

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

**Present: Shri Gajendra Mohapatra, Officiating Chairperson
 Shri S. K. Ray Mohapatra, Member**

**Reference: Remand Order dated 07.02.2024 passed by the Hon'ble Appellate
 Tribunal for Electricity in Appeal No.297 of 2009.**

Case No. 01/2017

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

**In the matter of: An application under Section 86 of the Electricity Act, 2003 read
 with Regulation Section 21 of the OER Act, 1995 and other enabling
 provisions seeking approval of the Power Purchase Agreement
 dated 05.01.2011 and the Supplementary Agreement dated
 23.07.2013 executed between the petitioner-GRIDCO Ltd. and M/s.
 Jindal India Thermal Power Ltd. for procurement of State share
 power by GRIDCO Ltd. as the State designated agency.**

Case No. 64/2017

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

**In the matter of: An application u/S. 62 & 86 (1) (b) & 86 (1) (f) of the Electricity Act,
 2003 seeking direction for amendment of the Power Purchase
 Agreement dated 05.01.2011 and Supplementary Power Purchase
 Agreement dated 23.07.2013 executed between GRIDCO Ltd. and
 M/s. Jindal India Thermal Power Ltd.**

For Petitioner: Ms. Susmita Mohanty, DGM (Electrical) along with Shri Bijay Kumar
 Das, Sr.GM (PP) on behalf of GRIDCO Ltd.-Petitioner in Case
 No.01/2017 and Shri Gopal Jain, Sr. Learned Counsel, Shri Matrugupta
 Mishra, Learned Advocate, Shri Sanjay Mital, Learned Advocate, Shri
 Vikrant Kain, Learned Advocate, Ms. Ananya Mishra, Learned Advocate,
 Ms. Nipun Dhawe, Learned Advocate along with Ms. Suvarna Kashyap,
 Learned Advocate on behalf of M/s. JITPL- Petitioner in Case No. 64 of
 2017.

For Respondent: Shri Gopal Jain, Sr. Learned Counsel, Shri Matrugupta Mishra, Learned
 Advocate, Shri Sanjay Mital, Learned Advocate, Shri Vikrant Kain,
 Learned Advocate, Ms. Ananya Mishra, Learned Advocate, Ms. Nipun

Dhave, Learned Advocate along with Ms. Suvarna Kashyap, Learned Advocate on behalf of M/s. JITPL- Respondent in Case No.01 of 2017 and Ms. Susmita Mohanty, DGM (Electrical) along with Shri Bijay Kumar Das, Sr.GM (PP) on behalf of GRIDCO-Respondent in Case No.64 of 2017.

None appears on behalf of the DoE, GoO-Respondent in both the cases.

ORDER

Date of hearing: 08.04.2024

Date of order:29.05.2024

The instant proceedings arise out of the Remand Order dated 19.03.2024 passed by the Hon'ble Appellate Tribunal for Electricity (Appellate Jurisdiction) in Appeal No.297 of 2019 viz. M/s. Jindal India Thermal Power Limited (Appellant)-Versus- the Odisha Electricity Regulatory Commission and Others (Respondents). The certified copy of the said order was issued by the Registry of the Hon'ble Appellate Tribunal on 14.02.2024 and received by the Commission on 19.02.2024.

2. The Petitioner M/s. GRIDCO Ltd. had filed a petition in Case No.01 of 2017 before this Commission under Section 86 of the Electricity Act, 2003 read with Regulation 21 of the Orissa Electricity Reform Act, 1995 seeking approval of the Power Purchase Agreement (PPA) dated 05.01.2011 and the Supplementary Agreement dated 23.07.2013 executed between GRIDCO Ltd. and M/s. Jindal India Thermal Power Ltd. for procurement of State share of power by the GRIDCO Ltd. as the State Designated Agency.
3. M/s. Jindal India Thermal Power Ltd. had also filed another petition in Case No.64 of 2017 before the Commission under Section 62 and Section 86 (1) (b) read with 86 (1) (f) of the Electricity Act, 2003 seeking a direction for amendment of the Power Purchase Agreement (PPA) dated 05.01.2011 and Supplementary Agreement dated 23.07.2013 executed between GRIDCO Ltd. and M/s. Jindal India Thermal Power Ltd.
4. The Commission vide its common Order dated 04.06.2019 disposed of both the aforesaid cases with its decisions and directions pertaining to the following issues which were not settled by the parties amicably.
 - i. Approval of the PPA dated 05.01.2011 & Supplementary PPA dated 23.07.2013 by OERC.
 - ii. Incorporation of a compensation clause to address the situations when M/s. JITPL fails to supply the State entitlement of power at any point of time to GRIDCO while selling power outside (through bi-lateral trading/power exchange).

- iii. Incorporation of a clause on usage of linkage coal only for supply of State entitlement of power to GRIDCO as per FSA and PPA. Accordingly, ECR shall have to be derived based on GCV and price of linkage coal.
- iv. Modification of Clause 7.2 of the PPA dated 05.01.2011 regarding rebate.
- v. Incorporation of a clause on review of the PPA in every 5(five) years.
- vi. Reimbursement of the transmission charges and losses to the extent borne by M/s. JITPL.
- vii. To allow other fuel charges / variable charges as may be applicable from time to time.

Be it mentioned here that although the above cases were heard by the Commission comprising three Members including the Chairperson, but by the time the order could be prepared and issued on 04.06.2019, one of the Members of the Commission had retired and the order was signed by two Members of the Commission including the Chairperson.

- 5. Being aggrieved by the above Order dated 04.06.2019 of the Commission, M/s. Jindal India Thermal Power Ltd. i.e. the Petitioner in Case No.64 of 2017 had challenged the Order dated 24.04.2018 of this Commission before the Hon'ble Appellate Tribunal for Electricity (in short "APTEL") by Appeal No.297 of 2019 as referred to above. The Hon'ble APTEL by its judgment dated 07.02.2024 has remanded the matter to the Commission for rehearing. The relevant extract of the judgment dated 07.02.2024 is as under:

"23. Hence, we find the impugned order of the Commission unsustainable, legally invalid and non-est.

24. We clarify and reiterate the legal principle that where one of the Members of the Commission who hear a matter, demits office by reason of superannuation, death etc. before passing of the final order, it is not permissible for the remaining Member/Members of the Commission to sign the order. In such a situation, the matter shall be heard de novo and final order be passed / signed accordingly.

25. The appeal is hereby allowed. The matter is remanded to the Commission i.e. 1st Respondent, with the direction to hear and decide the same de novo.

26. The Registry of this Tribunal is directed to transmit a copy of this judgment to the Electricity Regulatory Commissions in all the States/UTs for their information and guidance."

- 6. In compliance with the said remand order dated 07.02.2024 of the Hon'ble Tribunal, the Commission, vide the order passed on 21.02.2024, directed for issuance of notice to the

parties concerned for rehearing of both the cases, such as Case No.01 of 2017 and Case No.64 of 2017 denovo, and accordingly, both the cases have been heard by the Commission.

7. The factual backdrop is that a Memorandum of Understanding (MoU) was signed between Government of Odisha and M/s. Jindal Photo Limited (M/s. JPL) on 26.09.2006 for setting up a thermal power plant having capacity of 1000 MW. Accordingly, GRIDCO had signed a PPA with M/s. JPL on 28.09.2006. Subsequently, through supplemental MoUs on 14.05.2008, 17.10.2008, 13.01.2010 & 30.12.2010 between Govt. of Odisha and M/s. JPL, the following changes were effected in the original MoU:
 - (a) The change of name from M/s. Jindal Photo Limited (M/s. JPL) to M/s. Jindal India Thermal Power Limited (M/s. JITPL).
 - (b) The capacity of the plant was enhanced from 1000 MW to 1800 MW.
 - (c) Incorporation of a new policy guideline of the State Government keeping provision of employment of oustees of the project and local people of the State.
 - (d) The validity of the MoU was extended for one year beyond its expiry date 26.09.2010.
8. In view of the change effected as above, the principal Power Purchase Agreement (PPA) dated 28.09.2006 was restated and a fresh PPA was executed between the M/s. JITPL and GRIDCO Ltd. on 05.01.2011, with the agreed terms inter alia, as follows:

“2.2 Entitlement of power for GRIDCO:

2.2.1 GRIDCO shall at all times have the right on behalf of Government of Orissa to receive from the Station 14 percent of the power sent out from the thermal power station(s) if coal block (s) is allocated within the State of Orissa. Otherwise, GRIDCO shall receive 12 percent of the power sent out from the thermal power station(s). M/s. JITPL shall duly incorporate a term in the Agreements with other beneficiaries for sale of electricity or capacity pertaining to the Station, confirming the above rights of GRIDCO.

2.2.2 GRIDCO will be entitled to further receive on behalf of Government of Orissa the entire infirm power sent out from the Thermal Generating Plant (s) at variable cost.

2.3 It is understood and agreed by and between the parties that M/s. JITPL shall meet all the obligations laid down in the Principal MoU dated 26.09.2006 as well as subsequent MoUs signed between M/s. JITPL and Government of Orissa.”

x x x x x x x x

4.0 Transmission / Wheeling of Power

State share of power shall be made available to GRIDCO by M/s. JITPL at the Bus bar of OPTCL one nearest EHV Sub-station at required voltage level. OPTCL as STU with the help of GoO will assist M/s. JITPL in getting clearance/approvals within the State

jurisdiction. However, all the responsibility for obtaining the clearances/approvals shall remain with M/s. JITPL.

M/s. JITPL would need to bear the cost of

- (i) Dedicated transmission line from their generating plant to the designated Grid Sub-station of the STU at available voltage level.*
- (ii) Interfacing at both the ends including works at the Grid Sub-station, cost of Bays etc.*
- (iii) Replacement/up-gradation/augmentation of existing equipment / transmission system(s) if any of STU.*

The above works are to be carried out by M/s. JITPL as per the specification and requirements of the Licensee/Utilities. After commissioning of the project, M/s. JITPL shall transfer these lines and infrastructures at OPTCL Sub-station end to OPTCL as transfer of assets for the maintenance by the STU. On completion of the above works the maintenance of the transmission line will be undertaken by the Licensee/Utility at charges to be decided by the Licensee/Utility and paid by M/s. JITPL. High Tension lines and the system at OPTCL Grid Sub-station end shall be maintained by power utility as Licensee.

If M/s. JITPL desires to evacuate further power beyond State share they may strengthen the transmission system and also to bear the State Transmission Charges as applicable.

The detail metering arrangement for both Main and Check Meters shall be installed on the outgoing feeders of the generating station of M/s. JITPL in co-ordination with OPTCL, SLDC and GRIDCO.

x x x x x x x x

6.0 Charges

6.1 The charges payable by GRIDCO to the M/s. JITPL shall be restricted to variable cost in regard to 14%/12% capacity entitlement to GRIDCO and also for the infirm power.

6.2 The variable cost shall cover fuel cost and shall be worked out on the basis of ex-bus energy sent out from the generating stations proportionate to the energy delivered to GRIDCO against 14%/12% entitlement of GRIDCO.

