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

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

Case No. 48/2017

M/s. Bhushan Power & Steel Ltd.	……	Petitioner
Vrs.		
GRIDCO LImited	.....	Respondent

In the matter of: **An application under Section 86 (1) (f) & Section 142 of the Electricity Act, 2003 seeking direction of the Commission to GRIDCO Limited for compliance of the order dated 29.12.2015 in Case No. 26 of 2015.**

For Petitioner: **Shri Satyakam S, Advocate on behalf of M/s. Bhushan Power & Steel Limited, Shri Prabhat Kumar Mishra on behalf of M/s. Bhushan Power & Steel Limited.**

For Respondent: **Shri Tapas Pattnaik, DGM (PP), GRIDCO, Durga Madhab Sahoo, GRIDCO Ltd., Shri S. S. Nayak, CGM (PP), GRIDCO Ltd.**

ORDER

Date of hearing: 21.05.2019 **Date of order:09.07.2019**

The petitioner M/s. Bhushan Power & Steel Ltd. owns and operates a captive power plant of 506 MW capacity at Thelkoloi in Sambalpur district of Odisha and has filed the petition under Section 86 (1) (f) & Section 142 of the Electricity Act, 2003 seeking direction of the Commission to GRIDCO Limited for compliance of the order dated 29.12.2015 in Case No. 26 of 2015**.**

2. The Petitioner submitted that the Commission in its Order dated 14.03.2008 had determined the Policy for pricing of the surplus power from CGPs, wherein the surplus power injected by the CGPs has been classified as (a) Firm Power (b) Non-firm Power and (c) Inadvertent Power. Subsequently the Commission in its various Orders has determined the price for supply of surplus power to the Respondent from the CGPs and Co-generation plants. Subsequently, the Commission vide its order dated 23.11.2010 passed in Case Nos. 117 & 118 of 2010 had observed as follows:

"30 (a) The Commission in its Order dtd. 14.03.2008 at Para 12 stated that those Captive Generators who give a commitment for supply of power for a period of more than three months and upto one year shall be considered as supply of Firm Power and those Captive Generators who are capable of giving day ahead schedule but are not in a position to give supply continuously for a period upto three months shall be treated as 'Non-Firm' Power. Other than 'Firm' and 'Non-Firm' Power, any injection of power from CGPs to the State Grid shall be treated inadvertent injection of power to the Grid and such inadvertent power would be priced equal to the pooled cost of the hydro power of the State."

X x x x x x x x x x x x

34 (e) The Captive/Co-generation Plants who would supply inadvertent power/ infirm power within the Operating Frequency Band of 49.50 to 50.18 HZ would be paid at the pooled cost of State hydel power which is 62.51 Paise/KWh for FY 2010-11 as approved by the Commission and any inadvertent injection at a frequency of 50.20 Hz and above shall be considered as "Free Power" to the State Grid. Any injection over the implemented schedule at a frequency within the Operating Frequency Band of 49.50 to 50.18 HZ should also be paid at 62.51 Paise/KWh during FY 2010-11 (from 10.11.2010 to 31.03.2011)."

3. The petitioner has submitted that from the above observations of the Commission, the CGPs have been treated as 'must run' plant and entitled to inject their surplus power to the state grid without the need for any schedule and/or agreement/LoI with GRIDCO. But GRIDCO had not made payment to the CGPs at the tariff decided by the Commission in their aforesaid order dated 23.11.2010.Therefore, based on the petition filed by the CCPPO under Section 142 of the Electricity Act, 2003, the Commission at Para-34.1 of its order dated 29.08.2011 passed in Case No. 22/2011 had observed as follows:-

"34.1. x x x x x. Hence, for all practical purposes the injection of infirm power and inadvertent power would be treated under the same commercial principle i.e. the rate as approved by the Commission i.e. at the pooled cost of the hydro power of the State for the respective years."

4. The Petitioner further submitted that since GRIDCO did not clear the dues of any of the CGPs, CCPPO had filed a petition under Section 142 of the Electricity Act, 2003 against GRIDCO for non-compliance of the Commission's order dated 01.10.2012 which was registered in Case No. 30/2013 and the Commission vide its order dated 12.05.2015 passed in this case had directed GRIDCO to complete the reconciliation statement within 02.07.2015 and submit the compliance report to the Commission by 05.07.2015. Since GRIDCO did not undertake the reconciliation of the dues of CGPs as per the above direction of the Commission M/s. SMC Power Generation Limited had filed a petition under Section 142 of the Electricity Act, 2003 for implementation

of the aforesaid order dated 12.05.2015, which was registered in Case No. 26/2015 and the Commission vide its order dated 29.12.2015 passed in Case No. 26/2015 had observed as follows:

"13. x x x x x x x x x x x x. If any surplus power from CGPs has been purchased by GRIDCO Ltd. without any formal agreement and prior negotiation, the rate fixed by the Commission from time to time shall be allowed. Therefore, the LoI issued by GRIDCO Ltd. by offering lower rate for CGP power and accepted by the parties is not in the violation of Commission's order. These rates are subject to conditions fixed in Commission's order without any deviations. The energy accounting shall be in accordance with the Commission's order.

