

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

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

**Case No. 18/2019**

GRIDCO Ltd.	.....	Petitioner
Vrs.		
NTPC & others	.....	Respondents

**In the matter of:**    **An application under Ss.61(d),86(1)(b) of the Electricity Act,2003 read with Section 21(4)(b)(5) of the OER Act,1995 and other enabling provisions for approval of Power Purchase Agreement dated 11.08.2006 executed between NTPC and GRIDCO Ltd. for purchase of power from 1,980 MW Barh Super Thermal Power Station Stage-I, Bihar in the Eastern Region.**

**For Petitioner:**       Shri P. K. Mohanty, Sr. Advocate and Shri Pranoy Mohanty, Advocate for GRIDCO Ltd.

**For Respondents:**    Ms.Ritu Apurva, Advocate for NTPC Ltd., Shri R. P. Mahapatra and Ms. Niharika Pattanaik, ALO, DoE, Government of Odisha.

Nobody is present on behalf of MoP, Government of India.

**ORDER**

**Date of hearing: 21.07.2020**

**Date of order:01.11.2021**

1. GRIDCO has filed the present petition under Section 86 (1) (b) of the Electricity Act, 2003. GRIDCO has stated that as per different judgments of Hon'ble Supreme Court of India and Hon'ble APTEL Electricity Regulatory Commission can approve/disapprove Power Purchase Agreement (PPA) so that interest of the consumers can be protected in accordance with Section 61 (d) of the said Act.
2. GRIDCO has submitted that NTPC, in its offer dtd. 23.05.2006, had committed to commission the first unit of Barh Thermal Power Project by March, 2009 (3 x 660 MW). GRIDCO, keeping in view the power requirement of the state at that period, entered into a PPA with NTPC on 11.08.2006. But NTPC failed to commission the said project in time as per its commitment. Therefore, GRIDCO being a state designated entity, to cater state requirement of power, was constrained to arrange power from other

alternative sources by executing PPAs with OPGC (3<sup>rd</sup>&4<sup>th</sup> units) on 04.01.2011, M/s. JITPL on 04.01.2011, M/s. Vedanta Ltd. on 19.12.2012 in order to meet its statutory obligation for meeting the power requirement of the state. In the mean time, MoP, vide its letter dtd. 03.07.2012 allocated 418 MW of power from Barh STPS (Stage-I) in favour of Odisha.

3. Further due to uncertainty in commissioning of the NTPC projects and keeping in view the availability of power from the generating stations inside the state and enhancement of home state quota from 10% to 50% by MoP in respect of NTPC generating station at Darlipalli in Sundargarh district of Odisha, which would be sufficient to cater the future load growth of the state, it was decided in the 153<sup>rd</sup> meeting of GRIDCO Board to surrender the allocated power from upcoming NTPC stations located outside the state to reduce the liability of payment of fixed cost burden and to protect the interest of the consumer. Had NTPC commissioned the subject power project in time, GRIDCO would not have gone for entering into PPAs with other generating companies so as to meet the future anticipated demand of the state. Due to failure of NTPC to commission the power project within a period to the extent of nearly 8 years after signing of PPA, GRIDCO vide its letter dt.16.04.2014 requested the State Government to take up the matter with MoP for de-allocation of power from the upcoming NTPC stations located outside the state. The Government of Odisha vide letters dtd. 14.01.2014, 28.06.2014 and 12.11.2014 had requested MoP to consider de-allocation of power from the upcoming NTPC stations outside the state. Accordingly share of power from Nabinagar-I (155 MW) and Barh STPS-II (166 MW) have been de-allocated for Odisha and reallocated to Uttar Pradesh and Bihar respectively by MoP, Government of India.
4. GRIDCO has submitted that the PPA in question had been signed as per the then power requirement of the state, but in the meanwhile by the efflux of time, the purpose of the signing of the said PPA had been defeated since the petitioner, to meet the power requirement, cannot wait for indefinite period to procure power from the Respondent No.1 in detriment to the interest of the consumers of the state. GRIDCO has stated that when time is the essence of the contract, the promisor is expected to perform the contract within the stipulated time. On failure of the promisor, the promisee has the right to avoid the contract. In this regard, Section 55 (Para- I) of the Contract Act states as under:

*“When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be the essence of the contract”.*