6.3 The methodology for determining the fuel cost i.e. variable cost shall be as per the applicable norms, guidelines and directions of the Appropriate Commission.

6.4 In case of any dispute or difference in regard to the variable cost payable by GRIDCO to the M/s. JITPL, the same shall be referred to adjudication of the Orissa Electricity Regulatory Commission in the terms of Clause 10 of this agreement read with the provisions of the Electricity Act, 2003.”

9. Subsequently, a supplementary PPA was executed between M/s. JITPL and GRIDCO on 23.07.2013 in which the parties agreed to incorporate a new paragraph in the PPA dated 05.01.2011 without any changes in all other terms and conditions. The said incorporation in the supplementary PPA is stated hereunder:

“1.0 A new paragraph, as mentioned below, shall form a part of and be added at the end of Clause 4.0 of the PPA dated 05.01.2011.

As an interim arrangement till establishment of connectivity with State Transmission Utility (STU), M/s. JITPL shall supply the State's share of power using Central Transmission Utility (CTU) transmission system. For such delivery of power to GRIDCO, M/s. JITPL shall bear the necessary Interstate transmission charges, including transmission losses and any other charges as applicable.

2.0 Approval of the Agreement

This Supplementary PPA is subject to the approval of OERC, with or without modification."

10. In Case No.01 of 2017, GRIDCO in its earlier submission, had sought approval of this Commission in respect of both the PPA dated 05.01.2011 and the Supplementary PPA dated 23.07.2013 with the following submissions:

- a) The Unit-I & II of M/s. JITPL have been synchronized with the grid w.e.f. 28.03.2014 and 14.12.2014 respectively, whereas their Commercial Operation Dates (COD) are 19.04.2015 and 12.02.2015 respectively. Since synchronization of the Units, M/s. JITPL is selling power outside the State and supplying state entitlement of power as per its convenience by deviating from the obligations under the PPA. GRIDCO Ltd. is procuring state share of power from M/s. JITPL at the provisional variable cost fixed by the Commission in the ARR order of GRIDCO. M/s. JITPL is supplying power to GRIDCO Ltd. through CTU system bearing the POC charges and scheduling is being carried out by ERLDC. As per the meeting held on 13.07.2016, M/s. JITPL had agreed to supply the backlog quantum of State entitlement of power during November, 2016 to June, 2017 in addition to the existing entitlement. But M/s. JITPL has failed to honour its commitment. Therefore, GRIDCO Ltd. has proposed for incorporation of a compensation clause in the PPA for short supply in the State entitlement of power as given below:

"In case M/s. JITPL fails to supply entitlement of power as per the PPA provision to GRIDCO at any point of time, then the cost of under injection/shortfall quantum of power from the entitlement shall be compensated by M/s. JITPL at the rate of highest DSM Rate during such period/ two times of actual ECR applicable for M/s. JITPL for such period, whichever is higher."

- b) M/s. JITPL shall have to consider the GCV and price of linkage coal only while deriving the ECR for supply of State share of power to GRIDCO Ltd. and submit the details of linkage coal and oil data along with the monthly energy bills and auditor certified statement at the end of the financial year along with any modification in fuel supply agreement.
- c) The State entitlement of power is being supplied through CTU and the Scheduling & Energy Accounting are being carried out by ERLDC. Basing on it, SLDC

prepares the State Energy Accounts (SEA) for the bilateral transaction. Accordingly, GRIDCO verifies the monthly energy bills of M/s. JITPL considering the SEA of SLDC which is available towards the end of the second week of every month. Therefore, the Rebate Clause 7.2, as agreed in the PPA dated 05.01.2011 may be modified as follows:

“Two percent rebate shall be allowed on payment of bills through RTGS directly from GRIDCO on the amount paid within seven working days of receipt of the monthly energy bills by GRIDCO. If the payment is made after 7 working days but within 30 days of receipt of the monthly energy bills then 1% rebate shall be allowed.”

- d) The PPA dated 05.01.2011 is a long term PPA valid for 25 years. However, in view of ever-changing regulations, rules and policy in power sector, a suitable clause regarding review of the PPA in every 5 years may be allowed for incorporation.
11. Now, in its present filing, GRIDCO has submitted the following:
- a) The State Thermal Policy dated 08.08.2008 provides for supply of 14%/12% of Energy Sent Out (ESO) at variable cost (i.e. fuel cost only) unlike “free of cost” based on allocation/non-allocation of coal blocks within the State. Based on Clause 4(B) of State Thermal Policy dated 08.08.2008, modification of provisions in MOU and PPA of 2006 was done by M/s. JITPL on mutual consent. Accordingly, M/s. JITPL executed the Supplementary MOU dated 17.10.2008 and Revised PPA dated 05.01.2011. M/s. JITPL always had the option to continue with the MOU and PPA signed in 2006, as done by the IPP of M/s. GKEL in view of all kinds of options provided at Clause 3 of the said policy under “Existing MOU of Orissa”, “Proposed MOU with Future IPPs” and “Proposed MoU with existing IPPs”.
 - b) Having availed all facilities, resources, clearances under the MOU and voluntarily opting to supply 12/14% of ESO at variable cost as per the State Thermal Policy 2008 (as per PPA of 2006, 25% at two-part tariff was agreed to be supplied), M/s. JITPL consistently violated the PPA conditions and subsequent Minutes signed in 2016, for its own advantage at the cost of interest of State consumers. The State was deprived from 12% of ESO i.e. cheap thermal power whereas power was sold outside the State.
 - c) The same MOU and PPA, based on which M/s. JITPL could establish its thermal power plant in the State and commence its commercial operation, has now been allegedly challenged by M/s. JITPL before Hon’ble Orissa High Court in W.P. (C) No.18150 of 2018, as unlawful, contrary to regulation and infructuous. However, the

issue of payment of compensation for non/short supply of power is not matter of adjudication in WPC No.18150 of 2018.

d) M/s. JITPL, vide its affidavit dated 23.07.2013, had made the following undertakings:

(i) That M/s. JITPL shall deliver the State's share of power at the designated substation of OPTCL.

(ii) That as an interim arrangement, till establishment of connectivity with the STU, M/s. JITPL shall supply the State share of power using CTU transmission system. For such delivery of power, M/s. JITPL shall bear the necessary interstate transmission charges, including transmission losses and any other charges applicable.

(iii) Based on the aforesaid affidavit dated 23.07.2013, a Supplementary PPA was executed between M/s. JITPL and GRIDCO on 23.07.2013 to first application of GRIDCO vide affidavit dated 03.01.2017 admitted as Case No. 1 of 2017.

e) The details of Unit synchronization and COD declaration of M/s. JITPL are as follows:

Unit No.	Date of Synchronization	Date of COD
#1	28 th March, 2014	19 th April, 2015
#2	14 th December, 2014	12 th February, 2015

However, as per the Minutes of Meeting taken up on 4th June, 2015 by the Member (Planning), CEA, the COD of Unit#1 was considered as 6th June, 2014 date for the purpose of coal supply (only) as per the Fuel Supply Agreement.

f) M/s. JITPL is supplying State Entitlement of Power through CTU (dedicated transmission line i.e. 400 kV Double Circuit connected to 765 kV/400 kV Angul (Power Grid)) by bearing all the POC charges and losses and scheduling is being carried out by ERLDC.

g) During FY 2015-16 and FY 2016-17, M/s. JITPL sold power outside the State without proper declaration of COD as per the Regulation in force. Further, it was supplying State entitlement of power as per its own convenience and will by deferring from the obligation under PPA while continuing to generate and sale power outside on Round The Clock (RTC) basis. Instead of giving priority to supply of power to GRIDCO towards State Entitlement, M/s. JITPL continued to sale power outside the State unabatedly. In spite of signing the Minutes of Meeting held on 13th July, 2016, wherein M/s. JITPL agreed not to reduce the supply of power to the State, short supply of power commenced and continued from Sept, 2018

onwards. The supply of power was only 10 MW vis-à-vis the entitlement of 50 MW and above, based on 12% of energy sent out from the power plant.

- h) At the time of signing of PPA with M/s. JITPL in 2011, it was never conceived/apprehended by GRIDCO/State Government that the IPP would resort to breach of PPA conditions.
- i) In view of the above facts and trend of supply of power followed by M/s. JITPL from 2014 to 2017, the GRIDCO felt that it is essential to have a compensation clause for short/ non-supply in State entitlement of power to GRIDCO. Clause 2 of the PPA dated 05.01.2011 provides for approval of PPA with or without modification by the Commission. Accordingly, the Petitioner GRIDCO filed application in January, 2017 which inter alia included proposal for incorporation of suitable compensation clause in the PPA so as to address situations like default in supply of State Entitlement of Power to GRIDCO by M/s. JITPL while continuing to sale power outside (Third Party).
- j) The following prayers were made by GRIDCO in its first application filed in January, 2017 for approval of PPA with modifications before the Commission in Case No.1 of 2017:
 - (i) To approve the Power Purchase Agreement dated 05.01.2011 & Supplementary Power Purchase Agreement dated 23.07.2013 executed between GRIDCO and M/s. JITPL along with the modifications as prayed by GRIDCO.
 - (ii) To give necessary direction regarding a suitable compensation clause to be incorporated in the Power Purchase Agreement to address situations when M/s. JITPL fails to supply the State Entitlement of Power at any point of time to GRIDCO, while selling power outside (through bilateral trading / power exchanges).
 - (iii) To allow to incorporate a clause on usage of linkage coal only for supply of State entitlement of power to GRIDCO as per FSA and PPA. Accordingly, ECR shall have to be derived based on GCV and price of linkage coal.
 - (iv) To consider and direct for suitable modification of Clause 7.2 of the PPA dated 05.01.2011 regarding rebate.
 - (v) To allow to incorporate a clause on review of the PPA in every 5(five) years.
- k) In Case No.64 of 2017 (filed by M/s. JITPL), GRIDCO, vide its affidavit dated 24.11.2017, had strongly objected to various prayers made by M/s. JITPL. M/s. JITPL violated the Clause 4.0 of the PPA dated 05.0.2011 by not constructing a dedicated transmission line from their generating plant to the designated Grid Sub-

station of the STU. Only after receipt of an undertaking from M/s. JITPL, GRIDCO executed a supplementary PPA with M/s. JITPL on 23.07.2013 by adding the following at the end of Clause 4.0 of the PPA dated 05.01.2011.

“1.0 As an interim arrangement till establishment of connectivity with State Transmission Utility (STU), M/s. JITPL shall supply the State’s share of power using Central Transmission Utility (CTU) transmission system. For such delivery of power to GRIDCO, M/s. JITPL shall bear the necessary interstate transmission charges, including transmission losses and any other charges as applicable.”

