

**ODISHA ELECTRICITY REGULATORY COMMISSION
BIDYUT NIYAMAK BHAWAN
PLOT NO.-4, CHUNOKOLI, SHAILASHREE VIHAR
BHUBANESWAR - 751 021**

**Present: Shri U. N. Behera, Chairperson
 Shri S. K. Parhi, Member**

Case No. 26/2014

M/s. Jindal India Thermal Power Ltd.	Petitioner
Vrs.		
GRIDCO Ltd.	Respondents

In the matter of: **An application u/S. 61, 62 & 86 (1) (a) of the Electricity Act, 2003 read with OERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2014 read with the principles for determination of variable cost of the Unit-1 of 2x600 MW coal based Power Project At Deranga, Anugul for the period commencing from 06.06.2014 to 2019.**

For Petitioner: Shri Sanjay Sen, Sr. Advocate & Shri Matrugupta Mishra, Advocate on behalf of M/s. JITPL,

For Respondent: Shri Arjit Maitra, Advocate on behalf of GRIDCO Ltd., Shri Prashanta Kumar Das, DGM (Elect.), SLDC.
Nobody is present on behalf of DoE, GoO.

ORDER

Date of Hearing: 02.01.2018

Date of Order: 26.02.2018

The present petition has been filed by Jindal India Thermal Power Ltd. (JITPL), a generating company within the meaning of Section 2 (28) of the Electricity Act, 2003 having installed capacity of 1200 MW (2 x 600) at Derang of Anugul District in the State of Odisha. The Petitioner has undertaken this project in pursuance to the Memorandum of Understanding dated 26.09.2006 entered between Government of Odisha and Jindal Photo Limited. The Petitioner has filed the present petition seeking determination of variable cost (Energy Charge Rate) of 12% power generated by its Unit-I & II to be sold to GRIDCO, the State Designated Agency of Odisha. The Petitioner and M/s. GRIDCO have entered into PPA for this purpose and have filed the same before the Commission for its approval which is the subject matter of other cases (Case Nos. 1/2017 & 64/2017).

2. The Petitioner has submitted that Unit – I & II of the generating station have achieved CoD respectively on 19.04.2015 and 12.02.2015. The Petitioner has submitted that the project was always conceived as an inter-State generating station to supply power to consumers both within and outside the State of Odisha. Accordingly, the Petitioner has tied up various

PPAs with distribution licensees in the State of Kerala, Bihar and with the Indian Railways, therefore, is falling within the expression of ‘composite scheme’ as referred to under Section 79 (1) (b) of Electricity Act, 2003. The appropriate Commission for determination of tariff is accordingly the Central Electricity Regulatory Commission (CERC) . The issue is no more *res Integra*. The Hon’ble Supreme Court has clarified the above proposition of law in case of Energy Watch Dog Vrs. CERC & Ors., 2017 SC-378.

3. The Respondent GRIDCO submits that Tariff Policy notified by Government of India dated 28.01.2016 specifically mandates the SERC to determine the tariff of generating plants set up under State Government Policy to encourage investments out of which a maximum of 35% of the installed capacity is to be procured by the distribution licensee of the host State. The present Petitioner has established his power plant as per the State Government Policy. When the Tariff Policy being a statutory Policy mandates the SERCs of the host State to determine the tariff, then such a mandate is binding on the SERCs. In the PPA as well as in MoU the Petitioner has agreed to the jurisdiction of OERC for determination of tariff. Hon’ble Supreme Court has held that *‘once parties bound themselves as such it is not open for them to choose a different jurisdiction..... Such as suit will be in violation of the said agreement’* (Sriram City Union Finance Cop. Ltd. Vrs. Rama Mishra (2002) 9 SCC 613). Therefore, it is not now open for the Petitioner to choose the jurisdiction of CERC. Tariff Policy in Clause 5 (11) (j) has defined the ‘composite scheme’ which qualifies the generating station who have signed PPAs to sell 10% of the capacity of the project to a distribution licensee outside the State in which such project is located before date of commercial operation of the units. The Respondent further submits that the Petitioner has admitted to the fact that they did not have the PPAs for sale of at least 10% of power outside the State before CoD. The Respondent to buttress up its argument pointed out that in appeal No. 106 /2009 dated 31.03.2010 Hon’ble APTEL has stated as follows:

“20. XXXXXXXX Therefore, the power under Section 62 (1) (a) and Section 86 (1) (b) conferred on the State Commission cannot in any manner be restricted or whittled down by way of a policy document or a Sub-ordinate Legislation or notification issued by the Government / Executive.”

Therefore, the present Commission has jurisdiction to determine tariff under the PPA

4. We heard the forceful arguments of both the parties. As per Section 79 (1)(b) part X of Electricity Act one of the functions of the Central Commission is to regulate tariff of generating companies if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State. The State Commission

has no role to play in this matter. However, we want to point out a non-obstante clause in the Electricity Act, 2003 as far as jurisdiction of this State Commission is concerned.

“64. (5) Notwithstanding anything contained in Part X, the tariff for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor.”

In the instant case both the parties are not agreeable to the issue of jurisdiction of the State Commission in determination of tariff applicable for sale of electricity. The Petitioner, particularly does not defer to the jurisdiction of the State Commission in this matter.

5. The Electricity Regulatory Commission which is a Quasi Judicial Body has the trappings of a Court. The State Commission cannot infer or assume its Jurisdiction when it is not expressly provided in the statute. Regarding exercise of equitable jurisdiction by Courts in India it has been held by Hon’ble Supreme Court as follows in paras 21 and 22 of Shiv Kumar Sharma v. Santosh Kumar, AIR 2008 SC 171:

“21. In England, the Court of Equity exercises jurisdiction in equity. The courts of India do not possess any such exclusive jurisdiction. The Courts in India exercise jurisdiction both in equity as well as law but exercise of equity jurisdiction is always subject to the provisions of law. If exercise of equity jurisdiction would violate the express provisions contained in law, the same cannot be done. Equity jurisdiction can be exercised only when no law operates in the field.

22. A court of law cannot exercise its discretionary jurisdiction dehors the statutory law. Its discretion must be exercised in terms of the existing statute.”

6. In their judgement the Hon’ble Supreme Court in Civil Appeal Nos. 5399-5400 of 2016; Energy Watchdog Versus Central Electricity Regulatory Commission and Ors. etc dated 11.04.2017 has further strengthened the above views by stating as follows:

“Section 64(5) has been relied upon by the Appellant as an indicator that the State Commission has jurisdiction even in cases where tariff for inter-State supply is involved. This provision begins with a non-obstante clause which would indicate that in all cases involving inter-State supply, transmission, or wheeling of electricity, the Central Commission alone has jurisdiction. In fact this further supports the case of the Respondents. Section 64(5) can only apply if, the jurisdiction otherwise being with the Central

Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. We, therefore, hold that the Central Commission had the necessary jurisdiction to embark upon the issues raised in the present cases.”

7. In view of the above discussion, we find that the issue of determination of tariff of the power to be sold by the Petitioner and to be purchased by Respondent GRIDCO purely falls under exclusive jurisdiction of Central Electricity Regulatory Commission (CERC).
8. With the above observation the case is disposed of.

Sd/-
(S. K. Parhi)
Member

Sd/-
(U. N. Behera)
Chairperson