5. GRIDCO has stated that they have filed the present petition under Section 86 (1) (b) of the Electricity Act, 2003, which is a settled law as per different judgments of Hon’ble Supreme Court of India and Hon’ble APTEL. The averment of NTPC that once the application has been filed by GRIDCO for such approval, the Commission has to consider the same for approval is not absolute. It is violative of the above settled law and aims to render the said act as nugatory and otiose. Therefore, GRIDCO has submitted extracts of different judgments of Hon’ble Supreme Court and APTEL which mandates to regulate in all aspects of matter, with pros and cons, while considering the approval of PPA or disapproval of the same.
6. GRIDCO has submitted that Hon’ble Supreme Court of India, in the case of Tata Power Co. Ltd. Vs. Reliance Energy Ltd., (2009) 16 SCC 659, has settled the law in following terms:

*“Section 86 – Functions of the Commission*

*105. Section 86 provides for the functions of the State Commission, clause (a) of sub-section (1) whereof empowers it to determine the tariff for generation, supply, transmission and wheeling of electricity. Clause (b) empowers it to **regulate** electricity purchase and procurement process of distribution licensees. Inevitably it speaks of PPA. PPA may provide for short-term plan, a mid-term plan or a long-term plan. Depending upon the tenure of the plan, the requirement of the distribution licensee vis-à-vis its consumers, the nature of supply and all other relevant considerations, approval thereof **can be granted or refused**. While exercising the said function necessarily the provisions of Section 23 may not be brought within its purview. While even exercising the said power the State Commission must be aware of the limitations thereto as also the purport and object of the 2003 Act. It has to take into consideration that PPA will have to be dealt with only in the manner provided therefore”.*

The word “regulate” carries with it the powers to reject, modify, alter or vary the terms of the agreement. The scope and ambit of the word “regulate” has been interpreted by the Hon’ble Supreme Court of India in case of Cellular Operators Association V. Union of India in AIR (2003) SC 899 as given below:

*“The regulatory bodies exercises wide jurisdiction. They lay down the law. They may prosecute. They may punish. Intrinsically, they act like an internal audit. They may fix the price, they may fix the area of operation and so on and so forth. While doing so, they may, as in the present case, interfere with the existing rights of the licensees.*

*16. From the above observations, it is clear that the scope of approval under Section 86(1)(b) of the Act includes the power to reject, modify, alter or vary the terms of the*

*agreements for purchase of power and to further direct the distribution licensee to re-write the terms found reasonable by the State Commission”.*

As submitted by GRIDCO, it is clear and evident from the above that the Commission has the power to approve or disapprove the PPA depending upon the tenure of the plan, the requirement of the distribution licensee vis-à-vis its consumers, the nature of supply and all other relevant considerations thereof. Further as GRIDCO has already arranged the power from alternative sources, there is no necessity to avail the power from the subject generating station which is yet to be commissioned. Therefore, in accordance with the above settled law the State Commission is empowered to disapprove the PPA.

7. GRIDCO has submitted that since NTPC has inordinately delayed commissioning of the project by almost 10 years as per their offer and GRIDCO has arranged power from alternative sources to meet the state demand, GRIDCO has now no option except to approach the Commission for disapproval of the PPA so as to relieve the state consumer from the fixed cost burden and protect their interest in accordance with Section 61(d) of the Electricity Act, 2003. Therefore, the question raised by NTPC that GRIDCO has come for approval of PPA after a period of 13 years, is not sustainable in the eyes of law. In a similar case, Hon’ble APTEL in its judgment dtd.10.07.2013 in Appeal No.112 of 2012 in matter of Tamil Nadu Generation and Distribution Corporation Ltd. Vs. M/s Penna Electricity Ltd. and TNERC, have reiterated the following:

*“21. After coming into force of the Electricity Act, 2003 on 10.06.2003, the Power Purchase Agreement executed shall be approved by the State Commission in terms of Section 86(1)(b) of the Electricity Act, 2003. In the present case, the Power Purchase Agreement between the Generator Respondent and the Distribution Licensee, the Appellant was entered into on 25.08.2004. Admittedly, the said Power Purchase Agreement dated 25.08.2004 was never placed for approval before the State Commission.*

*32. Therefore, in the absence of the approval of the PPA by the State Commission, the present PPA would not become binding contract between the parties. As such, there is no infirmity in the finding on this issue rendered by the State Commission”.*

GRIDCO has stated that in view of the above, the PPA entered between GRIDCO and NTPC for Barh Stage-I Power Plant is liable for disapproval by the Commission.