- l) M/s. JITPL agreed and signed the supplementary PPA dated 23.07.2013 in its full consciousness and with consent in order to get the connectivity at CTU and declared COD of its thermal units in absence of dedicated transmission lines in place as per the provisions under the revised PPA dated 05.11.2011. Till date, M/s. JITPL has not constructed the dedicated transmission line from their generating plant to the designated Grid Sub-station of the STU. Instead of constructing the dedicated line to STU and evacuating the State’s share of power through STU, M/s. JITPL is presently claiming that the it is entitled to reimburse from GRIDCO to the extent of transmission charges borne by it in evacuating the contractual quantum to GRIDCO through CTU. Such claims/prayers are entirely in contravention of the provisions of the PPA and statutory Regulation in force and therefore denied.
- m) M/s. JITPL commenced power supply from 6th June, 2014 and from day one, there was dispute regarding, COD of Unit#2, which was resolved in April, 2015. Unconditional support was extended to M/s. JITPL by GRIDCO for connectivity and COD of their Units as and when required so as to avoid any kind of national wastage of power when the thermal units are ready to generate and supply.
- n) Having availed all facilities, resources, clearances under the MOU signed from time to time and voluntarily opting to supply 12/14% of ESO at variable cost as per MOU dated 17.10.2008 signed just after the State Thermal Policy 2008 followed by Revised PPA dated 05.01.2011 with GRIDCO (as per Principal PPA of 2006, 25% at two-part tariff was agreed to be supplied), the IPP consistently violated the conditions laid down in the Revised PPA dated 05.01.2011.
- o) The PPA was signed in 2011, power supply commenced in 2014 and there was short supply of power as per whims of the IPP-M/s. JITPL. The State was deprived of cheap thermal power whereas the IPP was unabatedly selling power outside the State.
- p) For the adverse situations /difficulties faced during 2014-2016, GRIDCO filed present case with certain modifications which inter alia include necessary direction

from the Commission compensation clause in PPA and also usage of linkage coal for supply of State share of power.

- q) As on date there is short supply of more than 4000 MU of power to the State since 2014. If the IPP adheres to the provisions of agreed contract/ subsisting PPA dated 05.01.2021 and 23.07.2013 and supplies State entitlement of power to GRIDCO consistently and without any kind of non/short supply, in such circumstances, M/s. JITPL would not have to pay any kind of compensation to GRIDCO.
- r) In various ARR orders of GRIDCO, the Commission has been consistently observing GRIDCO should take action for procurement of full entitlement of power from the IPPs established in the State. Further, the observations and direction made by the Commission in their order dated 04.06.2019 passed in Case No.1 and 64 of 2017 in the matter of approval of PPA of M/s. JITPL in respect of compensation clause for non-supply of power to GRIDCO are as follows:

*“13(ii) XXX XXX XXX **Commission’s observation:** Under the MoU and its consequent PPA M/s. JITPL is contract bound to supply 14% of power sent out from its thermal power plant at variable cost, if coal block is allocated to the IPP with the State, otherwise it will provide 12% power at variable cost. In case of default GRIDCO will purchase the required quantum of power from other sources to meet the State demand. Generally, it is expected that under merit order GRIDCO will purchase the same from power plant situated at the margin of the merit order. **The State consumer should not be burdened for the lapses of M/s. JITPL. Therefore, a compensation provision in the PPA in case of default of M/s. JITPL to supply the GRIDCO share of power should be incorporated.** The compensation should be equal to the variable cost of the Central Thermal Generating Station approved by the Commission for power purchase of GRIDCO and situated at the margin of the merit order dispatch for that year. Any other compensation mechanism such as DSM linked compensation cannot be adopted here because it is meant for grid stability and not for power purchase.*

- s) After supplying/short supplying power to GRIDCO/ State under the subsisting PPA from June, 2014 to May, 2019, M/s. JITPL cannot back down from agreed terms of the subsisting contract and such action shall be hit by the principle of promissory estoppel. The strategy of M/s. JITPL to sign an agreement without any precondition and violating the same thereafter is utterly against the true spirit of contract. As per the subsisting Supplementary PPA, till establishment of connectivity with State Transmission Utility (STU), the agreed interim arrangement provision shall continue to be operative.
- t) In IA No.4241 of 2022 in WPC No.18150 of 2018, the Hon’ble Orissa High Court passed an interim order dated 29.04.2022, directing M/s. JITPL for supply of 120 MW of power to the Petitioner-GRIDCO at the provisional rate of Rs.3.36 per Unit,

along with direction for payment of 50% of the transmission cost of the demand raised by the CTU subject to the cap of Rs.5 (five) crore payable by GRIDCO. GRIDCO have complied with all the directions mentioned in interim order dated 29.04.2022 of the Hon'ble Orissa High Court as follows:

- i. Vide letter dated 29.04.2022, requested MCL to revoke suspension on supply of Linkage Coal to M/s. JITPL with immediate effect. Accordingly, coal supply to M/s. JITPL was resumed;
 - ii. For Payment Security, established an LC for an amount of Rs.7.58 Crores (Revolving Weekly) valid upto 30.09.2022 and extended upto 30.09.2023 with an amount Rs.3.88 Crores (Revolving Weekly). Vide letter dated 31.03.2024, the said LC have been renewed for FY: 2024-25 for an amount of Rs.3.58 Crores (weekly revolving).
 - iii. Making regular payment of cost of power supplied by M/s. JITPL to GRIDCO at provisional rate of Rs.3.36/Unit;
 - iv. Have made payment of Rs.5 Crores towards Transmission Charges;
 - v. Has been intimating MCL to continue supply of Linkage Coal to M/s. JITPL as per interim orders of Hon'ble High Court Orissa till date;
- u) In complete violation of the Hon'ble Orissa High Court's interim order dated 29.04.2022 (continuing till date as per Hon'ble Court's order), M/s. JITPL is supplying 60 MW of power to GRIDCO/State i.e. totalling to 957.97 MU (Million Units) of energy to GRIDCO from 29.04.2022 to 31.03.2024 in place of 120 MW of power as directed in the interim order. Whereas, M/s. JITPL is selling substantial quantum of power, totalling to 14221.40 MU during FY 2022-23 and FY 2023-24 outside the State under Short term/ Medium term Open Access and as well as in Power Exchanges apart from sale to Bihar and Kerala under long term PPA. The summary statement of total energy sent out from the power plant, entitlement of GRIDCO, actual energy supplied to GRIDCO and shortfall in supply of power by M/s. JITPL are as shown below:

FY	State Entitlement of Power (normative) as fixed by OERC in ARR orders of GRIDCO (MU)	Total energy sent out from the Power Plant (MU)	State entitlement @ 12% of energy sent out	Actual quantum of Power supplied by M/s. JITPL	Shortfall quantum of Power
			(MU)	(MU)	(MU)
2014-15	162.05	197.40	23.69	25.24	0.14
2015-16	584.81	5871.364	704.56	317.1	387.46
2016-17	1007.89	6123.049	734.77	319.25	415.52
2017-18	503.95	3428.148	411.38	250.64	160.74
2018-19	1007.89	3929.678	471.56	261.14	210.49
2019-20	1010.57	4865.9	583.91	11.95	571.96
2020-21	1010.57	4132.02	495.8	0	668.41

2021-22	1010.57	6542.82	785.14	0	961.95
2022-23	1010.57	7375.10	885.01	458.38	426.63
2023-24	1010.57	7804.28	936.51	499.59	436.92
TOTAL	8157.39	50072.36	6008.65	2118.05	4240.08

- v) The submissions of M/s. JITPL made on 08.04.2024 citing the Hon'ble Supreme Court's judgements and provisions of the Indian Contract Act, 1872 are mere repetitions of submissions made before the Commission prior to passing of order dated 04.06.2019. The GRIDCO undoubtedly incurs commercial loss during real time power demand management in the State due to non/short supply of power by M/s. JITPL as per the entitlement under the existing PPA. Had there been consistent supply of power to the State by M/s. JITPL, such quantum of power would have been used to meet State demand and high-cost power under different subsisting contracts would have been utilised for sale in power market to reduce the revenue gaps left by the Commission in the ARR of GRIDCO. In no way M/s. JITPL would be adversely affected and unjustifiably burdened, if they maintain consistent supply/scheduling of the State entitlement of power to GRIDCO as per the PPA. Moreover, the data submitted in the above table is an undeniable proof of breach of contract by M/s. JITPL, which is required to be addressed through incorporation of suitable compensation mechanism in the PPA. The compensation mechanism shall be instrumental in curbing the violation of provision under the subsisting PPA to supply power to the State.
- w) In view of the above submissions, the Petitioner-GRIDCO has prayed that the Commission may kindly consider to prudently adjudicate the matter and pass such orders as may deem fit and proper in the interest of justice.
12. As discussed earlier, another application filed by M/s. JITPL, seeking modification of certain provisions in the PPA, had been registered as Case No. 64/2017 and was heard analogously with the petition of GRIDCO in the similar matter registered as Case No. 01/2017. The earlier submissions of M/s. JITPL are summarized hereunder:
- a) The Mandakini coal block allocated to M/s. JITPL has been cancelled by the Hon'ble Supreme Court of India. M/s. JITPL has executed a Fuel Supply Agreement (FSA) with M/s. Mahanadi Coal Field Limited (M/s. MCL) for supply of 3.193 lacs tonnes of coal towards generation of 72 MW capacity only to be supplied to GRIDCO under the PPA. The FSA has been modified on 21.09.2013 for the annual contracted quantity of 3.512 lakhs tonnes for accommodating the coal

consumption towards transmission losses and auxiliary consumption. This linkage coal for 72 MW is adequate to cater 12% power of one generating unit only. There is no further linkage coal for supply of State share of power from the second unit. However, for running of the second unit, M/s. JITPL has been procuring coal through e-auction. Cancellation of coal block by the Hon'ble Supreme Court comes under change in law event and M/s. JITPL has no reasonable control over this. Therefore, the actual cost incurred in procuring such coal through e-auction shall have to be factored in while determining the energy charges for supply of 12% power to GRIDCO from both the operating units at variable cost in compliance with the terms of PPA and supplementary PPA.

- b) M/s. JITPL has been supplying 12% of the energy sent out through CTU bearing all POC charges and losses as per the supplementary agreement dated 23.07.2013. The cost towards such transmission & other charges are variable in nature and as per the agreement, M/s. JITPL is entitled to reimburse the entire variable cost incurred by it. Further, as a matter of practice, the transmission charges are also to be borne by the procurers of power.
- c) The project originally secured coal linkage for one unit and coal block for the balance. With the secured coal supply and favourable market conditions at the time of inception of the project, M/s. JITPL had agreed for supply of 12%/14% power at variable cost and undertook the liability of transmission cost. The assumption was that through sale of 88% of power under long term, medium term and short term, the fixed cost and transmission cost will be recovered. But in the present scenario, supply of 12% power at variable cost and bearing the CTU transmission cost is not economically viable and sustainable.
- d) The Commission has the power to reopen the PPA so as to ensure recovery of the cost of electricity by the Generator in a reasonable manner. In the present case, M/s. JITPL is committed to supply 12% power at variable cost as agreed in the MoU and the PPA subject to determination of variable cost by the Appropriate Commission. But requirement of the generating company to bear the transmission charges under the POC regime on the basis of the supplemental agreement is contrary to the terms of the MoU and the original PPA. Once a generating station is connected to CTU for supply of 88% of power, then the suggestion under a supplementary agreement that transmission charges for delivery of 12% power at variable cost will be borne by the generator is contrary to the mandate of Electricity Act, 2003 and the policy issues

thereunder. No law or policy envisages supply of power only at variable cost. Hence there is a mismatch/conflict between the terms of MoU/PPA with the legislation and the statutory policies which need to be reconciled. Further, in case of central generating station which are connected to CTU and supplying power to State of Odisha, GRIDCO Ltd. is making payment of transmission charges and losses on ex-bus basis, which is an accepted regulatory practice. However, in the present case GRIDCO while receiving the power at variable cost is seeking to make a departure from such accepted regulatory practice, which constitutes an illegal discrimination.