19. x x x x x x x x x x x x. If the declaration of availability of CGP is not accepted by the SLDC and 'zero' schedule is made for that CGP, then the power if injected by the CGP within the conditions specified will be considered as inadvertent injection and paid at the rate of inadvertent power, as the CGPs have been declared as 'must run' units in the said order of Commission. However, the power injected by CGPs beyond the schedule or the power injected at 'zero' schedule at 50.20 Hz or above, shall be priced at 'zero' cost."

5. The petitioner has submitted that in the said order, the Commission had mentioned that *"the issues addressed above are also applicable to similarly placed CGPs and co-generation plants supplying their surplus power to GRIDCO for the stated period"*. However, the petitioner had also filed a petition u/S. 142 against GRIDCO for non-compliance of the directions of the Commission's said order dated 12.05.2015, which was registered in Case No. 31/2015. While disposing this case, the Commission vide its order dated 06.08.2016 had allowed one month time to GRIDCO for reconciliation of the outstanding dues of the petitioner. In pursuance to this order dated 06.08.2016, GRIDCO has undertaken reconciliation of the account of the petitioner for the period from 17.02.2014 to 31.03.2015 (excluding April, 2014). The petitioner has supplied 14.06 MU to the State Grid during April, 2014 and no payment has been made by GRIDCO for such supply of power on the ground that there was no commercial agreement between GRIDCO and the petitioner for April, 2014. The petitioner stated that GRIDCO vide its letter dated 31.03.2014 unilaterally withdrew LoIs issued to the CGPs w.e.f. 01.04.2014 and stated that *"there shall be no commercial transaction in respect of the CGPs/Co-generation plant with GRIDCO towards injection of surplus power to the State grid from 01.04.2014",* which was most arbitrary as the CGPs injecting their surplus power could not have been expected to curtail injection and/or find an alternative buyer to purchase their power. This act of intimation of GRIDCO on the last date of FY 2013-14 i.e. on 31.03.2014 that there

shall be no commercial transaction in respect of injection of surplus power by the CGPs w.e.f. 01.04.2014 without issuing new LoI, exhibits utter insensitivity to the interest of the CGPs. However, GRIDCO vide its letter dated 21.04.2014 communicated the terms of new LoI, which was accepted by the petitioner vide its letter dated 29.04.2014.

6. On the other hand, from February, 2014, GRIDCO has raised bills of deviation charges on the petitioner for over/under injection as per the CERC Deviation Settlement Mechanism (DSM) Regulations without adopting similar charges prescribed therein for over drawal. The petitioner has stated that such practice of GRIDCO is illegal and erroneous in light of the fact that the Commission in its various orders and Regulations has notified UI charges for the CGPs which is independent from what has been prescribed by CERC DSM Regulations. The petitioner stated that since the CGPs function continuously they must be treated as 'must run' power plants and inadvertent power flow by the CGP should be priced at the pooled cost of the hydro power in the State till Intra-State DSM Regulations is notified by the Commission.

7. The petitioner submitted that after signing of the LoI for FY 2014-15, he found that its schedules were not accepted by SLDC on several occasions for which GRIDCO did not make any payment in respect of power injected by the petitioner during such days. This issue was raised by the petitioner before GRIDCO several times. Further, GRIDCO had imposed penalty for over injection of power during high frequency i.e. 50.10 hz and deducted from the monthly bills, though it was refunded by GRIDCO later in October, 2016. Therefore, the petitioner had not accepted the LoI for the FY 2015-16 but injected its surplus power in the State Grid as per the dispensation ordained by the Commission in its orders from time to time. The petitioner has supplied 150.48 MU during FY 2015-16 and 157.82 MU during FY 2016-17 and requested GRIDCO to make payment for supply of such power. Despite GRIDCO having realised a price by billing such power to DISCOMs, GRIDCO has refused to make payment for the same on the ground that the petitioner has not accepted the LoI issued by GRIDCO.