8. GRIDCO has further submitted that when NTPC was unable to commission the plant within the schedule time for reasons whatsoever, they should have sought for fresh concurrence from GRIDCO before going for investment in the plant. As regards to the contention of NTPC that they have invested in this project and PPA has already been

signed, GRIDCO has stated that it is a settled law that there is no estoppel against the statute. Hon'ble Supreme Court in Union Territory V. Managing Society, Goswami, GDSC reported in (1996) 7 SCC 665 at Para 4 has held that -

*“... A contract in violation of the mandatory provisions of law can only be read and enforced in terms of the law and in no other way. The question of equitable estoppels does not arise in this case because there cannot be estoppels against a statute”.*

GRIDCO has stated that approval of PPA by State Commission is statutory requirement under Section 86(1)(b) and in case the State Commission refuses to approve the PPA, doctrine of 'Promissory Estoppel' would not be applicable.

9. GRIDCO has further submitted that to comply the query of the Central Commission in tariff hearing of Barh-STPS-II in petition No.130/GT/2014, NTPC had submitted that Barh-Stage-I (3x360 MW) units are in advanced stage of construction, however due to Covid-19 situation the execution is delayed. The expected date of commercial operation of Unit-I and Unit-II is in 3<sup>rd</sup> quarter of FY 2020-21 and Unit-III is in 1<sup>st</sup> quarter of 2022-23. In the above premises GRIDCO has prayed the Commission to disapprove the PPA for Barh-Stage-I in order to safeguard the interest of state consumers in terms of financial burden on account of fixed cost pertaining to the said upcoming generating units.
10. The respondent, Sri R P Mohapatra has submitted that he has agreed with the submission of the GRIDCO that there has been unusual delay in commissioning of Barh-Stage-I (3x660 MW). NTPC vide letter dated 23.05.2006 had intimated GRIDCO that as per the schedule, the 1st unit was expected to be commissioned in March, 2009, but it is yet to be commissioned. Further, NPTC vide its letter dated 12.10.2006 had intimated GRIDCO that they were planning to expand Barh-STPS by setting up Barh-STPS-Stage-II and the estimated tariff for ex-bus energy would be 216.82 p/Kwh (fixed charges at 80% PLF-129.46 p/Kwh and variable charges-87.36 p/Kwh). It would go up due to delay in commissioning.
11. He has further submitted that the MoP, GoI in their letter dated 17.01.2011 have decided to allocate 50% of power to the Home States from upcoming power projects of NTPC. GRIDCO has also entered into PPA with some IPPs inside the state. Keeping in view surplus availability of power in future, the Govt. of Odisha, in pursuance to suggestion of GRIDCO, have intimated MoP, GoI for de-allocation of power from NTPC stations outside the state except North Karanpura STPS.

12. The Counsel of NTPC has submitted that NTPC had opposed the impleadment of the consumer representative, because when the contesting parties are present and have argued the matter in detail, there is no basis for the consumer representative to appear and make submissions in the matter. In any event, the submissions made by the consumer representative relate to tariff determination and this Commission has no jurisdiction to decide the same. These issues will be decided by the Central Commission under Section 79(1) (a) of the Electricity Act, 2003 while determining the tariff of the Barh Project. Therefore, the issues raised by the consumer representative is out of context and thus cannot be sustained.
13. NTPC has submitted that seeking disapproval of the PPA dated 11.08.2006 after a period of more than 13 years of entering into the same is clearly an afterthought and an attempt to get out of the PPA without being able to get the power re-allocated by the Ministry of Power. The issues raised by GRIDCO are wrong and denied. The issues for consideration by the Commission are as under :
- a. Whether GRIDCO is bound by the provisions of the PPA read with the Government of India allocation policy?
  - b. Whether the PPA can be terminated on the basis of delay in commissioning of units and without having a clause of termination in the PPA?
  - c. Conduct of GRIDCO in filing the present petition after gap of 13 years and failing to get the electricity re-allocated by the Government of India ?

