of Odisha for their concurrence/approval.
- After due approval/concurrence by the State Govt. both the aforesaid amended PPAs shall be executed between GRIDCO and OPGC and shall be filed before the Hon'ble Commission for regulatory approval.

- As regards to tariff norms and parameters for Unit #1 and #2, the amended Plant Load Factor (PLF) of 80% (from 68.49%) is already being considered for calculation of incentive payable to OPGC with effect from 1st April, 2007 pending execution of amended PPA.
7. GRIDCO has consented to the views made by OPGC based on approval of PPA for Unit #3 & #4 of OPGC is a completely different matter and the Govt. Notifications as mentioned herewith: -
- OPGC shall take expeditious steps to commission Units 3 and 4 with installed capacity of 2X660MW and shall make half of the power generated from these Units available to GRIDCO.
 - The PPA for the power made available to the State/GRIDCO shall be subject to approval of OERC and the tariff norms and parameters shall be as per the tariff norms as may be notified by CERC from time to time.
8. GRIDCO's response to the objections filed by Shri R. P. Mohapatra are as follows:-
- It is submitted that mere apprehensions of the Objector that history may repeat itself should not pose any kind of obstacle for approval of PPA of the upcoming expansion units of the Respondent OPGC.
 - Regarding the issue of common systems, the Respondent OPGC have clarified the same in their filing dated 24.03.2012 and thus needs no reply.
 - As per Article, 3 (C) of the PPA, OPGC should file application before the Appropriate Commissions for the tariff determination under the Electricity Act. Further, the term Appropriate Commission has been defined under the Article 1.1(at page 3 of the said PPA dated 04.01.2011) that it is OERC or CERC as the case may be or such other succeeding authority or Commission as may be notified by the Appropriate Govt. from time to time. Hence the issue has been addressed properly in terms of the provisions of the existing law / regulations.
 - Further, it has been clarified at Clause 1 of Schedule 4 (Tariff) of the PPA dated 04.11.2011 that the tariff under this agreement shall be based on the tariff norms and parameters of CERC (Terms and Conditions of Tariff) Regulations, 2009. It is also clarified that as and when any amendment to the Tariff norms and parameters are made in the Tariff Regulations, the said

norms and parameters in this schedule shall be applied to reflect the said amendments from time to time.

- In reply to the technical mismatch, it is submitted that OPGC shall take care of these matters.

9. The Commission has scrutinized the PPA signed by GRIDCO and OPGC on 04.01.2011, heard the parties, noted the points raised by the objectors and the written submission of OPGC and GRIDCO. The Commission has observed that GRIDCO has submitted the PPA executed with OPGC for Unit 3 & 4 of capacity 1320 MW (2 x 660) proposed to be set up at IB Thermal Power Station of OPGC for sale of 50% of the contracted capacity under Section 86 of the Electricity Act, 2003 read with Section 21 of Orissa Electricity Reforms Act, 1995. The Commission observes that Units 3 & 4 constitute a separate project (vis a vis Units 1 & 2) and it has a separate contractual set up in the form of PPA 2 for the sale of power. Therefore, the approval of PPA 2 is unrelated with issues involving Units 1 & 2 of OPGC or the resolution thereof at this stage.

10. Further, as submitted by GRIDCO, in the PPA at Clause 1 of Schedule 4 (Tariff) it is clarified that *“Tariff under this Agreement shall be based on tariff norms and parameters of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 (“Tariff Regulations”). Accordingly the Tariff norms and parameters stated hereunder have been included in this schedule based on the tariff norms and parameters outlined in the Tariff Regulations.*

As and when any amendment to the Tariff norms and parameters are made in the Tariff Regulations, the said norms and parameters in this Schedule shall be applied to reflect the said amendments from time to time.

While the tariff provisions given herein are considered for the Power Station as a whole, while computing tariff for sale to GRIDCO, the provisions shall be considered in proportion to the 50% Contracted Capacity for GRIDCO.”

11. Section 79(1)(b) of the Electricity Act provides that CERC shall regulate the tariff of the generating companies having a composite scheme in generation and sale of electricity in more than one State. M/s. OPGC has signed PPA for allocation of 50% of its power generation with GRIDCO. As on date, it is not ascertained whether M/s. OPGC intends to sign PPA for its balance power to any other DISCOMs, outside the State for long-term allocation of power, qualifying for the composite scheme in generation and sale of electricity in more than one State for tariff determination by CERC. As on the date as the status of the power plant is concerned it has only long-

term PPA with one state i.e. Odisha and, therefore, the rate of purchase of power by GRIDCO from OPGC – Unit-3 & Unit-4 shall need to be determined by the State Commission.

12. Govt. Notification on supply of power from OPGC Unit 3 & 4 to GRIDCO is outcome of Govt. of Odisha decision based on a high level Task Force recommendation and notified by the Govt. of Odisha vide Notification dated 21.6.2008 which was subsequently amended vide Notification dated 12.10.2009. The extract of the amended Para 5(a) of the notification No.7216 dated 21.6.2008 is stated below:-

“OPGC shall take expeditious steps to commission Unit-3 & 4 with installed capacity of 2X660 MW with adoption of supercritical technology and shall make half of the power generated from these units available to GRIDCO. Since both the units will not be commissioned at a time, OPGC is allowed to share 50% of the power generated from the 3rd unit to GRIDCO and sell the balance 50% power for a period of 6 months within which the 4th unit shall be commissioned. In case the 4th unit is not commissioned within 6 months of commissioning of the 3rd unit, minimum power to be shared with State/GRIDCO from the expansion unit of OPGC would be 450 MW instead of 420 MW.”

13. GRIDCO has stated in its affidavit dated 30.12.2011 that *“GRIDCO shall be responsible for evacuation of its allocated capacity from the power station bus as per its own arrangement with the CTU/STU.”* The Commission has observed that in Case No. 71/2011 in the matter of seeking approval of the Evacuation Plan of OPTCL, GRIDCO in its affidavit dated 30.11.2011 has submitted vide para 7 dealing with Transmission/Wheeling of Power that *“State share of power shall be made available to GRIDCO by (IPP) at the Bus bar of OPTCL nearest EHV Sub-station at required voltage level. OPTCL as STU with the help of GoO will assist (IPP) in getting clearance/approvals within the State jurisdiction. XXXXXXXXX”*. We direct that instead of addressing the connectivity issue in such generic nature, in the subject PPA GRIDCO should clearly identify the name of sub-station where the full or State share of power shall be evacuated as per State transmission plan. GRIDCO must incorporate suitable provision for evacuation of power which is to be adopted in the present situation. However, the decision of the OERC in this regard for which hearing

has been taken up on evacuation plan of OPTCL will be mutatis mutandis applicable in this case.

14. In view of the above, we approve the PPA 2 between GRIDCO and OPGC considering Govt. of Odisha notifications and keeping in view the technological advantages and the interest of the state.
15. We further direct GRIDCO that the copy of the amended PPA 2 may be submitted before the Commission by 31st July, 2012 for our perusal.

The case is disposed of accordingly.

Sd/-

(B.K. Misra)
Member

Sd/-

(K.C. Badu)
Member

Sd/-

(S. P. Nanda)
Chairperson