

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

Present: Shri S. P. Nanda, Chairperson
Shri S. P. Swain, Member
Shri A. K. Das, Member

Case No. 74/2014

M/s. GRIDCO Ltd. Petitioner
Vrs.
M/s. Baitarani Power Project Pvt. Ltd. & Others Respondents

In the matter of: An application u/S. 86 of the Electricity Act, 2003 read with S.21 of the OER Act, 1995 & other enabling provisions for seeking approval of the Power Purchase Agreement (PPA) executed between GRIDCO Ltd. and M/s. Baitarani Power Project Pvt. Ltd. for procurement of power from its 24 MW Small Hydro Project located at Singanali & Dargadisila Village, Anandpur Block, Keonjhar district of Odisha.

For Petitioner: Ms. S. Pattjoshi, DM (PP), GRIDCO.

For Respondent: Shri R. P. Mahapatra authorized representative of M/s. Baitarani Power Project Pvt. Ltd, Shri Y. V. Subharao, MD, M/s. Baitarani Power Project Pvt. Ltd., Shri Rabinarayan Moharana, AM, CESU, Sujata Das, Verifier, OREDA, Ms. Niharika Pattnaik, ALO, DoE, GoO.

No body is present on behalf of WESCO, NESCO & SOUTHCO Utilities & M/s. GEDCOL.

Order

Date of hearing: 02.06.2015

Date of order: 16.10.2015

The petitioner GRIDCO Limited has executed a Power Purchase Agreement (in short PPA) with M/s. Baitarani Power Project Pvt. Ltd. (in short M/s. BPPPL) on 10.11.2014 to purchase electricity from the 24 MW (3x8 MW) Lower Baitarani Small Hydro Electric Project (SHEP) developed by M/s. BPPPL in Anandapur block of Keonjhar district. GRIDCO Limited has submitted the said PPA before the Commission for approval.

2. The case was first taken up for hearing on 06.01.2015. During the hearing on 06.01.2015, the representative of M/s. BPPPL Shri R P Mohapatra stated that they had reservation on certain issues in the PPA and had asked GRIDCO Limited for

modification/ amendment in the clauses of the draft PPA on such issues. GRIDCO Limited did not agree with the modification/ amendment. Petitioner further stated that to avoid delay in achieving financial closure and commencement of the project, after subsequent discussions with GRIDCO, they have signed the PPA subject to amendment consequential to the orders of the Commission on clauses on which both the parties diverge. M/s. BPPPL have submitted a list of 21 nos. clauses of disagreement the said PPA for adjudication by the Commission.

3. In view of the above submission made by the Petitioner, the Commission in its interim order dated 12.01.2015 directed GRIDCO Limited to furnish its reply on the outstanding issues with M/s. BPPPL and also directed both the parties to sit together with the Director (Tariff) and Director (RA) of OERC for amicable settlement of such PPA related issues raised before the Commission.
4. Accordingly, a meeting was held on 08.05.2014 between GRIDCO Limited and M/s. BPPPL in the Conference Hall of the OERC in presence of Director (Tariff) and Director (RA), OERC. In the said meeting, out of the 21 nos. of amendments /modifications in the PPA raised by M/s. BPPPL, 12 issues were mutually settled as agreed by both the parties and balance 9 nos. could not be settled. These were referred to the Commission for decision. Thereafter, the Commission heard the parties concerned on 02.06.2015.
5. In its submission, GRIDCO Limited has stated that,
 - (a) M/s. BPPPL has signed MoU with Government of Odisha on 22.08.2006 for setting up the said SHEP at its own cost. Revised TEC was accorded by the STC vide Office Memorandum No. 26.02.2014 and M/s. BPPPL executed Implementation Agreement with the GoO on 14.03.2014 for implementation, operation and maintenance of the said SHEP. Thereafter, M/s. BPPPL approached to GRIDCO Limited for execution of PPA. Being a state Designated Agency to procure power for the State from all sources, GRIDCO Limited executed PPA with M/s. BPPPL to procure power from the said SHEP in order to fulfil the non-solar RPO fixed by the Commission.
 - (b) GRIDCO Limited agreed for amendment of those clauses/issues in the PPA as mutually agreed in the meeting held on 08.05.2015 at OERC. However, the terms and conditions of the PPA are in line with the order dated 15.01.2014 of

the Commission passed in Case No. 80/2013 on determination of generic tariff of RE Sources for the second control period i.e. FY 2013-14 to 2017-18.