NTPC has made its submission as follows on the above issues:

**(a) Whether GRIDCO is bound by the provisions of the PPA read with the Government of India allocation?**

14. The power from the Barh Generating station has been allocated to GRIDCO vide Ministry of Power ('MoP') vide letter No.5/9/2010-Th. II dated 03.07.2012. The PPA was entered into on 11.08.2006 inter-alia, provides as under –

**“2.2 Allocation of power**

- 2.2.1** *GRIDCO has requested for 100 MW power from this station. The allocation of power to GRIDCO shall be finalized after signing of PPAs by the proposed beneficiaries. The power allocation from the “BARH STPS” will be decided by Govt. of India/Ministry of Power and the same shall form integral part of this PPA.*

- 2.2.2 *Fifteen percent capacity of the Station shall be kept unallocated at the disposal of the Govt. of India and shall be subject to allocation from time to time as per the decision of the Ministry of Power. Out of this unallocated, balance if any, shall be deemed to have been allocated to various Beneficiaries in proportion to their allocated shares.*
- 2.2.3 *The right of Beneficiary to draw power against the above allocation shall be limited to the amount of LC opened by them.*
- 2.2.4 *Notwithstanding the obligations of Beneficiary(ies) to pay all the dues as per this Agreement, in the event of default in opening of LC of adequate of amount in favour of NTPC or payment of bills beyond a period of 60 days from the presentation of bills, NTPC shall be entitled to regulate/divert the share of the Defaulting Beneficiary to any other Beneficiary(ies) as per the provisions of generic procedure for regulation of power supply issued by CERC from time to time read with the provisios of Tripartite Agreement signed between Govt. of Odisha, RBI and GOI till the time default is rectified.*
- 2.2.5 *In case of default in payment of bills beyond a period of 90 days from the presentation of bills, NTPC shall have the right to reallocate power to the other Beneficiary(ies). However, the defaulting Beneficiary shall continue to be liable to pay the Capacity Charges in proportion to its allocation during the period of regulation/diversion of power till the power is reallocated*

### 2.3 *Operation of Power Station*

*It is understood and agreed by and between the parties that NTPC shall operate the station as per manufacturer's guidelines, applicable grid operating standards; directions of the CERC and relevant statutory provisions, as applicable from time to time."*

15. NTPC has submitted that GRIDCO is bound by the provisions of the PPA read with the Government of India allocation, unless the contracted capacity stands surrendered and re-allocated by the Government of India. NTPC has proceeded to invest substantially in setting up of a Generating Station, on the assumption that the electricity shall be purchased by the various beneficiaries identified by the Government of India, including GRIDCO. In such circumstances, any beneficiary cannot unilaterally rescind its obligations under the PPA by preferring a petition under Section 86(1) (b) of the Electricity Act, 2003. Further, the PPA entered into in 2006 did not provide for any commissioning date and clearly recorded that the allocation by MoP would form an integral part of the PPA. Accordingly, till the surrender is accepted by the MoP and the quantum of power already allocated to GRIDCO is firmly allocated to another procurer who accepts the entire obligation to pay the tariff for the quantum of power allocated, an existing beneficiary such as GRIDCO which has entered into the PPA, cannot be released from its obligation under the PPA unless the capacity is duly allocated to another entity. This issue had also been raised by another Distribution Licensee – Tata Power Delhi Distribution Company Limited before the Central Commission by filing

Petition No.182/MP/2015. The Central Commission passed an order dated 31.03.2017, inter-alia holding as under -

