

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

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

Case No. 26/2017

M/s. Aarati Steels Limited	Petitioner
Vrs.		
GRIDCO Limited & Others	Respondents

In the matter of: **An application under Section 142 of the Electricity Act, 2003 for non-implementation of Order dated 09.06.2015 of the Commission passed in Case Nos. 28, 29, 107 & 108 of 2010.**

For Petitioner: Shri Rajiv Yadav, Advocate,
 Shri Baljeet Singh, Sr. GM (E & I),
 Ramesh Talwar, Sr. DGM (F&A).

For Respondents: Shri S. S. Nayak Sr. G.M. PP, GRIDCO,
 Shri P. K. Das, GM, GRIDCO,
 Shri P. K. Mishra, CLD, SLDC.

ORDER

Date of hearing: 15.01.2019

Date of order: 09.04.2019

- The Petitioner M/s. Aarti Steel Ltd. has filed the present case under Section 142 of the Electricity Act, 2003 for non-implementation of order dated 09.06.2015 of the Commission passed in Case Nos. 28, 29, 107 & 108/2010.
2. The petitioner has submitted that it had entered into a PPA with GRIDCO on 24.10.2009 for sale of 12% power generated from its 50 MW generating unit at variable cost. This 50 MW generating unit was commissioned on 05.03.2010 and the date of Commercial Operation (COD) was 24.04.2010. However, since GRIDCO was facing acute shortage of power at that time the total power generated from this unit was supplied to GRIDCO from 24.04.2010 till the end of June, 2011. In the meantime GRIDCO had approached the Commission for approval of its PPA in Case No. 28/2010 and for determination of provisional tariff in Case No. 29/2010. Subsequently, the petitioner had filed Case No. 107/2010 for determination of final tariff and Case No. 108/2010 for review of the interim order dated 04.05.2010 of the Commission regarding status of the subject 50 MW generating unit. In its application the petitioner had prayed

for determination of tariff for 12% State share and also to direct GRIDCO to finalize the tariff for the balance 88% power. The Commission, while disposing the above cases simultaneously vide its order dated 13.09.2011 at Para-20 had observed as given below:

“We would however also like to settle the dispute regarding the rate for the power already purchased by GRIDCO out of the remaining 88% generation from the subject 50 MW generating unit of M/s.ASL. This power has been purchased by GRIDCO mostly during the FY 2010-11. It is observed that the average rate of power purchased by GRIDCO from the NTPC-ER generating stations during the FY 2010-11 is about Rs.3.02 per Kwh (at the generator end) with due consideration of central transmission loss. If GRIDCO would not have availed this power from the 50 MW generating unit of M/s.ASL then GRIDCO had to purchase this power from the CGPs/NTPC-ER generating stations or through power exchange. We find that the average rate of the NTPC-ER stations i.e.Rs.3.02 per Kwh will be more appropriate for the price towards purchase of power from the balance 88% of the generation of 50 MW generating unit of M/s.ASL. There is no need to prolong the dispute any further. We direct GRIDCO to make payment @Rs.3.02 per Kwh to M/s.ASL towards earlier purchase of power till date, out of the balance 88% of the generation from the 50 MW generating unit of M/s.ASL. We further direct that any further purchase of such power by GRIDCO from M/s.ASL will be governed by the National Tariff Policy and associated guidelines for the procurement of power”.

3. The petitioner, being aggrieved by the above order of the Commission, moved to the Hon’ble APTEL in Appeal No. 191/2011 with a prayer for determination of tariff on the basis of fully allocated cost. The Hon’ble APTEL in their order dated 04.10.2012 remanded the matter back to the Commission with the following observations:

“30. XXXXXXXX The result is that the appeal has to be allowed, and so we do and by setting aside the order under challenge we remand the matter back to the Commission with direction to pass afresh an order in accordance with the law upon hearing the parties and on the basis of the materials as were made available before the Commission and as may be produced further by the parties to the extent of relevancy. Since the appellate order is an order of remand it is deemed appropriate that the Commission complete the exercise within six months from the date of communication of the order and report of compliance with this order within a month thereafter. Meanwhile, the Commission’s determination of tariff @ Rs. 3.02 shall be treated as an interim order till an order is passed afresh within the timeframe as given. No costs. ”

4. Thereafter, the Commission heard the matter again and in its order dated 16.04.2013 refused to recognise the petitioner’s plant as an IPP and determined that the price of power procured by GRIDCO from its power station was to be as per the CGP pricing policy and observed as follows:-