- (c) GRIDCO Limited further submitted that M/s. BPPPL is to implement the said SHEP within 36 months from the date of signing of the Implementation Agreement dated 14.03.2014 and to commission the project in FY 2017-18. As understood, financial closure for the project has not been achieved so far. Further, another SHEP developer, M/s. Shri Avantika Power Projects Pvt. Limited has already executed PPA with GRIDCO Limited as per the same terms and conditions and other developers have also approached GRIDCO Limited to execute PPAs. In such a circumstances, if M/s. BPPPL is not willing to honour the PPA even after its execution, he may be allowed to go out of the contract and this 24 MW Lower Baitarani SHEP can be implemented through bidding route to select the developers.
- (d) In view of the above, GRIDCO Limited prayed the Commission to approve the said PPA by considering their views which are in line with the relevant orders passed by the Commission earlier.

6. The Respondent No-1, M/s. BPPPL has submitted that,

- (a) In the Minutes of Meeting held on 08.05.2015, it was recorded that on reconciliation, out of 21 issues most of the issues were mutually agreed upon except 9 issues, on which the Commission will take a view. But the mutual settlement between the parties needs to be vetted by the Commission to prevent any future dispute. However, such mutual agreement is subject to the amendment based on the judgment of the Hon'ble ATE, New Delhi, as an Appeal No. 109 of 2015 has been filed by the Respondent no-1 against the orders of the Commission passed in Case No. 80/2013 and 47/2014.
- (b) The 9 nos. of clauses in the PPA out of 21 nos., which could not be mutually settled in the said meeting held on 08.05.2015, should be modified/amended as proposed by M/s. BPPPL.

7. The Respondent No-4, M/s. CESU has submitted that the terms and conditions of PPA as well as the tariff for electricity supplied from the SHEP of M/s. BPPPL to GRIDCO Limited shall be governed by the Commission's order dated 15.01.2014 passed in Case No. 80/2013. But the Respondent No. 1 has challenged this order

before the Hon'ble ATE in Appeal No. 109/2015, wherein the Commission is impleaded as Respondent No. 1.

8. The Commission, taking into consideration the oral as well the written submissions made by the parties, has observed that in the present case the PPA has already been signed by both the SHEP developer M/s. BPPPL and the purchaser GRIDCO Limited. However, the generator M/s. BPPPL has asked for amendment/modification in certain clauses of the said PPA. As per rule, Power Purchase Agreement in this case, is the agreement between the buyer (GRIDCO) and seller (M/s. BPPPL) of energy and it is to be approved by the Commission under Section 62 and 86 of the Electricity Act, 2003. The Commission has to look whether such agreement is within the regulatory framework or not and at the same time the interest of the state consumers is also to be protected while implementing mandatory provisions of 86(i) (e) of Electricity Act, 2003. Herein afterwards we analyse the nine disputed issues of the PPA which remained unresolved between parties keeping in view the provisions under Section 86 (1) (e) of the Electricity Act, 2003.

Unresolved Issues in the PPA

- (a) **Clause: 1.0(b)(46)**

Term of the Agreement – *Shall mean 35 years from the date of Commercial Operation Date (COD) but not later than the operation period.*

AND

- (b) **Clause: 16.0**

EFFECTIVE DATE AND DURATION OF AGREEMENT: *The agreement shall come into force from the date of signing of the Agreement for all purposes and intents and shall remain operative initially up to completion of thirty five (35) years from the Date of commercial Operation of last unit of the Station and may be extended beyond the same on mutually agreed terms and conditions but no later than the operation period.*

The contention of M/s. BPPPL is that since the tariff period for SHEPs is 25 years as fixed by the Commission, the term of PPA should be for 25 years. After 25 years it may be extended further on mutually agreed terms and conditions.