13. The present submissions of M/s. JITPL, after remand of the matter from the Hon'ble APTEL, are as follows:

- a) This Commission, vide its order dated 26.02.2018 passed in Case No. 26 of 2014, had held that the issue of determination of tariff purely falls under the exclusive jurisdiction of the Central Electricity Regulatory Commission (CERC). The said Order was challenged by GRIDCO before the Hon'ble APTEL in Appeal No. 250 of 2018 and Hon'ble APTEL, vide its Judgement dated 10.01.2022, had dismissed the appeal. Thereafter, GRIDCO has preferred a Civil Appeal under Section 125 of the Electricity Act, 2003 against the said Judgment dated 10.01.2022 of the Hon'ble APTEL, which is pending adjudication. However, the Hon'ble APTEL, vide its Order dated 07.02.2024 in Appeal No. 297 of 2019, has declared this Commission's Order dated 04.06.2019 passed in Case No. 01 of 2017 and Case No. 64 of 2017 as *non-est* and nullity and remanded the matters for complete de-novo hearing. Accordingly, this Commission heard the parties on 08.04.2024 and granted liberty to the parties to file their written submissions. Without pre-judice to the submissions advanced by M/s. JITPL before any other Court, Tribunals and/or Commissions and its remedies available under law, it made submissions here.
- b) The subject PPA dated 05.01.2011 has been entered into without any statutory provisions by the Central Government under the provisions of Electricity Act, 2003 and Tariff Regulations made thereunder, therefore, the same is liable to be held invalid so far as this Commission approves PPA at variable cost only. No statutory arrangement / provision has been brought about by the State Government from the Central Government for the purchase/sale of electricity at variable cost only, despite clear agreement entered into in MoU dated 26.09.2006. In the absence of any such policy decision by the Central Government, the purchase of power only at variable cost becomes questionable. Since the approval of the PPA only on variable cost is

neither provided in the Electricity Act, 2003 nor under the Regulations framed thereunder, any such approval is violative of the Statutory provisions enshrined in Section 61 and 62 of the Electricity Act, 2003. It is a settled principle of law that Statutory provisions override the provisions of a contract.

- c) The approval of transmission charges to be paid by M/s. JITPL as per SPPA dated 23.07.2013 is also against the Section 61 to 63 of the Electricity Act, 2003, which provides that the supply of electricity should be conducted on commercial principles and there should be the recovery of cost of electricity in a reasonable manner. If by virtue of an order, the transmission charges beyond the bus bar of M/s. JITPL till the point of drawl of GRIDCO is to be borne by M/s. JITPL, then such cost of transmission of power shall adversely affect the entitlement of cost of supply of JITPL. Therefore, loading the cost of transmission charges on M/s. JITPL, is violative of the provisions of the Electricity Act, 2003 and the Regulations framed thereunder.
 - d) This Commission, vide its Order dated 26.2.2018, has held that the CERC has the exclusive jurisdiction for the purpose of tariff determination. Therefore, the Commission ought not to consider the submissions of GRIDCO which has any element of tariff of its part thereof, whatsoever.
14. M/s. JITPL further submits that since GRIDCO has now confined its contentions to the issue of incorporation of compensation clause and alleged non-supply of power only and has not pressed any other contentions, therefore it is not entitled to any relief and M/s. JITPL has confined its submission to that extent. M/s. JITPL has the following legal submissions:

(A) In re: Power to “Regulate” does not confer power to rewrite terms of the contract

- a) The relief(s) sought by GRIDCO for incorporation of the compensation clause under the PPA dated 05.01.2011, is contrary to the terms of the MoU dated 29.06.2006 (as amended from time to time), PPA dated 05.01.2011 as well as the provisions under the Electricity Act, 2003. The enforcement of such relief(s) would necessarily mean that this Commission in exercising its powers as regulator under the Electricity Act, 2003 is forced to usurp in toto, “party autonomy” i.e., the ability of any party to enter into an agreement of its own volition and thus to force M/s. JITPL to accept under a contract, such terms having grave commercial implications to its prejudice. The same would be contrary to very scheme of the Electricity Act, 2003 and the settled law.
- b) Since M/s. JITPL is not *consensus ad ident* on the proposed modification or incorporations and as such does not form part of the agreement, hence relief(s) sought by GRIDCO are not even maintainable before this Commission to the extent the same

seeks to modify/deviate/amend or effectively rewrite the terms of the PPA dated 05.01.2011 and SPA dated 23.07.2013.

- c) Incorporation of new clauses on usage of linkage coal only for supply of State entitlement of power to GRIDCO is also without any basis in law. This Commission ought not to entertain/consider tariff aspects (*as admitted by this Commission vide its order dated 26.2.2018 in Case No. 26 of 2014*) as no such clause exists under the PPA. As per Clause 6 of the PPA power needs to be supplied at variable cost and such cost shall be worked out on the basis of ex-bus energy sent out from the plant. PPA does not stipulate use of linkage coal only for supply to GRIDCO. In absence of any such mandate under the PPA, GRIDCO cannot ask for incorporation of this mandate as a stipulation under the PPA for supply of power. Further allocation of linkage coal is beyond the control of M/s. JITPL and hence, GRIDCO cannot force M/s. JITPL for use of linkage coal as a stipulation for supply of power. The linkage coal is available to M/s. JITPL only for supply of its proportionate committal power from its Unit-1 and not for Unit-2. For the purpose of supplying power from Unit-2, M/s. JITPL is forced to rely on other sources of non-linkage routes like e-auction, import coal etc.
- d) As per the Clause 6.3 of the PPA dated 05.01.2011, the methodology for determining the fuel cost i.e., variable cost shall be as per applicable norms, guidelines and directions of the Appropriate Commission. As on date, it is an admitted position that the Central Commission is to determine tariff in terms of Section 79 read with Sections 61 and 62 of the Electricity Act, 2003. Since it is the Central Commission which has the exclusive jurisdiction to determine the tariff under the present PPA dated 05.01.2011 in terms of Clause 6.3, therefore, the issues raised herein by GRIDCO including, but not limited to incorporation of new clauses for mandatory usage of linkage coal are beyond the jurisdiction of this Commission. Since this Commission cannot, and is in fact, not determining the tariff under Section 86(1)(a) of the Electricity Act, 2003, it cannot decide the relief(s) as sought by GRIDCO.
- e) GRIDCO cannot seek from this Commission to pre-judge the tariff determination exercise or pre-empt this Commission to exercise its power to determine tariff under the Electricity Act, 2003, which is within the exclusive purview of Central Commission and as also decided by the Hon'ble APTEL in Appeal No. 250 of 2018 and even the CERC has also admitted that it has the Jurisdiction to determine the tariff.
- f) This Commission is a creature of the Electricity Act, 2003 and as such, its powers are confined to the four corners of the Statute. This Commission can only exercise such powers which are expressly provided under the Electricity Act, 2003. In this regard, M/s. JITPL placed reliance on the decisions of the Hon'ble Supreme Court in **K.S.**

Venkataraman & Co. Vrs. State of Madras, AIR 1966 SC 1089; **D. Ramakrishna Reddy Vrs. Addl. Revenue Divisional Officers**, (2000) 7 SCC 12; **Rajeev Hitendra Pathak Vrs. Achyut Kashinath**, (2011) 9 SCC 541.

- g) As per Section 86(1)(b) of the Electricity Act, 2003, this Commission has the power to “regulate” power purchase and procurement process through “agreements” such as PPA/Supplementary PPA under the instant case. The power to regulate under Section 86 and 79 of the Electricity Act, 2003 as exercised by any State/Central Commission has been interpreted by the Hon'ble Supreme Court to not include within itself the power to rewrite the terms of the Contract. This Commission can only exercise powers qua concluded contracts and not seek to act as a mediator in settling proposed terms of the power purchase agreement. In this regard, reliance is placed on the decision of **Haryana Power Purchase Centre Vrs. Sasait Power Ltd.**, (2024) 1 SCC 247, wherein it was held as under:

“102. We are not dealing with a case where the exercise of power of the Commission under Section 63 is under review. In a case where, however, the rates are approved under Section 63 and PPA is entered into, the question would undoubtedly arise as to whether there is a power which can be described in a manner of speaking to be plenary power with the Commission under Section 79? Can there be a power which can be christened as omnibus? Can the Tribunal, in other words, disregard the express words of the contract? Can it discover a new change in law which the parties have not contemplated as change in law? In short, can the Tribunal rewrite the contract and create a new bargain?”

103. We are of the view that the Tribunal cannot indeed make a new bargain for the parties. The Tribunal cannot rewrite a contract solemnly entered into. It cannot ink a new agreement. Such residuary powers to act which varies the written contract cannot be located in the power to regulate. The power cannot, at any rate, be exercise in the teeth of express provisions of the contract.”

Reference is also made to paragraphs 29 to 34 (at pages 26 to 48 in Case No. 64 of 2017) wherein reliance is placed on authorities elucidating the scope/width of the power to regulate contracts which are entered into by a generating company with a distribution licensee in terms envisaged under section 62 read with 86(1)(a) and (b) of the Act.

- h) The relief claimed by GRIDCO seeking review of PPA in every 5 (five) years is also without any basis in law inasmuch neither the PPA/Supplementary PPA provides for such a review, nor this Commission is empowered to “review” periodically, or otherwise, under the four comers of the Act, once a regulatory approval is granted under Section 86(1)(b) of the Electricity Act, 2003. Without prejudice to the submission that this Commission does not have the power to rewrite the terms of the

PPA/Supplementary PPA in guise of “regulating” agreements, even then the new clauses as sought need not be inserted for providing compensation in the form of liquidated damages or otherwise inasmuch as the parties to the contract are not denied of any of their legal rights and remedies. The parties, including GRIDCO is under law, at liberty, to seek all and any such remedy under law. The law of contract provides that in case either party is in breach of a contract, the parties can either sue for specific performance or damages. In this context, reference may be made to section 73 and 74 of the Indian Contracts Act, 1872.

- i) The contentions of GRIDCO to the extent it seeks from this Commission to rewrite the terms of the Contract ought to be rejected at the very outset, as being held not maintainable and beyond the scope of this Commission.