- “16. *Ministry of Power has submitted its reply on merits in its affidavit dated 8.1.2016. The Ministry has stated that allocation of power from the Central Sector Generating Stations, which have been set up considering the long-term PPAs entered into by the procurers, is made at the instance of the State Governments/Procurers. According to the Ministry, the procurers are not entitled to unilaterally terminate the PPAs, except in accordance with the provisions thereof. The Ministry has pointed out that the purported cancellation or termination of the PPAs by the Petitioner on unilateral basis was not contemplated at the time of allocation of power by the Central Government. The cancellation or termination of the PPAs executed based on allocation of power made by the Central Government seriously affects the scheme of investment in the infrastructure such as power generation by Central Public Sector Units (CPSUs). The Ministry pointed out that investments made by the CPSUs are to be serviced and that when a procurer decides to unilaterally terminate the PPAs, the CPSUs are seriously prejudiced. According to the Ministry, the Petitioner as the procurer has a right to the allocated capacity under the PPAs at all times and correspondingly, has the obligation to pay the fixed charges for the power allocated even in case of non-scheduling of power of its own volition.*
- .....
18. *Explaining the process of reallocation of power, the Ministry has stated that the Central Power Sector Units can approach it for reallocation to any other procurer in case the procurer to whom power has been allocated decides to surrender it at any time during the operation of the long-term PPA. It has been explained that release of the procurer from its obligations under the PPA would be subject to the Ministry being able to reallocate the power, fully or partially, to any other person and would be limited to the period for which reallocation fructifies. The Ministry has argued that the procurer who has surrendered power continues to be bound by the obligations incurred under the PPA till such time and to the extent other procurer undertakes to honour the obligations of the procurer surrendering power.*
- .....
- 26 *..... Seeking direction to the Central Government for reallocation of power in the petition filed by the Petitioner, a distribution licensee, is clearly outside the scope of clause (f) of subsection (1) of Section 79 of the Electricity Act. Therefore, relief on prayer (B) cannot be granted. However, the Petitioner is at liberty to approach the Ministry of Power, Government of India with its grievance for consideration and appropriate directions.”*
16. NTPC has submitted that Section 86 (1) (b) of the Act deals with procurement of power by GRIDCO from generating companies etc. through agreements for purchase of power. Once the application has been filed by GRIDCO for such approval, the Commission has to consider the grant of approval with reference to the date on which GRIDCO and the Government of Odisha had first agreed to procure such power. The delay on the part of GRIDCO in making or pursuing the application to the Commission



or the time taken for passing an order should not in any manner allow GRIDCO to change its stand.

17. NTPC has submitted that in the present case, it was at the behest of GRIDCO (amongst others) it proceeded to enter into a PPA dated 11.08.2006 for sale of 100 MW of electricity. The allocation of power by MoP is not in the domain of either of the Central Commission or of this Commission and the power can only be re-allocated by MoP. GRIDCO is well aware of the procedure for re-allocation of power since it has already approached the MoP. Therefore, the filing of the petition is an abuse of the process of this Commission. Even during the hearing, the counsel of GRIDCO has admitted that since the MoP has not re-allocated the power, it had approached this Commission. NTPC submitted that such an invocation of Section 86 (1) (b) of the Act is an abuse of the provision and the correct way to proceed is to pursue with the MoP to re-allocate the power.

***(b) Whether the PPA can be terminated on the basis of delay in commissioning of units and without having a clause of termination in the PPA?***

18. NTPC has submitted that the issue of delay in the commissioning of the units will be considered by the Central Commission at the time of determination/approval of tariff. The Central Commission will, after considering the submissions of all the beneficiaries/procurers including GRIDCO, determine whether the time overrun and/or cost overrun should be allowed in the tariff or not depending upon whether the delay was on account of / attributable to NTPC. If it is found that the delay was for reasons attributable to NTPC, it will not be a pass through in tariff. Thus, the interests of all the procurers including GRIDCO are taken care of. Merely a delay in establishment of the generating station does not give GRIDCO the right to unilaterally terminate the PPA or avoid its obligations under the PPA without getting the power re-allocated through the MoP. GRIDCO cannot take the shelter of Section 86 (1) (b) to ask this Commission to approve or disapprove the PPA, as per the likes of GRIDCO or otherwise allow GRIDCO to implement or interdict the implementation of the PPA or power procurement process at its whims and fancies. All issues of tariff including time and cost overrun can only be examined by the Central Commission under Section 79 (1) (a) where GRIDCO will be free to make any and all submissions. Further, the issue of consumer interest cannot be read out of context and Section 61 (g) of the Act which speaks about consumer interest is to be exercised while framing Tariff Regulations.

19. NTPC has submitted that in exercise of the powers under Section 176 of the Electricity Act, the Central Government has notified the Electricity Rules, 2005. Rule 8 of the Electricity Rules, 2005 reads as under:

**“8. Tariffs of generating companies under Section 79 -** *The tariff determined by the Central Commission for generating companies under Clause (a) or (b) of sub section (1) of section 79 of the Act shall not be subject to re-determination by the State Commission in exercise of functions under clauses (a) or (b) of sub section 1 of section 86 of the Act and subject to the above the State Commission may determine whether a Distribution Licensee in the State should enter into Power Purchase Agreement or procurement process with such generating companies based on the tariff determined by the Central Commission.*”

Further, the scope of Rule 8 of the Electricity Rules, 2005 was clarified by the Central Government in terms of the Letter dated 28.08.2006, which reads as under:

*“Please refer to your DO letter dated 16.5.06 in which you have sought clarification as to which Regulatory Commission should approve the PPA in case of inter- State projects.*

2. *Your attention is drawn to Rule 8 of Electricity Rules 2005 which prescribes that the tariff determined by CERC for generating companies under clause (a) or (b) of subsection 1 section 79 of the Act shall not be subject to re-determination by SERC and with this condition, the State Commission may determine whether a distribution license in the State should enter into PPA or procurement process with such generating companies based on the tariff determined by CERC.*
3. *Therefore, the concerned SERC has the jurisdiction to regulate electricity purchase and procurement process of a distribution license under section 86(1)(b) of the Act except the tariff and tariff related matters of the PPA.*
4. *It is further clarified that the PPA, in cases where tariff has been determined through competitive bidding process under section 63 of the Act and in accordance with the relevant guidelines issued by the Central Government, is finalised within the bidding process and the Appropriate Commission is required to adopt the tariff in accordance with the provisions of the law.”*

In view of the above, the tariff for sale of electricity by the Central Government owned or controlled generating Stations to GRIDCO is required to be determined as per the Orders of the Central Commission. The Central Commission will be undertaking the proceedings in a transparent manner and making a decision after hearing all the concerned stakeholders including GRIDCO with respect to the delay which has occurred in establishment of the Barh Generating Station. The allegations made by GRIDCO with regard to the delay in establishment of the Generating Station will be answered by NTPC in the tariff proceedings before the Central Commission.

20. NTPC has submitted that on the basis of the commitment by GRIDCO and also other allocates of power that NTPC proceeded to invest and establish the Project. In the absence of such firm commitment from GRIDCO and others for the aggregate capacity, NTPC would not have borrowed funds and infused its own equity in developing and constructing the Barh Generating Station. Thus, NTPC had altered its position on the basis of the act of GRIDCO. Further, based on GRIDCO's PPA and subsequent allocation of 418 MW, NPTC has borrowed debt, invested equity and set up the plant. GRIDCO cannot use the Commission's platform to unilaterally walk out of the PPA. In fact, the PPA does not provide for an option of termination. Neither NTPC nor GRIDCO can terminate the PPA, since based on the PPA; a thermal power plant with huge investment has been set up. This clearly shows that neither party can terminate the PPA and it is only the MOP that can reallocate the power. If the reverse case is examined, the interpretation of the PPA becomes clear and GRIDCO just cannot walk out of the PPA using the shelter of any provision of the Electricity Act, 2003 or the Contract Act, 1956. NTPC denied that there is delay in the execution of the project due to NTPC or that CEA has forecasted the energy demand on a higher side. There is no occasion for this Commission to go into the matter under the present proceedings.

***RE: Issue 3- Conduct of GRIDCO***

21. NTPC has submitted that it is a well settled position of law that what cannot be done directly cannot be done indirectly. However, the action of GRIDCO in filing the petition purportedly for seeking approval of the PPA dated 11.08.2006 after a period of more than 13 years of entering into the same is clearly an afterthought and an attempt to get out of the PPA without being able to get the power re-allocated by the Ministry of Power. Apart from the above, if GRIDCO wanted to get the PPA approved, nothing prevented GRIDCO to approach this Commission in a time bound manner for the same. A perusal of the averments in the petition clearly indicate that after the Government of Orissa vide letter dated 12.11.2014 requested the Ministry of Power to reallocate electricity from various generating stations then only GRIDCO spurred into action. Knowing fully well that it must proceed in the above manner, GRIDCO has thought it fit to file the present petition so that a different route becomes available to GRIDCO so as not to purchase the electricity from the Barh generating station. NTPC has submitted that the conduct of GRIDCO is not bonafide. GRIDCO after a span of 13 years cannot

approach this Commission for disapproval of the PPA. GRIDCO has no right of termination under the PPA.