“11. In view of the above findings, the Commission rejects the plea of the appellant to treat the subject 50 MW Generating units as an IPP. The Commission would also like to order to treat the subject 50 MW generating unit as an extension of its existing 40 MW CGP to make the total CGP capacity of M/s. ASL as 90 MW. Accordingly all stakeholders are directed to treat the entire 90 MW capacity of ASL as Captive Generating Plant of the Integrated Steel Plant of M/s. ASL. The price fixed by the

Commission from time to time for procurement of surplus power from all the CGPs of the State by GRIDCO shall also be equally applicable in the present case for any surplus power drawn from the 90 MW (40 MW + 50 MW) CGPs of M/s. ASL. The infirm power availed by GRIDCO from the subject 50 MW Generating unit before its commercial operation shall be paid at the rate of inadvertent power fixed by the Commission for relevant period. As such, Commission is not inclined for vetting of the PPA of 50 MW capacities as the subject 50 MW Generating Unit is not an IPP. Parties are liberty to file the PPA for the 500 MW (2x250 MW) IPP, as per the MoU condition signed with Govt. of Odisha, in due course of time. In supersession of all interim order(s) on adhoc rate of 50 MW Generating Unit, GRIDCO should clear all the bills of M/s. ASL for the surplus power received from the 90 MW (40 MW + 50 MW) CGPs as per the prevalent CGP pricing approved by the Commission from time to time.”

5. The above order of the Commission was again challenged by the petitioner before the Hon’ble APTEL in Appeal No. 159/2013 and Hon’ble APTEL in their order dated 17.10.2014 had remanded the matter again to the Commission with the following observations:-

“35 (i) We find that the State Commission has failed to adhere to scope of the remand ordered by this Tribunal vide judgment dated 4.10.2012 in Appeal NO. 191 of 2011. In the previous order dated 13.09.2011, the State Commission instead of determining the tariff of Appellant’s power plant of 50 MW capacity on cost plus basis, decided that the 88% energy supplied by the Appellant may be paid by GRIDCO at NTPC-Eastern Region tariff. The Tribunal in Appeal No. 191 of 2011 held that linking the tariff of the Appellant’s power plant with NTPC tariff was not in order and directed determination of tariff as per the provisions of the Act and its Regulations by taking into account the costs incurred by the Appellant. There was no occasion for the State Commission to institute an enquiry regarding the status of the 50 MW units in the remand proceedings.

(ii) Even if it is accepted that the 50 MW unit of the Appellant is a CGP, when the entire power output of the 50 MW plant of the Appellant was consumed by GRIDCO there was no question of applying the generic tariff applicable for purchase of surplus power from the CGP to be made applicable for the power taken by GRIDCO that too without any agreement and after unlawfully denying open access to the Appellant. The state Commission should have determined the tariff on the cost plus basis taking into consideration the capital cost of the 50 MW plant, actual landed cost of coal and fuel oil and operational and financial parameters as per its Tariff Regulations.

(iii) In view of the above, the impugned order is set aside and the matter is again remanded to the State Commission to determine the tariff as per the directions given by the Tribunal within three months of date of communication of this judgment.”

6. Pursuant to the above order of the Hon’ble APTEL, the Commission vide its Order dated 09.06.2015 in Case No. 28, 29, 107 & 108/2010 had determined the capacity charges of the petitioner’s 50 MW generating unit along with methodology for determination of the energy charge rate for the power plant. However, GRIDCO in the meantime has challenged the order of Hon’ble APTEL dated 17.10.2014 passed in Appeal No. 159/2013 as stated above before the Hon’ble Supreme Court of India. The Petitioner has submitted that the Commission has determined the tariff of the

petitioner's 50 MW generating unit vide its order dated 09.06.2015 in pursuance to the principles laid down in the earlier order of Hon'ble APTEL passed in Appeal No. 159/2013, which were not challenged before any judicial forum, hence have attained their finality. Further, even if the appeal filed by GRIDCO before the Hon'ble Supreme Court against the Hon'ble APTEL order dated 17.10.2014 is maintainable; GRIDCO is liable to pay the amount to the petitioner in absence of any stay by the Hon'ble Apex Court. The petitioner submitted that they have computed an arrear bill amount of Rs.75,44,62,286/- as on 31.03.2017 including DPS payable by GRIDCO to the petitioner as per the tariff determined by the Commission in its order dated 09.06.2015. The Petitioner further submitted that they are not agreeable to the argument of GRIDCO that DPS should not be considered on the pending bill since the year 2011.