The contention of GRIDCO Limited is that the Commission has fixed the life period of the SHEPs as 35 years. It may not be fair that initially GRIDCO Limited will purchase power at higher rate on account of loan capital and interest thereon and M/s. BPPPL shall sell power to others in later years when the generation tariff will be less. Hence, the terms of PPA should be for 35 years as executed for other small and large hydro projects. Beyond 35 years, it may be extended further in mutually agreed terms and conditions till the plant is in operation.

In view of our observation in Para 21 of the order dated 15.01.2014 passed in Case No. 80/2013 we direct that the present PPA should have a tenure of 25 years from the date of commercial operation of last unit of the station which is extendable for further period in agreement of parties in PPA with due approval of the Commission.

(c) **Clause: 5.4**

Load Dispatch Centre Charges – *All SLDC charges shall be borne by BPPPL as per applicable OERC Regulations.*

The contention of M/s. BPPPL is that they shall pay the all charges to SLDC. But the same should be reimbursed from GRIDCO Limited as is being done in case of OHPC stations.

The contention of GRIDCO Limited is that in Intra-State ABT regime scheduling and despatch is the matter between the SLDC and the generator. Hence SLDC charges should be borne by M/s. BPPPL.

Considering the above views of both the parties, we find that while fixing generic tariff in Case No. 80/2013 the Commission had not factored in the SLDC charges in it. Therefore, we direct that PPA be modified stating that SLDC charges which are paid directly to SLDC by M/s. BPPPL shall be reimbursed by GRIDCO in line with practice adopted by OHPC.

(d) **Clause: 7.1.2**

Billing – *BPPPL shall present the monthly bill after the end of each calendar month for energy supplied to GRIDCO from the Small Hydro Station as per the Energy Account of the concern month issued by SLDC along with reasonable details and supporting documents.*

The contention of M/s. BPPPL is that it shall present the monthly bills based on the Joint Meter Reading (JMR) taken on or after first day of the month and not based on the energy accounts issued by the SLDC, because SLDC takes 5 to 7 days to prepare the energy account.

The contention of GRIDCO Limited is that the BPPPL shall present the monthly bill at the end of the month as per the energy account of the concerned month issued by SLDC along with reasonable details and supporting documents. In Intra-State ABT scenario JMR is no more valid. All the state generators are raising their bills on the basis of energy accounting statement issued by EBC/SLDC. In case the bill is prepared based on the JMR, it may be revised later on the basis of energy accounting data.

Taking into consideration, contention of both the sides, we find that the energy accounting statement issued by EBC/SLDC provides correct assessment energy transactions. Therefore, we feel that it is appropriate to prepare the bills on the basis of EBC data. The same shall be submitted on or after 5th day of the succeeding month by M/s. BPPPL. In case EBC data is not available within 5th of succeeding month then M/s. BPPPL is at liberty to raise the bill on the basis of Joint Meter Reading. We direct to incorporate the same in the PPA.

(e) **Clause: 7.3**

***REBATE AND LATE PAYMENT SURCHARGE** - Two percent (2%) rebate shall be allowed on payment of bills within 7 (seven) business days of GRIDCO excluding the date of presentation of the bills. If payments are made beyond 7 business days of GRIDCO but within a period of one month from the date of presentation of bill, a rebate of One percent (1%) shall be allowed.*

A surcharge calculated at the rate of one point two five percent (1.25%) per month on the amount of the bill remaining unpaid shall be payable for the actual period of delay beyond sixty (60) days from the date of presentation of bill.

The rate/percentage of rebate and late payment surcharge shall be in line with the OERC guideline as amended from time to time.

The contention of M/s. BPPPL is that the rebate and the late payment surcharge shall be as per the OERC order dated 15.01.2014 in Case No. 80/2013 whereas GRIDCO

submits that 2% rebate on payment of bills may be allowed, if paid within seven working days of the presentation of the bill excluding the date of presentation.

Since the Commission has already decided the matter in Case No. 80/2013 we direct that payment through LC or by cash transfer within 2 working days a rebate of 2% shall be allowed. Where payment is made other than through LC within a period of one month of presentation of the bill, a rebate of 1% shall be allowed. If the payment is delayed beyond a period of 60 days from the date of billing, a late payment surcharge @ 1.25% per month shall be levied by the generating company.