(B) In re: Compensation is a matter of adjudication and cannot be thrust upon M/s. JITPL

- a) The law of damages only entitles a party to claim “actual loss” suffered in the form of compensation and the same is a matter of adjudication before a court of law. However, GRIDCO has sought to incorporate a new clause of compensation whereby it has bypassed the requirement of there being an adjudication and proof of “actual loss suffered”, if any, on account of alleged non supply of committal power.
- b) Given the dynamic nature of power market, there cannot be clause providing for *ipso facto* compensation to GRIDCO, the same would be *per se* illegal. Since under the clause, GRIDCO is not required to demonstrate “actual loss”, it would be entitled to compensation, even when it is possible for GRIDCO to source power at relatively cheaper rate under a scenario of non-supply of power. This goes against the settled jurisprudence of contract law.
- c) Even under a provision for liquidated damage(s), the sum provided is only in the nature of a ceiling. Under law, a party is not entitled to anything beyond the liquidated sum provided in a contract. Further, it is liable to prove “actual loss”, the liability of which cannot go beyond the liquidated damages if provided under the contract and the same has to be “reasonable” as well. This is settled law as laid down by the Hon'ble Supreme Court in ***Fathe Chand Vrs. Balkishan Dass***, reported in 1963 SCC OnLine SC 49 (*Fateh Chand*) and ***Kailash Nath Associates Vrs. Delhi Development Authority and Another***, reported in (2015) 4 SCC 136. In this regard, reliance is place on following extract from the decision of Hon'ble Supreme Court in *Fateh Chand*, which held *inter-alia*, as under:

“10 Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of a breach and (ii)

where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a contract containing a covenant of forfeiture of deposit for due performance of a contract false within the first class. The measure of damages in the case breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, Jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of “actual loss or damage”; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things. or which the parties knew when they made the contract, to be likely to result from the breach.”

- d) In case of ***Kailash Nath Associates vs. Delhi Development Authority and Another***, reported in (2015) 4 SCC 136, the Hon'ble Supreme Court expounded the law relating to requirement of proving “actual loss” in seeking compensation claim under well-known principles of contract law.
- e) The proposed new compensation clause in the PPA or any variation thereof would be detrimental to the rights and interests of M/s. JITPL, apart from being illegal and against the scheme of the Electricity Act, 2003. A Liquidated Damages (“LD”) clause in a contract where the loss suffered by a party can be quantified, cannot have an advantage of getting the “genuine pre-estimate” amount without demonstrating and adducing evidence as to the “actual loss” sustained by such party. Further, it might amount to an unjust enrichment on the part of GRIDCO whereby at one end, GRIDCO would enjoy power at variable cost only, whereas due to failure of M/s. JITPL to supply committal power, it may be entitled to compensation amount which would be more than the consideration payable per unit to M/s. JITPL and that to without even demonstrating any actual loss being suffered, which is contrary to the settled jurisprudence.
- f) This Commission while exercising its regulatory power under Section 86(1)(b) of the Electricity Act, 2003, it is not denuded of other powers so vested under the Act in order

to discharge its function as a sectoral regulator. Reference may be made to Section 60 of the Electricity Act, 2003 whereby this Commission is empowered to take into cognizance any action which may amount to abuse of dominant position and take action appropriately. In the present case GRIDCO is seeking to take substantive departure from the initial understating arrived between the parties.

- g) In view of the above, the new compensation clause as sought to be incorporated is *per se* illegal and contrary to the settled law and thus the same ought to be rejected at the threshold itself.

(C) In re: Principles of Economic Justice binds this Commission

- a) This Commission is bound by the principles of “economic justice” as laid down by the Hon'ble Supreme Court as well as the Hon'ble APTEL and commercial viability of a generating plant, while seeking to incorporate a new compensation clause as sought by GRIDCO in its present petition. The contention of GRIDCO relating to incorporation of new clauses are un-fair, unreasonable, unjust and prejudicial. The same would render the entire operation of the plant as wholly unviable. Further, on account of supply of power only at variable cost, M/s. JITPL is also facing under-recovery for a huge quantum.
- b) The Hon'ble Supreme Court in the matter of ***Adani Power (Mundra) Ltd. v. Gujarat Electricity Regulatory Commission***, reported in (2019) 19 SCC 9 have observed that the principle of business efficacy and economic justice binds sectoral regulator such as this Commission. Therefore, the contention and relief(s) sought by GRIDCO may be rejected.

(D) In re: Supply of power only on variable cost component and Reimbursement of PoC Charges

M/s. JITPL has preferred W.P.(C) No. 18150 of 2018 before the Hon'ble High Court of Orissa, wherein it has sought following relief(s) against State of Orissa and GRIDCO, calling show cause on the State Thermal Policy Notification No.8960-OPGC-PPD-IH-97/07/E dated 08.08.2008 issued by the Department of Energy, Government of Odisha and Clause 3 of the Supplemental Memorandum of Understanding (MoU) dated 17.10.2008 executed between the State of Odisha and M/s. JITPL and consequential amendment of Clause 1 (iii) of the MoU dated 26.09.2006, Clause 22.1 & Clause 6.1 to 6.4 of the PPA dated 05.01.2011 executed between M/s. JITPL through Supplementary PPA. Further, calling show cause on Clause 1.0 of the Supplementary PPA dated 23.07.2013, amending of Clause 4 of the PPA dated 05.01.2011 by providing M/s. JITPL to bear the necessary inter-state transmission

charges & losses. The Hon'ble High Court has already ceased of the subject matters relating to (a) supply of power only on variable cost; as well as well as (b) issues relating to liability of transmission charges under the PPA. Therefore, this Commission may restrain itself from deciding any aspect relating to the aforesaid issues in light of principles of judicial propriety and discipline.

(E) In re: Queries from the Technical Member of the Commission

- a) During the course of hearing, the Technical Member of the Commission has raised certain queries/clarifications with regards to non-supply of power to GRIDCO as well as failure to abide by the terms and conditions of the MoU/PPA, including failure of M/s. JITPL to bear transmission charges.
 - b) Notwithstanding the fact that the both the subject matter of transmission charges and supply of power only at variable cost are pending before the Hon'ble High Court in W.P. (C) No.18150 of 2018. M/s. JITPL is not in violations of its obligations under MoU/ PPA as it has been supplying power to GRIDCO under provisional and interim arrangement based on decision of the Hon'ble High Court under Interlocutory Application being IA No.4221 of 2022 in W.P. (C) No.18150 of 2018 filed by GRIDCO seeking power supply citing power crisis situation and in terms of the consent order dated 29.04.2022. Therefore, it is incorrect and patently erroneous for GRIDCO to allege that there has been no supply of power. It may be appreciated that even assuming but not admitting the same, GRIDCO is at liberty to take its remedy under law before the Hon'ble High Court. Further, the grant of any relief(s) on this subject as sought by GRIDCO will transgress into the domain of proceedings pending adjudication before Hon'ble High Court, thus this Commission may restrain itself in passing any order in judicial propriety.
15. Heard the parties and perused their written notes of submissions, which have been taken into record. We observe that earlier in both the cases GRIDCO Ltd. and M/s. JITPL had agreed for approval of the PPA dated 05.01.2011 and the supplementary PPA dated 23.07.2013 by this Commission. However, both the parties had individually suggested certain modifications in some clauses and incorporation of certain new clauses in the PPA which, however, had not reached consensus. Since, the disputes on PPA could not be amicably settled, the Commission basing on their request, vide its interim order dated 31.03.2018, had directed the rival sides, to sit together with Director (RA) and Secretary, OERC in the office hours by 10.04.2018 for reconciliation of their unresolved issues in the PPA. Reconciliation failed and the disputes were left for the Commission to be

adjudicated after hearing the parties. The unreserved issues were as follows:

- i. Approval of the PPA dated 05.01.2011 & Supplementary PPA dated 23.07.2013 by OERC.
 - ii. Incorporation of a compensation clause to address the situations when M/s. JITPL fails to supply the State entitlement of power at any point of time to GRIDCO while selling power outside (through bi-lateral trading/power exchange).
 - iii. Incorporation of a clause on usage of linkage coal only for supply of State entitlement of power to GRIDCO as per FSA and PPA and derivation of ECR accordingly based on GCV and price of linkage coal.
 - iv. Modification of Clause 7.2 of the PPA dated 05.01.2011 regarding rebate.
 - v. Incorporation of a clause on review of the PPA in every 5(five) years.
 - vi. Reimbursement of the transmission charges and losses to the extent borne by M/s. JITPL.
 - vii. To allow other fuel charges / variable charges as may be applicable from time to time.
16. The Commission, vide its order dated 04.06.2019, had disposed of both the cases with its decisions and directions on the above issues. As already stated, although the matter was heard by the Commission comprising three Members including the Chairperson, but when the impugned order was issued, one of the Members of the Commission had retired, and the said order was signed by only two Members including the Chairperson. Being aggrieved by the said order, M/s. JITPL challenged the same before the Hon'ble APTEL in Appeal No.297 of 2019, and the Hon'ble APTEL vide their judgment dated 07.02.2024, have found that the impugned order of the Commission to be unsustainable, legally invalid and non est on account of the legal principle that where one of the Members of the Commission who hear a matter, demits office by reason of superannuation, death etc. before passing of the final order, it is not permissible for the remaining Member/Members of the Commission to sign the order. In such a situation, the matter shall be heard de novo and final order be passed / signed accordingly. Therefore, the Hon'ble APTEL have remanded the matter to this Commission with the direction to hear and decide the same de novo.
17. In view of the above direction of the Hon'ble APTEL, the Commission has heard the parties afresh on the same issues. The discussions on the above seven unresolved issues

are as follows:

Issue No.1

18. Approval of the PPA dated 05.01.2011 & Supplementary PPA dated 23.07.2013 by OERC.

In the impugned order dated 04.06.2019, the Commission had approved the PPA dated 05.01.2011 & Supplementary PPA dated 23.07.2013 executed between GRIDCO Ltd. and M/s. JITPL under Section 62 of the Electricity Act, 2003 as both the parties had agreed for approval of the same by OERC for supply of power from 1800 MW (3x600 MW) thermal power plant of M/s JITPL, out of which two (2) units (Unit#1 & Unit #2) have achieved date of commercial operation. However, the Commission in the impugned order had made certain observations regarding modification of certain clauses and incorporation of some new clauses in the PPA, on the basis of the submission/counter submission made by the parties on the issues involved. It is now pertinent to mention that M/s. JITPL has filed writ petition in W.P. (C) No.18150 of 2018 before the Hon'ble High Court of Orissa challenging the MoU & Supplemental MoUs, State Thermal Policy Notification issued by Govt. of Odisha as well as the said PPA & Supplementary PPA, which is now sub-judice before the Hon'ble High Court of Orissa. Since, the PPA and the Supplementary PPA have been agreed and signed by both the parties, we approve the same with our observations stated hereinafter, which shall be subject to the result of W.P. (C) No.18150 of 2018 pending before the Hon'ble High Court of Orissa.