8. The Petitioner has submitted that GRIDCO's refusal to make payment for power supplied by the petitioner during April, 2014 and FY 2015-16 and thereafter is patently inconsistent with the orders of this Commission and the petitioner is entitled

to be paid in terms of payment fixed by the Commission. Therefore, the Petitioner has prayed the Commission to direct GRIDCO to pay a sum of Rs. 1,04,62,020/- to the petitioner in respect of power supplied by the petitioner to the State Grid in the month of April, 2014 and a sum of Rs. 26,60,47,768/- in respect of power supplied during FY 2015-16 and FY 2016-17 along with interest at the rate of 18% per annum till the date of payment.

9. The respondent GRIDCO has submitted that the Commission in their order dated 28.10.2009 passed in Case No. 06/2009 at Para-20 have said that the applicability of the order was effective from 01.11.2009 until further order and at Para-1 (ii) & 19 (vi) of the said order has directed both the CGPs and GRIDCO for signing of agreement for supply of power to GRIDCO. Accordingly, GRIDCO entered into time bound contract/agreement issuing LoI to the CGPs for supply of power by them. Further, the Commission's order dated 29.12.2015 passed in Case No. 26/2015 dealt with the payment of outstanding dues of the CGP for the period upto the FY 2011-12 and the Commission at Para-22 of the said order has stipulated that *"the issues addressed above are also applicable to similarly placed CGPs and Co-generation plants supplying their surplus power to GRIDCO Ltd. for the stated period."* The Respondent-GRIDCO Ltd. has submitted that nowhere in the referred orders of the Commission it has been mentioned to pay the CGP with hydro-pool cost without any contract/agreement. Rather, the Commission in its order dated 28.10.2009 had directed to sign the agreement for supply of surplus power from the CGPs to GRIDCO. Further, the referred orders of the Commission pertain to payment of CGP dues for a particular period only but not for indefinite period.

10. GRIDCO has entered into agreement with the petitioner upto March, 2015 by issuing LoI and acceptance by the petitioner thereof and paid all the dues upto the contract period as per the order of the Commission except for the month of April, 2014. Regarding non-payment for April, 2014, GRIDCO has submitted that they have issued a letter to the petitioner on 31.03.2014 towards cancellation of existing LoI w.e.f. 01.04.2014 and there shall be no commercial transaction in respect of CGP with GRIDCO towards injection of surplus power to the state grid from 01.04.2014. However, on 21.04.2014 GRIDCO issued another LoI to the petitioner wherein it has been mentioned that this LoI shall come into effect from 01.05.2014 and shall be in force till 31.03.2015 or any subsequent intimation whichever is earlier and the

petitioner had accepted this LoI on 29.04.2014. Thus, the claim of the petitioner for payment with hydro-pool cost for injection of such un-contracted/un-scheduled power to the grid during April, 2014, without any subsisting contract is not sustainable.

11. GRIDCO has submitted that as mandated in Electricity Act, 2003 at Section 2 (70), "supply" in relation to electricity, means the "sale" of electricity to a licensee or consumer. Thus, sale cannot be effected without any contract between the parties. In this connection the order dated 08.05.2017 of the Hon'ble ATE passed against Appeal No.120/2016 and I.A. No. 272/2016 reveals as follows:-

"Para-9(g)- " x x x x x x x x x .... This Tribunal in the judgments in Appeal Nos. 267 of 2014 and 68 of 2014 also held that energy pumped into the grid without consent/agreement and schedule, need not be compensated."

Para-l0 (b) (iii) "xxxxxxxxxxxxxxx .... From the combined reading of all the above provisions and the communications exchanged between the Appellant and the Respondent No.1, it is clearly established that the Appellant has pumped the energy on its own without entering into any contract with Respondent No.1 and without the knowledge/ schedule from SLDC. The energy pumped into the grid during the period under dispute by the Appellant is unauthorized and does not call for any payment by the Respondent No.1.

Para-l0(c) i "xxxxxxxxxxx .... Here we would like to mention that each entity created under the Electricity Act, 2003 has a clear defined role. In this case, the responsibility of regulation of power inflow into the grid from all suppliers lies with SLDC in accordance with Section 32 of the Electricity Act, 2003, based on the contractual agreements entered by the distribution licensee with power generators suppliers through a well-established system of scheduling. It is the duty of everyone connected with the operation of the power system to comply with the directions of the SLDC in its control area. In the instant case, the Appellant has not sought any approval/ schedule from SLDC before synchronization for pumping any power into the grid. Even the SLDC was not aware of the power pumped during this period by the Appellant into the grid. Hence, the onus of the wrong doing by the Appellant cannot be shifted to the Respondent No.1."