(f) **Clause: 7.4**

THIRD PARTY SALE ON ACCOUNT OF DEFAULT IN PAYMENT - In the event direct payment of the dues is not made by GRIDCO, resulting an amount equivalent to the bills of two months (two months of average of the previous six months) remains outstanding for a period exceeding 60 days, then BPPPL shall restrict the right offered to GRIDCO for the capacity and dispatch output of the power station wholly or partially as the case may be and shall be at liberty to undertake third party sale of its power either in full or in part with due approval of Govt. of Odisha and OERC. GRIDCO shall have no objection for such third party sale.

In the case of third party sale, extra revenue earned, if any over and above the revenue that could have been earned by sale of power to GRIDCO will be adjusted against outstanding dues of GRIDCO. Resumption of supply to GRIDCO is subject to the decision of Govt. of Odisha/OERC.

M/s. BPPPL contends that the above clause should be substituted by “*Subject to the approval of the State Govt. as well as OERC, the company will have the option for 3rd party sale, in case LC is not replenished, replaced or renewed within 60 days of its expiry*” and does not agree with the provision of adjusting extra revenue earned from third party sale with the outstanding dues of GRIDCO.

The contention of GRIDCO Limited is that since the generator has availed facilities from the State Govt. to establish the generating station inside the state, the extra revenue earned by the generator on account of 3rd party sale should be utilized for benefit of the state consumers. Therefore the provisions of this clause should not be deleted.

The Commission finds it appropriate to continue with the existing provision except adjustment of extra revenue from third party sale against the outstanding dues of GRIDCO. The extra revenue earned, if any, shall be adjusted against DPS dues payable by GRIDCO. Further in case of 3rd party sale, the power supply to GRIDCO Limited shall be immediately resumed after settlement of the power purchase dues by GRIDCO Limited. Accordingly, the PPA should be modified.

(g) **Clause: 9.0**

DELAYED COMMISSIONING

- (i) *In the event that the actual COD of the Project occurs after the scheduled COD of the Project as per the Implementation Agreement executed, such day on which the Project is commissioned shall be taken as COD of the Project.*
- (ii) *The Project will be implemented in 36 months from the date of signing of the Implementation Agreement except any delay under Force Majeure clause.*
- (iii) *In case of delay in commissioning, the Company shall be liable to pay to GRIDCO for the less energy which could not be generated or exported to GRIDCO due to delayed commissioning. This shall be compensated at the rate of the actual market price of the non-Solar RECs during that period. The amount is to be later adjusted from the energy invoices raised by the Company after the CoD of the project spread over the PPA period with applicable delay payment surcharge.*

M/s. BPPPL contends that any delay in execution of the PPA results in delay in achieving financial closure, which shall delay the Commissioning of the project. Therefore, the implementation of the project be specified as 36 months from the date of achieving the financial closure. It further contends that the company loses on account of delay on CoD in terms of payment of interest and loan instalment. Therefore, penalty for delay in CoD due to reasons other than force majeure condition should not be there.

The contention of the GRIDCO Limited is that scheduled COD of the project is considered as per the implementation agreement already executed with EIC (Elec.). This Clause will help in getting a closed end PPA and the developers will be involved

seriously in implementation of the projects. Further, this penal Clause will be a part of every RE PPA as already done for solar projects implemented through State Bidding Process. Also this clause has been included as per observation of AG Audit.

We find that this project is being developed under the MoU signed with Govt. of Odisha. Implementation Agreement has also been signed by the developer in advance which normally follows signing of the PPA. Thus reckoning the completion period of 36 months from the date of signing of IA would leave inadequate period for construction of a hydel project which involves substantial amount of civil works apart from slow pace of work during monsoon periods. On the other hand lack of serious efforts by developer would also result in delay in financial closure of the project and its cascading effect.