7. The Petitioner, M/s. ASL has further stated that they have already submitted the detailed data relating to coal purchased and consumed by the generating plant through additional affidavit to the main petition before this Commission on 30.11.2012. But plant availability data was not submitted by the petitioner on the ground that it is an internal matter of SLDC and GRIDCO. In view of the above, the petitioner has prayed the Commission to calculate the tariff payable to the petitioner company including the energy charges for the period July, 2010 to June, 2011 and to direct GRIDCO to pay the amount due to the petitioner company for power availed from its 50 MW plant after calculating the tariff in accordance with the directions of the Commission in its order dated 09.06.2015 while disposing of Case Nos. 28, 29, 107 & 108 of 2010.
8. The respondent GRIDCO has submitted that they have made an appeal before the Hon'ble Supreme Court of India (Civil Appeal No. 1298/2015) against the Hon'ble APTEL Order dated 17.10.2014 passed in Appeal No. 159/2013 praying for declaring 50 MW thermal generating unit of the petitioner M/s. ASL as a Captive Generating Plant (CGP) in view of the evidences mentioned and conclusion derived in OERC order dated 16.04.2013 in Case Nos. 28, 29, 107 & 108 of 2010. In this appeal it has been stated that the Hon'ble APTEL has failed to appreciate and consider the following facts and grounds before pronouncing their judgment.
 - i. Whether the 50 MW generating unit of M/s. ASL is a CGP or an IPP under the purview of various statutory provisions and Regulations?
 - ii. What should be an appropriate tariff structure based on the status of the 50 MW generating unit of M/s. ASL?

The above civil appeal is pending before the Hon'ble Apex Court.

9. GRIDCO further submitted that during pendency of the said civil appeal before the Hon'ble Apex Court, the Commission vide its order passed in Case Nos. 28, 29, 107 & 108 of 2010 dated 09.06.2015 had determined the tariff of M/s. ASL for the period from 24.04.2010 to June, 2011 in obedience to the direction of Hon'ble APTEL vide their judgment in Appeal No. 159/2013 dated 17.10.2014. The Commission at Para-19 of its order dated 09.06.2015 had observed the following:-

“During the hearing GRIDCO Ltd. submitted that they have preferred an appeal before the Hon'ble Supreme Court of India against the judgment dated 17.10.2014 of the Hon'ble APTEL passed in Appeal No. 159/2013 in Civil Appeal No. 1298/2015 and the Hon'ble Apex Court has admitted the said Civil Appeal and has issued notice to the Commission for filing of reply in the said matter. The present order of the Commission shall be subject to the outcome of the said Civil Appeal pending with the Hon'ble Supreme Court for final disposal.”

10. GRIDCO submitted that neither Hon'ble APTEL nor the Commission had directed GRIDCO in their orders to make payment to M/s. ASL as per the consequential tariff determined by the Commission. Moreover, GRIDCO had paid an amount of Rs. 80.04 Cr. towards purchase of 288.03 MU during the period starting from 5th March, 2010 to June, 2011 which includes the cost of infirm power from 05.03.2010 to 23.04.2010 and firm power from 24.04.2010 till June, 2011 at the provisional rates as directed by the Commission in its earlier orders from time to time. Therefore, GRIDCO submitted that the petition filed by M/s. ASL u/S. 142 of the Electricity Act, 2003 is not maintainable under law.
11. GRIDCO has further submitted that M/s. ASL vide its letter dated 27.06.2015 had claimed an amount of Rs. 65.45 Cr. (including Delayed Payment Surcharge) over and above the payment of Rs. 80.04 Cr. paid by GRIDCO. But M/s. ASL had not submitted the required documents as per the Commission's order like plant availability factor issued by SLDC for calculation of capacity charge and details of actual coal inventory and utilization of coal along with GCV and landed price certified by statutory auditor and also actual percentage of blending of imported coal etc. GRIDCO stated that M/s. ASL itself has not complied the Commission's order dated 09.06.2015 by not submitting the required documents for verification of its claim. In absence of such data GRIDCO was not able to verify and arrive at the final amount payable to M/s. ASL. GRIDCO has time and again informed M/s. ASL to submit the required documents during their discussions and while replying the queries raised by M/s. ASL on ARR application of GRIDCO. However, M/s. ASL has submitted the certified coal cost and

GCV of coal only in the month of October, 2018 and required Plant Availability Report issued by SLDC in December, 2018. GRIDCO has stated that they have also intimated M/s. ASL that they would not pay Delayed Payment Surcharge (DPS) on the disputed claim made in an incomplete shape without the essential documents as per the statutory provisions and Commission's order dated 09.06.2015.