22. Replying to the contention of NTPC that as because the power from the subject power station has been allocated by the Central Government, it is mandatory for the Commission to approve the PPA, GRIDCO has submitted that allocation of power by the Central Government is based on a formula which is a guideline. The same is confirmed by the reply of the Minister of State (Independent Charge) for Power in Lok Sabha on 26.02.2015 to starred question No.41 regarding allocation of power to the state as given below:

*“Electricity being a concurrent subject, supply and distribution of electricity to various consumers in a State/UT within the purview of the respective State Government or State Power Utility”.*

*“Power from Central Generating Stations to beneficiary States/UTs is allocated in accordance with formula for allocation of power which is being treated as guidelines from April, 2000”.*

Therefore, a guideline is neither binding on the State Utility or on the State Commission. Further, APTEL at Para 21 of its judgment dated 28.05.2015 in Appeal No.88 of 2015 in the matter of Noida Power Company Vs UPERC has ruled that –

*“xxxxxx However, after referring to relevant judgments of the Supreme Court, this Tribunal held that the power under Section 62(1)(a) and Section 62(1)(b) conferred on the State Commission for determination of tariff through negotiated route cannot in any manner be restricted or whittled down by way of a policy document or a subordinate legislation or notification issued by the Government/Executive and by any rules or executive instructions or notifications which are contrary to any provisions of the tariff statute shall be read down as ultra virus of the parent statute. xxxxx”*

Further, Hon’ble Supreme Court of India in the case of Tata Power Company Vs Reliance Energy Company Ltd reported in 2009 16 SCC 659 that –

*“108. A generating company, if the liberalization and privatization policy is to be given effect to, must be held to be free to enter into an agreement and in particular long term agreement with the distribution agency, terms and conditions of such an agreement, however, are not unregulated. Such an agreement is subject to grant of approval by the Commission. The Commission has a duty to check if the allocation of power is reasonable. If the terms and conditions relating to quantity, price, mode of supply the need of the distributing agency vis-à-vis the consumer, keeping in view its long term need are not found to be reasonable, approval may not be granted.”*

GRIDCO has submitted that that in view of the above judgments of the Tribunal with reference to relevant judgments of the Supreme Court as referred above, the contention

of NTPC that due to power allocation by the Central Government, it is mandatory on the part of the State Commission to approve the PPA is not sustainable.

23. GRIDCO has further submitted that NTPC's reliance on Rule-8 of Electricity Rules, 2005 for approval of the PPA is not based on the fact as in accordance with the above rule, CERC has been assigned with the function of determination of Tariff for Generating Stations as per Section 79(a) & (b) of the Electricity Act, 2003 whereas the State Commission has the prerogative to determine whether a distribution licensee in the State should enter into Power Purchase Agreement or procurement process with such generating companies based on the tariff determined by the Central Commission. Therefore, as per the above Rule, the State Commission has been empowered not to entertain the PPA for a Generating Station in the State, even if the Tariff for the said Generating Station has been determined by the Central Commission. Further, the parent statute prevails upon any policy document or a subordinate legislation or notification issued by the Government/Executive and by any rules or executive instructions or notifications which are contrary to any provisions of the tariff statute.
24. Heard the parties. Their written notes of submission have also been taken into consideration. The Commission observes that GRIDCO, keeping in view the power requirement of the state at that point and assessment of the requirement in future had entered into a PPA with NTPC on 11.08.2006 to procure power from Barh Thermal Power Project of NTPC based on the commitment of NTPC in its offer dated 23.05.2006 that the 1<sup>st</sup> unit of the said project would be commissioned by March, 2009. As submitted by GRIDCO, initially GRIDCO had requested for 100 MW power from this project at the time of signing the PPA and later GRIDCO vide its letter dated 30.04.2010 had requested NTPC to enhance the capacity from 100 MW to 396 MW keeping in view the demand of the state. But, MoP, GoI vide its letter dated 03.07.2012 allocated 418 MW power from Barh STPS-I in favour of Odisha. GRIDCO has further submitted that in the mean time, keeping in view the uncertainty in commissioning of the upcoming generating stations of NTPC and fast growing demand in the state, GRIDCO entered into PPAs with OPGC (3<sup>rd</sup> & 4<sup>th</sup> units) on 04.01.2011 for 50% share of the installed capacity of 1320 MW, M/s. JITPL on 04.01.2011 for 12% share of the installed capacity of 1200 MW, consolidated PPA with M/s. Vedanta Ltd. on 19.12.2012 for 600 MW and revised PPA with M/s. GKEL on 04.01.2011 (in the event of enhancement of its installed capacity) for 25% share of the installed capacity of 1050