Issue No.2

19. Incorporation of a compensation clause to address the situations when M/s. JITPL fails to supply the State entitlement of power at any point of time to GRIDCO while selling power outside (through bi-lateral trading/power exchange):

GRIDCO's View –

- a) M/s. JITPL has availed all facilities, resources, clearances under the MoU signed by it with the Govt. of Odisha. It has voluntarily opted to supply 12/14% of ESO at variable cost as per the provision in the State Thermal Policy, 2008 which has been incorporated in the supplementary MoU followed by the revised PPA dated 05.01.2011 (contrary to the provision of PPA executed in 2006 where it has been agreed by M/s. JITPL to supply 25% of power generated to the State at two-part tariff). However, M/s. JITPL has consistently violated the conditions laid down in the revised PPA. M/s. JITPL though resumed power supply to GRIDCO in the 2014 but the supply was less than the agreed quantum in the revised PPA. M/s. JITPL has

deviated from its obligation in the PPA depending upon its convenience. The IPP has even failed to honour its commitment mentioned in the Minutes of the Meeting held on 13.07.2016 by not making up of the short supply for the past period (November, 2016 to June, 2017) and continuously injecting less power from 2018 onwards.

- b) The supply of power even reduced to 10 MW vis-à-vis the entitlement of GRIDCO of 50 MW. By this action of M/s. JITPL the State was deprived from cheap thermal power whereas the IPP continued to generate and sell power unabatedly outside the State on Round The Clock (RTC) basis instead of honouring its commitment in the revised PPA to supply State entitlement of power. As on date, the short supply of power to the State is more than 4000 MU since 2014. At the time of signing of PPA with M/s. JITPL in 2011, it was never conceived/apprehended by GRIDCO/State Government that the IPP would resort to breach of PPA conditions.
- c) In view of the above facts and trend of supply of power followed by M/s. JITPL from 2014 to 2017 and the power crisis situations/difficulties in the State during summer, the GRIDCO felt it essential to have a compensation clause for short/ non-supply in State entitlement of power. Since Clause 2 of the PPA dated 05.01.2011 provides for approval of PPA with or without modification by the Commission, GRIDCO approached the Commission for certain modification in the PPA which inter-alia includes necessary direction from the Commission for incorporation of compensation clause and also usage of linkage coal for supply of State share of power.
- d) As per GRIDCO, only in case of any default on the part of M/s. JITPL, i.e. shortfall in supply/scheduling of State Entitlement of power on real time basis as per the PPA, the compensation clause would be invoked, which would in no way adversely affect and unjustifiably burden M/s. JITPL, if it maintains consistent supply/scheduling of the State entitlement of power to GRIDCO as per the PPA. Therefore, GRIDCO has proposed for incorporation of compensation clause in the PPA as given below:

“In case M/s. JITPL fails to supply State Entitlement of power as per the PPA provision to GRIDCO at any point of time, then the cost of under injection / shortfall quantum of power from the entitlement shall be compensated by M/s JITPL at the rate of highest DSM rate during such period or two times of actual ECR applicable for M/s JITPL for such period, whichever is higher.”

M/s. JITPL's View-

- a) Earlier the views of M/s. JITPL was that the proposed compensation clause was not inserted in the PPA initially, as the intention of the supply of power behind this contract is not purely commercial and claiming compensation in a contract, where supply of power is at variable cost, is an unjustified burden on it. Generally, the PPAs

should have the provision for recovery of full cost and penalty /incentive depending upon the availability of the plant. The PPA with GRIDCO is different from general contracts where supply of power is only on variable cost. As the variable cost itself is not recovered in full, no further clause which stipulates commercial liability should be incorporated in the PPA. Hence, M/s. JITPL was not agreeable to incorporation of compensation clause in the PPA.

- b) Presently, M/s. JITPL submits that the relief(s) sought by GRIDCO for incorporation of the compensation clause under the PPA dated 05.01.2011, is contrary to the terms of the MoU dated 29.06.2006 (as amended from time to time), PPA dated 05.01.2011 as well as the provisions under the Electricity Act, 2003. The enforcement of such relief(s) would mean that the Commission, in exercising its powers as regulator under the Electricity Act, 2003, is forced to usurp in toto, “party autonomy” i.e., the ability of any party to enter into an agreement of its own volition and thus to force M/s. JITPL to accept under a contract, such terms having grave commercial implications. The same would be contrary to very scheme of the Electricity Act, 2003 and the settled law.
- c) The new clause as sought need not be inserted for providing compensation in the form of liquidated damages or otherwise inasmuch as the parties to the contract are not denied of any of their legal rights and remedies. The parties, including GRIDCO is under law, at liberty, to seek all and any such remedy under law. The law of contract provides that in case either party is in breach of a contract, the parties can either sue for specific performance or damages. In this context, reference may be made to section 73 and 74 of the Indian Contracts Act, 1872.
- d) Since M/s. JITPL is not *consensus ad ident* on the proposed modification or incorporations and as such does not form part of the agreement, hence relief(s) sought by GRIDCO are not even maintainable before this Commission to the extent the same seeks to modify/deviate/amend or effectively rewrite the terms of the PPA dated 05.01.2011 and Supplementary PPA dated 23.07.2013.

Commission’s observation:

M/s. JITPL had agreed initially in PPA of 2006 for supply of 25% of power from the thermal power plant at two part tariff. Subsequently, M/s. JITPL had entered into MoU & Supplemental MoU with the Govt. of Odisha and consequential PPA dated 05.01.2011 & Supplementary PPA dated 23.07.2013 with GRIDCO and availed all facilities, resources & support from the Govt. of Odisha. The PPA was approved by

the Commission on 04.06.2019 as both parties had agreed for approval. Under the MoUs and its consequent PPAs, M/s. JITPL had voluntarily agreed and is contractually bound to supply 14% of power sent out from its thermal power plant at variable cost, if coal block is allocated to the IPP within the State, otherwise it will provide 12% power at variable cost. As per the submission of GRIDCO, there is short supply/non-supply of power by M/s. JITPL on regular basis against the State's entitlement of power. M/s JITPL is selling power outside State on RTC basis and the fact is established from the trend of power supply from 2014-2017. There is short supply of power to GRIDCO to the tune of 4200 MU since 2014 which was not conceived at the time of signing of PPA which is breach of terms & conditions of PPA. M/s. JITPL has also violated interim order dated 29.04.2022 of the Hon'ble High Court of Orissa with direction for supply of 120 MW of power to GRIDCO at provisional rate of Rs.3.36/unit against which M/s. JITPL is supplying only 60 MW. In such circumstances, GRIDCO must have purchased the required quantum of power from other sources to meet the State demand during power crisis situation, particularly during summer, for which the State consumers have been and would be affected in future. Generally, it is expected that under merit order principle GRIDCO will have to purchase the required quantum of power from other sources/ power plants (having higher variable cost) in the merit order. There is 'actual loss' to the consumer of the State on account of non-supply of committed power. We opine that the State consumers should not be burdened for such lapses of M/s. JITPL. Therefore, there should be a compensation provision in the PPA in case of default of M/s. JITPL to supply the State's entitlement of power to GRIDCO and the compensation should be based on the Variable Cost (VC) of the Central Thermal Generating Station approved by the Commission for power purchase of GRIDCO and should be the next higher variable cost (w.r.t. the VC of power of M/s JITPL) in the merit order dispatch for that year. The compensation clause is not likely to adversely affect and burden M/s JITPL, if State's entitlement of power is supplied to GRIDCO as per PPA. The DSM, which is meant for grid stability, may not be applied for such compensation.

Issue No.3

20. **Incorporation of a clause on usage of linkage coal only for supply of State entitlement of power to GRIDCO as per FSA and PPA. Accordingly, ECR shall have to be derived based on GCV and price of linkage coal.**

GRIDCO's View-

- a) State's entitlement of power is meant for ultimate supply of power to consumers of the State. Therefore, M/s. JITPL is required to use linkage coal for the State's entitlement of power. The contention of M/s. JITPL that they have linkage coal only for Unit-1 i.e. for 72 MW (State share) is not acceptable. GRIDCO has long term PPA with M/s. JITPL for purchasing power from its Unit-2 also. It is the obligation of M/s. JITPL to avail the coal linkage for the State's share of power. The plea of M/s. JITPL is not acceptable after de-allocation of the allotted coal block for Unit-2. After de-allocation of the coal block, M/s. JITPL should have proactively and vigorously followed up the matter with MCL to ensure availing coal linkage for the entire State's share of power in order to avoid extra financial burden on the State consumers.
- b) Regarding determination of Energy Charge Rate on the basis of Linkage coal as well as e-auction coal, GRIDCO was of the view that considering the generation data, the total supply of State's share of power by M/s. JITPL from the IPP has never exceeded 72 MW. As M/s. JITPL is getting full quota of Linkage coal for 72 MW irrespective of the supply of State's entitlement of power, it should furnish information on the month-wise details of utilization of such Linkage Coal including quantum of unused portion of the Linkage Coal and there is no need of use of e-auction coal for generation of such quantum (72 MW).

M/s. JITPL's View-

- a) The proposed Clause is not as per the PPA. As per Clause 6 of the PPA the power needs to be supplied at variable cost and charges shall be worked out on the basis of ex-bus energy sent out from the plant. PPA does not stipulate use of linkage coal only for supply to GRIDCO. To meet the required quantum of coal for supply of power from Unit-1, M/s. JITPL source the fuel from linkage as well as non-linkage routes and for supply of power from Unit-2, M/s. JITPL sources fuel from non-linkage routes such as open market, imported, E-auction etc. Therefore, incorporation of a clause on usage of linkage coal only for supply of State entitlement of power to GRIDCO is not agreed by M/s. JITPL.
- b) Incorporation of new clauses on usage of linkage coal only for supply of State entitlement of power to GRIDCO is also without any basis in law. This Commission ought not to entertain/consider tariff aspects (*as admitted by this Commission vide its order dated 26.2.2018 in Case No. 26 of 2014*) as no such clause exists under the PPA. As per Clause 6 of the PPA power needs to be supplied at variable cost and such

cost shall be worked out on the basis of ex-bus energy sent out from the plant. PPA does not stipulate use of linkage coal only for supply to GRIDCO. In absence of any such mandate under the PPA, GRIDCO cannot ask for incorporation of this mandate as a stipulation under the PPA for supply of power. Further allocation of linkage coal is beyond the control of M/s. JITPL and hence, GRIDCO cannot force M/s. JITPL for use of linkage coal as a stipulation for supply of power. The linkage coal is available to M/s. JITPL only for supply of its proportionate committal power from its Unit-1 and not for Unit-2. For the purpose of supplying power from Unit-2, M/s. JITPL is forced to rely on other sources of non-linkage routes like e-auction, import coal etc.