Considering all these, the Commission is of the view that Clause (i) on delayed commissioning from the date of signing PPA by both Parties should remain in the PPA and the Clause (ii) & (iii) should be deleted. The project should be commissioned within 36 months of signing the PPA. In case of delayed commissioning which is attributable to the developer, except force majeure the interest during construction shall not be capitalised and shall be borne by the developer. The Commission further directs that if financial closure does not take place within three months of signing of PPA or such extended period not over six months as agreed between parties in line with this order the PPA shall stand cancelled. M/s. BPPPL shall submit an anticipated milestones till COD to be signed by both parties with PERT chart for completion during the stated period. The force majeure clauses shall be well defined in the PPA.

(h) **Clause: 10.1**

SETTLEMENT OF DISPUTES:

In the event a monthly bill/supplementary bill presented by BPPPL is disputed by GRIDCO for any reason, the GRIDCO shall without prejudice to its dispute against that bill, pay 75% of the bill so disputed upon furnishing a Note of Dispute on that bills along with the following particulars to Baitarani Power Project Pvt. Ltd.

- (i) *Item disputed, with full details / data and reasons of dispute.*
- (ii) *Amount disputed against each item.*

(iii) *Upon such payment of 75% of the monthly bills along with the Note of Dispute, it shall be deemed to have been paid in full for the purpose of Clause 7.3 hereof.*

Baitarani Power Project Pvt. Ltd. & GRIDCO shall endeavour to resolve the above dispute(s) as soon as possible.

M/s. BPPPL does not agree to pay rebate on payment of 75% of the disputed monthly bill and wants Clause 10.1 (iii) be deleted. On the contrary GRIDCO wants that rebate should be paid on the payment of 75% of the disputed bill within stipulated time.

We find that it will be appropriate here to follow the line of OHPC with whom GRIDCO is already having a PPA. Accordingly, the disputed Clause No. 10.1 (iii) of the PPA between M/s. BPPPL and GRIDCO on settlement of disputed bills should be modified as given below:

“iii) Upon such payment of 90% of the monthly bills along with the Note of Dispute, it shall be deemed to have been paid in full for the purpose of Clause 7.3 hereof.”

(i) **New Clause suggested by M/s. BPPPL**

Deemed Generation- The present PPA does not provide for payment towards “Deemed Generation”. It is provided in para 27 of the OERC Order dated 15.01.2014 in Case No. 80/2013 that the Small Hydro Projects shall be treated as “Must Run” power plants and are not subject to “merit order dispatch principles”. However, this order provides that the RE projects of capacity 5 MW and above shall be subject to scheduling procedure as specified in the OGC/IEGC. Therefore, there might be reduction in generation due to direction of the SLDC and failure of grid. Accordingly, a deemed generation clause may be incorporated in the PPA.

The contention of the GRIDCO Limited is that the SHEPs are being paid at preferential tariff for total generation. This provision has not been incorporated in any other PPAs with generators. Hence any payment towards deemed generation should not be allowed.

We find it is appropriate if generator come to the Commission on this matter when situation so warrants after completion and operation of the power plant with adequate justification of events. The PPA is to operate within the existing

Rules and Regulations as amended from time to time. Both the Parties are to abide by the same. It is premature to comment on this subject at present and need not be incorporated in the present PPA.

9. During the pendency of the present proceeding before the Commission we find that M/s. BPPPL has preferred an appeal before Hon'ble APTEL in Appeal No. 109/2015 against the order of the Commission passed in Case No. 47/2014 in which the prayer of the M/s. BPPPL to review the order of the Commission passed in Case No. 80/2013 had not been accepted. The said order of the Commission deals with generic tariff of RE projects for control period 2013-14 to 2017-18. However, Hon'ble APTEL has not stayed the order of the Commission. Therefore, the final outcome of that proceeding which is pending before Hon'ble APTEL on the issues of project specific tariff, cost of interconnection and metering arrangement etc. shall be binding on the both the parties.
10. Accordingly, we direct both the parties to modify the PPA as per our observations in this order and also incorporate the issues mutually agreed upon in the meeting held on 08.05.2015 in the PPA. The revised PPA should be submitted for approval of the Commission within one month of this order.
11. With the above observations and directions, the case is disposed of.

Sd/-
(A. K. Das)
Member

Sd/-
(S. P. Swain)
Member

Sd/-
(S. P. Nanda)
Chairperson