Para-(10) (g)(i)"The safe and economic operation of the grid is of utmost importance. In this regard, many regulations, rules and procedures have been made by the Central/State Regulator(s). Maintenance of the grid discipline is the responsibility of all the stakeholders. The Appellant has pumped power into the grid without knowledge obtaining prior approval of the SLDC and without any valid agreement contract with the Respondent No.1. t If every generator starts injecting power into the grid without prior approval of the grid operators/LDCs and without valid contractual agreements this may jeopardise secure grid operations and may lead to catastrophe. The action of the Appellant is not justified and moreover pleading that there was no such impact in the instant case is misplaced."

Para-10(I) iv "XXXXXXXXXXXXXX .... The crux of these two judgments is also that a generator cannot pump electricity into the grid without having consent/contractual agreement with the distribution licensee and without the approval/ scheduling of the

power by the SLDC. Injection of such energy by a generator is not entitled for any payments."

12. GRIDCO has stated that as per the above judgment of Hon'ble APTEL, injection of such energy by a generator into the State grid without contract and without schedule is not entitled for any payment. GRIDCO further stated that the petitioner in its petition has cited the rate of inadvertent power and mis-understood it as the direction of the Commission for payment at the said rate without any subsisting agreement which has been observed by the Hon'ble ATE at Para-10 (b) (iii) of their order dated 08.05.2017 in Appeal No. 120/2016 and I. A. No. 272/2016. In the referred orders of the Commission, no where it has been mentioned to pay the CGP for inadvertent injection of power at hydro pooled cost without any contract with GRIDCO. Rather in its various orders, the Commission had directed the CGP to sign agreement with GRIDCO for supply of power. GRIDCO stated that the petitioner has misconceived the fact that mere approval of connectivity by the STU to the CGPs for their own reliability and stability provides them legal right to inject power at their sweet will without any contract and scheduling and also to claim the charges for the same. Further, the Commission in its orders while approving the ARR of GRIDCO for the FY 2014-15 to 2018-19 has not approved purchase of power by GRIDCO from the CGPs.

13. GRIDCO has stated that the petitioner is not liable for any payment for injection of power after 31.03.2015 i.e. upto the period GRIDCO was having an agreement with petitioner for supply of power and also for the month of April, 2014. GRIDCO further submitted that nowhere in the referred orders of the Commission it has been mentioned to pay the CGPs with hydro pool cost without any contract with GRIDCO. The unauthorized injection of power by the petitioner for a very short period due to load throw from its industry normally acts as a jerk which is absorbed by State grid by maintaining stability and reliability of the industry of the petitioner.

14. In view of the above the respondent GRIDCO has submitted that as per the direction of the Commission reconciliation statement upto March, 2015 has been duly signed by the petitioner and GRIDCO and GRIDCO has paid all the dues of the petitioner upto March, 2015 (excluding April, 2014) i.e. for the period having subsisting contract with the petitioner and they have got no liability to pay anything to the petitioner towards un-authorised injection of power by him to the State grid thereafter

without any contract/agreement. Hence, the petition filed by the petitioner is devoid of any merit and liable for outright rejection.

15. Heard the parties at length. Their written notes of submission are taken into record. Regarding supply of surplus power from the CGPs, the Commission is of the view that any supply from an independent generator or a CGP can only be effected through a contract. That means the buyer and the seller both have to agree for purchase and sale of power. In this regard we are quoting the order of the Commission in Case No. 16/2018 dated 09.04.2019 where the Commission on the same issue has held as under.

"13. We are aware that the power which is inadvertent in nature cannot be speculated or ascertained ahead of its injection. Injection of such inadvertent power arises out of obligation/contract to supply power to the licensee. This injection should be within the full knowledge of GRIDCO and SLDC through a contract and a valid schedule so that safety of the grid at no situation is affected. Power system cannot be a dumping ground for unwarranted power. Injecting erratically and claiming compensation for the same amount to unsafe grid operation and unnecessary enriching of any injector of power such as a CGP, who has no intention of selling power to GRIDCO. Rather it should be treated as a source of pollution in the grid.

14. In view of the above, we observe that two basic ingredients that are necessary for payments towards transaction of power between a generator (CGP) and the licensee (GRIDCO) are (i) there should be a subsisting contract between them and (ii) there should be a day ahead schedule for grid discipline. GRIDCO must pay the CGPs for their scheduled power and the inadvertent power injected during such schedule and currency of a subsisting contract. x x x x x x x x x x."

16. Accordingly, the case is disposed of.

Sd/- **Sd/-**

(S.K.Parhi) **(U. N. Behera)**
Member **Chairperson**