Commission's Observation:

- a) Fuel which is procured by the Generator through any form of preferential or captive allocation or sale by a Government Instrumentality shall be deemed as Concessional Fuel and earmarked for the benefit of the Utility and ultimately for the benefit of the consumers. Any fuel procured through e-auction and /or through import could be utilised for sale of merchant power through short term contract or through power exchange.
- b) As M/s. JITPL is having PPA with GRIDCO, the State's share of power should be met primarily from the linkage coal available to M/s. JITPL and accordingly, the ECR should be calculated basing on the GCV and price of linkage coal only. The State's share of Power from the IPP (M/s JITPL) has never exceeded 72 MW for which full quota of linkage coal is being received by M/s JITPL. M/s. JITPL can use other sources of coal such as e-auction / imported coal for selling power to the buyers other than GRIDCO. As per the contention of M/s. JITPL, availability of linkage coal to its IPP is not sufficient for supply of total quantum of State's entitlement of power considering the total generation of both the units 1 & 2 and PPA does not stipulate use of linkage coal only for supply of power to GRIDCO. In such case, the Commission is of the view that the quantum of generation from the linkage coal should be supplied to GRIDCO towards State's entitlement of power for consumption of the State consumers. Further, the balance quantum of State's entitlement of power produced using non-linkage route may be purchased by GRIDCO at higher rate considering the cost and GCV of e-auction / imported coal used by M/s. JITPL, if the variable cost of such power comes under merit order despatch for GRIDCO. In this arrangement there would not be any additional burden on M/s. JITPL for supply of State's entitlement of power to GRIDCO as per the

provisions in the PPA. However, it remains open for both M/s. JITPL and GRIDCO to take up the matter with the State Govt. to pursue the matter with Ministry of Coal, GoI for allotment of more linkage coal to the extent of State's entitlement of power from the IPP (M/s. JITPL).

Issue No.4

21. Modification of Clause 7.2 of the PPA dated 05.01.2011 regarding Rebate.

GRIDCO's View-

- a) GRIDCO has mentioned that, the State entitlement of power is being supplied through CTU network as an interim measure and scheduling is being done by ERLDC. Energy Accounting is also being done by ERLDC, based on which SLDC prepares the State Energy Accounting (SEA) for the bilateral transaction. Accordingly, GRIDCO verifies the monthly energy bill of M/s. JITPL considering the SEA of SLDC which is available towards the end of the second week of every month. Therefore, considering the aforementioned factor, GRIDCO has proposed the following modification of the Rebate Clause 7.2 of the PPA.

“Two percent (2%) rebate shall be allowed on payment of bills through RTGS directly from GRIDCO on the amount paid within 7(seven) working days of receipt of the monthly energy bills by GRIDCO. If payment is made after 7(seven) working days but within 30 days of receipt of the monthly energy bills then 1(one) % rebate shall be allowed.”

M/s. JITPL's View-

- a) As per PPA 2% rebate is allowed, if payment is made within 7 days of presentation of the bill. Modification of the proposed rebate clause will further add to the financial burden of the company. Hence, M/s. JITPL do not agree to the proposed modification of rebate clause in the PPA.

Commission's Observation:

As per Clause 6.7 of the OERC's Generation Tariff Regulation, 2014, if the bill of the generating company is presented through Letter of Credit (LC) or paid through NEFT/ RTGS within a period of two working days, a rebate of 2% shall be allowed and if payments is made on any day after two working days and within a period of 30 days, a rebate of 1% shall be allowed. However, as per Clause 7.2 of PPA executed between GRIDCO and M/s. JITPL, a rebate of 2% shall be allowed on payment of bill through Letter of Credit or directly on the amount paid within seven days of the presentation of the bill. If payment is made after seven days and within 30 days, then 1% rebate shall be allowed. As in the existing PPA, rebate of 2% is allowed for payment within seven days,

the Commission feels that there is no need for any change in the rebate clause in the existing agreement as claimed by GRIDCO.

Issue No.5

22. Incorporation of a clause on review of the PPA in every 5 (five) years

Earlier, both GRIDCO and M/s. JITPL had agreed for incorporation of a clause for review of the PPA in every 5(five) years and the Commission had accepted the same vide its earlier order dated 04.06.2019. Now, M/s. JITPL submits that seeking review of PPA in every 5 (five) years is without any basis inasmuch as neither the PPA/Supplementary PPA provides for such a review, nor this Commission is empowered to “review” periodically, or otherwise, under Law, once a regulatory approval is granted under Section 86(1)(b) of the Electricity Act, 2003. Without expressing any opinion on the submissions that this Commission does not have power to rewrite the terms of the PPA/Supplementary PPA in guise of “regulating” agreements, we are of the view that review of the PPA at certain interval may be beneficial to both the parties. However, if any of the parties does not agree for incorporation of such a clause in the PPA, both/all the parties should abide by the terms and conditions agreed upon in the PPA.

Issue No.6

23. Reimbursement of the transmission charges and losses to the extent borne by M/s. JITPL.

M/s. JITPL’s View-

a) Earlier, the views of M/s. JITPL was that the 12% of the power from the M/s. JITPL is contracted with the GRIDCO, whereas 88% of the capacity is supplied outside the State. Since the major share of the power was to be sourced by outside States, it was incumbent upon the M/s. JITPL to be connected to the transmission network of CTU. Moreover, it is not technically possible to connect plant to CTU and STU network simultaneously and supply State’s entitlement of power through STU network. M/s. JITPL had stated that supply of State’s entitlement of power at variable cost and bearing the transmission cost is not economically viable and sustainable and therefore, it has claimed reimbursement of Transmission Cost from GRIDCO.

b) Now, in its present submission, M/s. JITPL has stated that it has preferred W.P.(C) No.18150 of 2018 before the Hon'ble High Court of Orissa, wherein it has sought relief(s) against State of Orissa and GRIDCO, calling show cause on the State Thermal Policy Notification No.8960-OPGC-PPD-IH-97/07/E dated 08.08.2008 issued by the Department of Energy, Government of Odisha and Clause 3 of the Supplemental

Memorandum of Understanding (MoU) dated 17.10.2008 executed between the State of Odisha and M/s. JITPL amending Clause 1 (iii) of the MoU dated 26.09.2006 and amendment in Clause 22.1 & Clause 6.1 to 6.4 of the PPA dated 05.01.2011 executed through Supplementary PPA pursuant to the aforesaid Notification dated 08.08.2008. Further, calling show cause on Clause 1.0 of the Supplementary PPA dated 23.07.2013, amending of Clause 4 of the PPA dated 05.01.2011 by providing M/s. JITPL to bear the necessary inter-state transmission charges & losses. The Hon'ble High Court has already seized of the subject matters relating to (a) supply of power only on variable cost; and (b) the issues relating to liability of transmission charges under the PPA. Therefore, this Commission, at this stage should refrain from deciding any aspect relating to the aforesaid issues in the light of the principles of judicial propriety and discipline.

GRIDCO's View-

- a) M/s. JITPL commenced power supply from 6th June, 2014 and from day one, there was dispute regarding COD of Unit#1, which was resolved in April, 2015. M/s. JITPL has violated the Clause 4.0 of the PPA dated 05.01.2011 by not constructing a dedicated transmission line from their generating plant to the designated Grid Sub-station of the STU. Unconditional support was extended to M/s. JITPL by GRIDCO for connectivity and COD of their Units, as and when required, so as to avoid any kind of national wastage of power when the thermal units would be ready to generate and supply. After receipt of an undertaking from M/s. JITPL, GRIDCO executed a supplementary PPA with M/s. JITPL on 23.07.2013 by adding the following at the end of Clause 4.0 of the PPA dated 05.01.2011.

“1.0 As an interim arrangement till establishment of connectivity with State Transmission Utility (STU), M/s. JITPL shall supply the State's share of power using Central Transmission Utility (CTU) transmission system. For such delivery of power to GRIDCO, M/s. JITPL shall bear the necessary interstate transmission charges, including transmission losses and any other charges as applicable.”

- b) M/s. JITPL agreed and signed the supplementary PPA dated 23.07.2013 in its full consciousness and consent in order to get the connectivity at CTU network/system and declare COD of its thermal units in absence of dedicated transmission lines in place as per the provisions under the PPA dated 05.11.2011. Till date, M/s. JITPL has not constructed the dedicated transmission line from their generating plant to the designated Grid Sub-station of the STU. Instead of constructing the dedicated line to STU system and evacuating the State's share of power through STU network, M/s.

JITPL is presently claiming that it is entitled for reimbursement of transmission charges from GRIDCO to the extent it is borne by them in evacuating the contractual quantum of power from the generating station to GRIDCO through CTU network. Such claims/prayers are entirely in contravention to the provisions of the PPA and statutory Regulation in force and therefore denied.

- c) While executing the MoU and PPA, M/s. JITPL was well aware of all the future repercussions related to the evacuation of the State's entitlement of power from their thermal power plant through STU network. Considering all the factors M/s. JITPL signed all the MoUs and PPAs without any preconditions and they have never raised any dispute while signing the same. By signing the MoUs and PPAs, M/s. JITPL is liable to adhere to the terms and conditions of the MoUs and PPAs. Instead, M/s. JITPL has violated the Clause 4.0 of the PPA dated 05.01.2011 by not constructing a dedicated transmission line from their generating plant to the designated Grid Sub-station of the STU.
- d) As per the above, it was agreed between the parties that for a temporary period only, till the completion of dedicated line to STU system, M/s. JITPL was allowed to evacuate the State's share of power using CTU transmission system. In contrast, till date M/s. JITPL has not shown any sign of constructing the dedicated transmission line from their generating plant to the designated Grid Sub-station of the STU. Instead of constructing the dedicated line to STU and evacuating the State's share of power through it, M/s. JITPL is presently stating that connectivity with CTU and STU system simultaneously is not technically possible and supplying the State entitlement of power at variable cost bearing the transmission charges and has asked GRIDCO to reimburse the same. M/s. JITPL is entitled to only the Fuel cost, i.e. Energy Charge, calculated as per Regulation OERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2014. The proposal of M/s. JITPL for reimbursement of Transmission Cost by GRIDCO is not in line with the PPA, MoU and State Thermal Policy. Therefore, GRIDCO does not agree to this proposal of M/s. JITPL because the above proposal is in violation of the agreed Supplementary PPA dated 23.07.2013 executed between GRIDCO and M/s. JITPL which was signed basing on the Affidavit of M/s. JITPL dated 23.07.2013.

Commission's Observation:

- a) The Commission, in its earlier order dated 04.06.2019, had observed that:

Para-1(vi) of the MoU dated 26.09.2006 between M/s. JPL (now M/s. JITPL) and Government of Odisha stipulate as follows:

“M/s. JPL may set up its own transmission facility for evacuation of power to the point of off take by the buyer(s) or may request the State Transmission Utility (STU) and Central Transmission Utility (CTU) or any other Transmission Utility or Licensee for evacuation of power from the Thermal Power Plant and may enter into agreement for such purchase. The Government and its concerned agency shall assist JPL in the matters of the transmission facility for evacuation of power from the Thermal Power Plant. In case JPL evacuates power through State Transmission Utility or Central Transmission Utility, transmission of the entire capital cost for strengthening such lines for evacuation of entire power of the Thermal Power Plant will be borne by JPL.”

Further, the supplementary MoU dated 30.12.2010 stipulates as follows:

“3. xxxxxx

(ii) For power evacuation the Independent Power Producer will get connected at appropriate voltage and one most suitable designated location as may be suggested by Orissa Power Transmission Corporation Limited (OPTCL) at the cost of the said Independent Power Producer.”