12. GRIDCO further submitted that based on the documents submitted by the petitioner they have arrived at an amount of Rs.8,17,05,879/- payable by GRIDCO to M/s. ASL as final balance dues under the cost plus tariff towards power supply by the petitioner during the period from 05.03.2010 to June, 2011 including cost of infirm power from 05.03.2010 to 23.04.2010 as per the Commission's order dated 09.06.2015 without considering DPS as indicated in the above paragraph. However, GRIDCO submitted that such consideration for verification of claim of M/s. ASL as per the Commission's tariff order dated 09.06.2015 is without prejudice to GRIDCO's stand taken in the Civil Appeal No. 1298/2015 which is sub-judice before the Hon'ble Apex Court on the matter of status of the subject generating unit of the petitioner.
13. GRIDCO submitted that if at all the payment is made by GRIDCO based on the tariff order dated 09.06.2015 of the Commission and after the decision in the Civil Appeal No. 1298/2015 by the Hon'ble Apex Court if it is found that there is an over payment by GRIDCO, under such circumstances there would be no way to adjust the excess payment as power is no more being availed by GRIDCO from M/s. ASL either from its 50 MW generating unit or from 40 MW CGP unit. Therefore, Bank Guarantee is the only option which is to be provided by the petitioner to GRIDCO to ensure security of additional payment being made by GRIDCO under cost plus tariff mechanism for the period from 05.03.2010 to June, 2011 including the period of availing infirm power.
14. In view of the above, the respondent GRIDCO has prayed the Commission to direct the petitioner M/s. ASL to submit Bank Guarantee with GRIDCO for an equal amount of Rs. 8, 17, 05,879/- with the validity till disposal of C.A. No. 1298/2015 pending before the Hon'ble Apex Court and to consider the said amount as pass through in the ARR of GRIDCO.
15. Heard the parties and their written notes of submission are taken into record. We observe that the Commission vide its order dated 09.06.2015 had determined the tariff of the subject 50 MW generating unit of M/s. ASL pursuant to the judgment dated 17.10.2014 of the Hon'ble APTEL passed in Appeal No. 159 of 2013. GRIDCO has made an appeal before the Hon'ble Supreme Court of India vide C.A. No. 1298 of 2015

on the basic issue of determining the status of the subject 50 MW generating plant as an IPP or CGP, which has an impact on the principle of determining the tariff of such generating unit. We further observe that though the petitioner has submitted certain data/information relating to price and GCV of coal to the Commission in its additional submission made during hearing of the Case Nos. 28, 29, 107 & 108 of 2010 in November, 2012, they have not submitted the same along with the energy bills served to GRIDCO in pursuance to the Commission's order dated 09.06.2015 passed in those cases. Therefore, GRIDCO has submitted that they were not able to verify the energy bills and arrive at the amount payable to petitioner. Hence, we observed that the present case filed by the petitioner does not attract Section 142 of the Electricity Act, 2003 for non-implementation of order dated 09.06.2015 of the Commission.

16. Now, we observe that in the meantime GRIDCO has received the certified coal cost and GCV of coal from the petitioner in the month of October, 2018 and plant availability report in December, 2018 during pendency of the present case before this Commission. GRIDCO has arrived at an amount of Rs.8,17,05,879/- payable to the petitioner as balance dues towards power supply by the petitioner during the period from 05.03.2010 to June, 2011 including cost of infirm power from 05.03.2010 to 23.04.2010 basing on the data submitted by M/s. ASL under the cost plus tariff mechanism pursuant to the order dated 09.06.2015 of the Commission in Case No. 28, 29, 107 & 108/2010. At the same time the petitioner M/s. ASL has also claimed an amount of Rs.75,44,62,286/- as on 31.03.2017 including DPS payable by GRIDCO to the petitioner for the said period. Therefore, both the parties are directed to make an attempt for reconciliation of the bill. DPS is payable on a correct bill, otherwise calculation of DPS shall be erroneous. After reconciliation if the bill remains unpaid then DPS shall be chargeable as per CERC Regulation. Since the matter is sub-judice before Hon'ble Apex Court in CA No. 1298/2015, the outcome of the same shall decide the ultimate status of the generating unit and dues of the Petitioner. GRIDCO may make the payment on the agreed amount against a Bank Guarantee of equal amount valid till the matter remains sub-judice.
17. With the above observation, the case is disposed of.

Sd/-
(S. K. Parhi)
Member

Sd/-
(A.K.Das)
Member

Sd/-
(U. N. Behera)
Chairperson