MW, in order to meet its statutory obligation for meeting the power requirement of the state. Further, GRIDCO has entered into PPA with NTPC on 27.12.2010 for availing 10% state share of power from its Daliparlli STPS in Sudergarh district of Odisha having installed capacity of 1600 MW. However, the MoP, GoI vide its letter dated 17.01.2011 approved allocation of 50% of power to the home states from the upcoming power projects of NTPC. Accordingly, 800 MW has been allocated in favour of Odisha from Darlipalli STPS of NTPC. Further, in the meantime GRIDCO has executed supplementary PPA with the state generating station OPGC on 24.01.2019 for purchase of 100% power i.e. the entire installed capacity of 1320 MW of OPGC 3<sup>rd</sup> and 4<sup>th</sup> Units. GRIDCO has submitted that all the above mentioned generating stations have already been commissioned and are now supplying power to the state. But the subject Barh STPS-I of NTPC has not yet been commissioned, though they had committed that the 1<sup>st</sup> unit of the generating station would be commissioned during 2009. GRIDCO has submitted that to comply the query of the Central Commission in the tariff hearing of Barh STPS Stage-II, NTPC had submitted that Barh STPS Stage-I (3 x 660 MW) units were in advance stage of construction, however due to Covid-19 situation the execution got delayed. The expected date of CoD of units I & II was in 3<sup>rd</sup> quarter of FY 2020-21 and unit III is in 1<sup>st</sup> quarter of FY 2022-23.

25. GRIDCO has further submitted that now it has much surplus power so that the Commission in its tariff order is not allowing drawal of high cost NTPC power from many of their power stations.
26. As per Section 61 of the Electricity Act, 2003 the Commission while determining tariff shall be guided inter alia by the following principle.

*“61.(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;”*

Accordingly, in the tariff order of GRIDCO for the FY 2019-20, the Commission had estimated surplus availability of 5315.78 MU and not allowed drawal of high cost energy from Farakka STPS-III and Kahalgaon STPS-I, but full fixed cost was allowed. Further, in the tariff order of GRIDCO for the FY 2020-21, the Commission had estimated surplus availability of 5941.37 MU and not allowed drawal of high cost energy from Farakka STPS-I & II, Farakka STPS-III, Kahalgaon STPS-I and Kahalgaon STPS-II and part drawal from Talcher STPS-I and some amounts of fixed cost was deferred. Similarly, the Commission for FY 2021-22 has not allowed any

drawal from high cost energy sources for State use like FSTPS-I, II, III and Kahalgaon I & II of NTPC due to surplus availability of 5792.43 MU and accordingly has not allowed the fixed cost. The Commission further observed that in the mean time OPGC Stage-II (3rd & 4th units) and Darlipalli STPS of NTPC have been commissioned and the Commission estimates a drawal of 7902.91 MU from these power stations for State use. This surplus situation will continue for some time.

27. The Commission further observed that since GRIDCO is not able to meet the RPO, it has entered into PPA with many renewable developers as well as with SECI and PTC to purchase renewable energy (both solar and non-solar) in order to meet its RPO. GRIDCO is still far behind in meeting the RPO fixed by the Commission and it needs procurement of more renewable energy for meeting the RPO. Consequently, availability of surplus power from the NTPC station will further increase resulting in a huge burden of fixed charge of the NTPC generating stations on the state consumers.
28. GRIDCO while purchasing power for State use must always ensure that the power is purchased in an efficient and economic way for State use. Therefore, when GRIDCO wants to wriggle out of the PPAs with Barh STPS-I of NTPC at the same time it is drawing power from Darlipalli STPS of NTPC which has already been commissioned basing on the prudent commercial principle. Had the Barh STPS-I power stations of NTPC come to the stream as per schedule, GRIDCO would have definitely drawn power from those stations. But this has not happened. Completion of power generation projects in time is in the responsibility of NTPC and not that of beneficiaries. This Commission is mandated to regulate the electricity purchase and procurement process of GRIDCO under Section 86 (1) (b) of the Act. Therefore, the Commission cannot allow GRIDCO to enter into a PPA when there is no requirement of power thereby burdening the consumers with its redundant fixed cost. Hence, we do not approve the subject PPA with Barh STPS-I of NTPC. GRIDCO is directed to approach MoP again through State Government for immediate de-allocation of Barh STPS-I for Odisha.
29. Accordingly, the case is disposed of.

Sd/-  
**(G. Mohapatra)**  
**Member**

Sd/-  
**(S. K. Parhi)**  
**Member**

Sd/-  
**(U. N. Behera)**  
**Chairperson**