Further, Para-4.0 of the PPA dated 05.01.2011 executed between M/s. JITPL and GRIDCO Ltd. stipulates as given below:

“4.0 Transmission / Wheeling of Power

State share of power shall be made available to GRIDCO by M/s. JITPL at the Bus bar of OPTCL one nearest EHV Sub-station at required voltage level. OPTCL as STU with the help of GoO will assist M/s. JITPL in getting clearance/approvals within the State jurisdiction. However, all the responsibility for obtaining the clearances/approvals shall remain with M/s. JITPL. M/s. JITPL would need to bear the cost of

- (i) Dedicated transmission line from their generating plant to the designated Grid Sub-station of the STU at available voltage level,*
- (ii) Interfacing at both the ends including works at the Grid Sub-station, cost of Bays etc.*
- (iii) Replacement / up-gradation / augmentation of existing equipments / transmission system (s) if any of STU.*

The above works are to be carried out by M/s. JITPL as per the specification and requirements of the Licensee/Utilities. After commissioning of the project, M/s. JITPL shall transfer these lines and infrastructures at OPTCL Sub-station end to OPTCL as transfer of assets for the maintenance by the STU. On completion of the above works the maintenance of the transmission line will be undertaken by the Licensee/Utility at charges to be decided by the Licensee/Utility and paid by M/s. JITPL. High Tension lines and the system at OPTCL Grid Sub-station end shall be maintained by power utility as Licensee.

If M/s. JITPL desires to evacuate further power beyond State share they may strengthen the transmission system and also to bear the State Transmission Charges as applicable.

The detail metering arrangement for both Main and Check Meters shall be installed on the outgoing feeders of the generating station of M/s. JITPL in co-ordination with OPTCL, SLDC and GRIDCO.”

Further, the supplementary PPA dated 23.07.2013 stipulates as follows:

“A new paragraph, as mentioned below, shall form a part of and be added at the end of clause-4.0 of the PPA dated 05th January, 2011.

As an interim arrangement till establishment of connectivity with State Transmission Utility (STU), M/s. JITPL shall supply the State’s share of power using Central Transmission Utility (CTU) transmission system. For such delivery of power to GRIDCO, M/s. JITPL shall bear the necessary inter-state transmission charges, including transmission losses and any other charges as applicable.”

The Commission, in its earlier order dated 04.06.2019, had further observed that M/s. JITPL had agreed for construction of dedicated transmission line from their generating plant to the designated grid sub-station of OPTCL, at their own cost, for evacuation of State’s share of power as per Clause No.4.0 of PPA dated 05.01.2011. However, M/s. JITPL has neither constructed the dedicated line for evacuation of power nor has initiated any action for the same till date and presently power is being supplied to GRIDCO Ltd. through CTU network. Further, in the supplementary PPA dated 23.07.2013, M/s. JITPL had agreed to bear the necessary inter-state transmission charges including transmission losses and any other charges as applicable for delivery of State’s share of power to GRIDCO Ltd. through CTU network. Now, M/s. JITPL submits that supply of State’s entitlement of power at variable cost and bearing the transmission cost is not economically viable and sustainable, and has claimed reimbursement of transmission charge from GRIDCO which tantamounts to breach of contract. Supply of State’s share of power at variable cost is the responsibility of M/s. JITPL as per PPA and MoU. Any additional cost against State’s share of power over and above the variable cost is a financial burden to GRIDCO and ultimately to the consumers of the State. Under these circumstances, the Commission is not inclined to accept the proposal of M/s. JITPL for reimbursement of transmission cost by GRIDCO Ltd. (as per order dated 04.06.2019 passed in Case No.64 of 2017) for evacuation of its power through CTU network as M/s. JITPL is contract bound as per MoU and PPA.

- b) Now, we reiterate the earlier views of the Commission on this issue as stated in the aforesaid order dated 04.06.2019 as M/s. JITPL has consciously agreed and signed the PPA as well as the Supplementary PPA. However, in its present submissions, M/s. JITPL has submitted that the matters relating to bearing of liability of transmission charges under PPA and supply of power only at variable cost are

subjudice before the Hon'ble High Court of Orissa in W.P. (C) No.18150 of 2018. Since this issue is under challenge before the Hon'ble High Court of Orissa in the said writ petition, we refrain from making any further observations on the said issue in tune with the principles of judicial propriety and discipline. In such premises, we express that the parties concerned should abide by the outcome of the aforesaid Writ Petition before the Hon'ble High Court of Orissa.

Issue No.7

24. To allow other fuel charges / variable charges as may be applicable from time to time.

In their present submissions, both M/s. JITPL and GRIDCO Ltd. have not submitted their views on this issue. However, GRIDCO has stated that they stand by their earlier views on the issues as discussed in the order dated 04.06.2019 passed in the present cases. The earlier views of M/s. JITPL and GRIDCO Ltd. are given below:

M/s. JITPL's View:

- a) Other fuel charges and variable charges are variable in nature and directly linked with the generation of power. Had there been no generation and supply under the PPA with GRIDCO, the charge arising for other fuel charges and other variable charges would not have arisen. In addition to the above, it is stated that Clause 6.1 of the PPA also provides that M/s. JITPL would be entitled to variable cost. These charges are as per actuals and M/s. JITPL requested the Commission to allow these charges as per actuals.

GRIDCO Views:

- a) As per the State Thermal Policy, i.e. the Policy Guidelines, for setting up of Thermal Power Plants, issued by Department of Energy, GoO, vide Notification no. 8960, Dated 08.08.2008, for future IPPs *"A nominated agency(s) authorized by the State Govt. will have the right to purchase 14% of the power sent out from the Thermal Power Plant at variable cost from the IPPs who have been allocated coal blocks within the State. Others will provide 12% power at variable cost. The tariff for such power will be determined by the OERC."*

As per the Clause 3 of the MoU dated 17.10.2008 *"a nominated agency (s) authorized by the State Govt. will have the right to purchase from the M/s. JITPL (excluding the quantum of power indicated at Clause No.1(ii) of Principal MoU under terms of a PPA) at the rate of 14% of the power sent out from the Thermal*

Power Plant(s) at variable cost produced from the coal consumed out of coal blocks allocated within the State of Orissa and 12% of the power sent out at variable cost produced from the coal procured from other sources. The tariff for such power will be determined by the OERC.”

- b) The State Thermal Policy was issued and the MOU was executed during the control period of CERC (Terms & Conditions of Tariff) Regulations (FY 2004-2009). As per Regulation 22, of CERC (Terms & Conditions of Tariff) Regulations 2004, the variable cost is defined on the basis of the cost of the fuel only.
- c) It may be observed from the above that the term “Variable” is interchangeably used with “Energy” and the Variable (Energy) cost only covers fuel costs. In subsequent CERC’s Tariff Regulations and OERC’s Tariff regulations the term “Variable Cost” has been substituted by “Energy Charge Rate” with the same meaning and covers only the fuel costs.
- d) When the Memorandum of Understanding (MoU) was signed between Government of Odisha and M/s. Jindal Photo Limited, the holding company of M/s. JITPL, on 26.09.2006 the CERC (Terms & Conditions of Tariff) Regulations, 2004 was in place, basing on which the term “Variable Cost” was incorporated.
- e) Further as per Regulation 4.1 of Odisha Electricity Regulatory Commission (Terms and Conditions for Determination of Generation Tariff) Regulations, 2014, the tariff for supply of electricity from a thermal generating station shall comprise of two parts, namely, Capacity Charge (for recovery of annual fixed cost consisting of the components specified in Regulation 4.3) and Energy Charge (for recovery of primary and secondary fuel cost). Thus, it implies that the energy charge is the only variable cost for recovery of primary and secondary fuel cost.
- f) It is surprising to note that M/s. JITPL is claiming other items under Variable Cost, when the components of the Variable Cost are clearly mentioned in the Power Purchase Agreement dated 05.01.2011.
- g) Therefore, as per the above, the variable cost, i.e. Energy Charge rate, which constitutes fuel cost only, shall be determined as per the relevant norms, guidelines of OERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2014 and relevant directions of the Odisha Electricity Regulatory Commission. Relevant Regulations, i.e. no. 4.32, 4.33 & 4.34 of OERC (Terms and Conditions for

Determination of Generation Tariff) Regulations, 2014, which are the only clauses applicable for calculation of variable cost;

- h) Therefore, the plea of M/s. JITPL to allow other fuel charges / variable charges as may be applicable from time to time is not in line with the aforementioned State Thermal Policy, MOUs, Revised Power Purchase Agreement dated 05.01.2011 and most importantly OERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2014 and therefore is liable for outright rejection
- i) Therefore, GRIDCO is not agreeable to the proposal of M/s. JITPL as the proposal is in stark violation of the Clause No. 6.0 (Charges) of the agreed Power Purchase Agreement dated 05.01.2011 between GRIDCO and M/s. JITPL. Moreover, the said issue is not a part of the GRIDCO's proposal in Petition No. 01/2017 and therefore, the issue is not relevant to the case.

Commission's Observation:

- a) Earlier, the Commission had observed that the reimbursement of charges is part of the tariff of the generating company. Since this Commission has already held in Case No. 26/2014 dated 26.02.2018 that it has no jurisdiction in this matter and determination of tariff of inter-State generating station of the Petitioner falls within the jurisdiction of Hon'ble CERC, therefore, the matter should be raised before that Commission.
- b) Now, we observe that M/s. JITPL in its present submission has stated that as per the Clause 6.3 of the PPA dated 05.01.2011, the methodology for determining the fuel cost i.e. variable cost shall be as per the applicable norms, guidelines and directions of the Appropriate Commission. As on date, it is an admitted position that the Central Commission is to determine the tariff in terms of Section 79 read with Sections 61 and 62 of the Electricity Act, 2003. Since it is the Central Commission which has the exclusive jurisdiction to determine the tariff under the present PPA dated 05.01.2011 in terms of Clause 6.3, this Commission cannot determine the tariff under Section 86 (1) (a) of the Electricity Act, 2003. Thus, this Commission cannot decide the relief(s) as sought for, by M/s. GRIDCO Ltd.
- c) We further observe that the variable cost for coal based and lignite fired stations is being computed based on a formula given by the Central Electricity Regulatory Commission. The formula for variable cost i.e. Energy Charge Rate (ECR) given in the OERC's Generation Tariff Regulation, 2014 is exactly the same as given in the CERC's Generation Tariff Regulation, 2014, wherein the cost of other fuel charges

has been factored into. Therefore, the variable cost would remain same irrespective of which Commission determines the same. Therefore, we do not accept the contentions of M/s. JITPL.

25. In view of the above, we approve the PPA dated 05.01.2011 and supplementary PPA dated 23.07.2013 along with the modifications suggested in the above paragraphs. However, the suggested modifications/amendments may be incorporated in the PPA subject to outcome of the judgement of the Hon'ble High Court of Orissa in W.P. (C) No.18150 of 2018 on the relevant issues.
26. Accordingly, both the Cases are disposed of, in terms of directions of the Hon'ble APTEL in their judgment dated 07.02.2024 in Appeal No.297 of 2019.

Sd/-
(S. K. Ray Mohapatra)
Member

Sd/-
(Gajendra Mohapatra)
Officiating Chairperson