

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

**Present: Shri G. Mohapatra, Officiating Chairperson
Shri S. K. Roy Mahapatra, Member**

Case No. 67/2019

GRIDCO Ltd.	Petitioner
Vrs.		
OPGC & Others	Respondents

In the matter of: **Application under Section 86 of the Electricity Act, 2003 read with Section 21 of the OER Act, 1995 and other enabling provisions for approval of Supplementary Power Purchase Agreement (PPA) executed between OPGC Ltd. and GRIDCO Ltd. dated 24.01.2019 and draft amendment to PPA-2 dtd.04.01.2011 for procurement of power from Units- III & IV (2X660MW) of OPGC extension project in compliance with the notifications dtd.21.06.2008 and 12.10.2019 of the State Government.**

For Petitioner: Ms. Susmita Mohanty, AGM (PP) of GRIDCO.

For Respondent: Shri Suresh Mukharjee, Sr. Advocate on behalf of OPGC Ltd., Shri B.K. Das, GM (RT & C) of OPTCL, Shri P. K. Pradhan, Shri R. P. Mahapatra and Ms. Niharika Pattanaik, ALO, DoE, GoO.

ORDER

Date of hearing: 02.01.2024

Date of order:12.01.2024

The Petitioner-GRIDCO Ltd. had filed the petition under Section 86 of the Electricity Act, 2003 read with Section 21 of the Orissa Electricity Reform Act, 1995 and other enabling provisions for approval of Supplementary Power Purchase Agreement (PPA) executed between OPGC Ltd. and GRIDCO Ltd. dated 24.01.2019 and draft amendment to PPA-2 dated 04.01.2011 for procurement of power from Units- III & IV (2X660MW) of OPGC extension project in compliance with the notifications dated 21.06.2008 and 12.10.2019 of the State Government. GRIDCO has prayed before the Commission (a) to approve the supplementary PPA dated 24.01.2019 executed between GRIDCO & OPGC Ltd. (b) to allow three months (3) time to file the draft amendment to PPA-2 dated 04.01.2011 in line with the supplementary PPA dated 24.01.2019. The matter was earlier disposed of by this Commission vide its order

dated 22.06.2021 in the present case. The Commission gave its findings in its order dated 22.06.2021 vide paragraph 27 to 32 which are quoted hereafter:

- “27. *Heard the parties. Their written notes of submission are taken into record. It is observed that the Commission vide its order dated 04.04.2012 in Case No. 113/2011 had approved the PPA dated 04.01.2011 (PPA-2) executed between GRIDCO and OPGC for procurement of power from OPGC expansion Units-3 & 4 towards allocated share of 50% of the installed capacity of 1320 MW (2x660 MW). In the said order, the Commission had directed GRIDCO to incorporate the observations of the Commission including clarity on evacuation system and submit the amended PPA before this Commission for perusal but the PPA-2 has not yet been amended till date. However, in the meantime Government of Odisha vide its notification dated 20.12.2018 has decided that OPGC and GRIDCO shall execute a supplementary agreement to the PPA-2 on the same terms as the executed PPA-2 for 50% capacity (660 MW), for procurement of another 25% (330 MW) of OPGC expansion capacity to be effective from the CoD of the Units-3 & 4 till 31st March, 2023. The supplementary agreement shall also include enhancement of capacity from 75% to 100% from 1st April, 2023 for a period of 25 years thereafter.*
28. *The Commission further observed that the State Government had 51% equity in OPGC and balance 49% was with AES. Now, the Government has acquired the remaining 49% equity of AES through OHPC which is a Government owned company. Therefore, OPGC is now fully owned by the State Government. Further, the coal supply position to this expansion unit of OPGC is expected to be very smooth since coal blocks are allocated to this project through OPCL, a joint venture company of OPGC and OHPC along with arrangement for bridge linkage supply by MCL.*
29. *Further, from the LGBR submitted by GRIDCO for the next 10 years it is observed that there is some surplus power available to GRIDCO for coming two three years and thereafter there will be deficit in power availability in the State. Therefore, the Commission is of the view that GRIDCO may procure power from OPGC expansion Units-3 & 4 as decided by the State Government. However, the Commission observed that as per PPA -2 the tariff norms and parameters for this project shall be as per the guidelines of CERC Tariff Regulations. The same is reiterated in the supplementary agreement to the PPA-2. Since 100% power shall be procured by GRIDCO from this expansion project of OPGC, the tariff should be as per the norms and parameters of OERC Generation Tariff Regulations notified by the Commission from time to time.*
30. *The Commission further observed that GRIDCO has stated that as per Clause-1 (c) of the supplementary PPA dated 24.11.2019, payment liability of any POC charges and losses associated with the usage of CTU network with respect to the additional power beyond 50% of the station capacity if scheduled from Unit-4 will be mutually settled*

between GRIDCO and OPGC at later stage. The Commission is of the view that both the parties should finalise the matter at the earliest and incorporate the same in the proposed amendment to the PPA-2.

31. *In view of the above the Commission accord in principle approval to the supplementary PPA dated 24.01.2019 and directs GRIDCO and OPGC to amend the PPA-2 accordingly incorporating the observations of the Commission in the present order and earlier order dated 04.04.2012 passed in Case No. 113/2011 and submit the same before this Commission for perusal.*
32. *With the above observations and directions, the case is disposed of.”*

2. The Respondent-OPGC had filed a Writ Petition before the Hon’ble High Court of Orissa in WP(C) No.34663 of 2021 against the Commission’s order dated 22.06.2021. Hon’ble High Court, vide its judgement dated 09.11.2023, has set aside and quashed the order of this Commission dated 22.06.2021 to the extent of fixation of tariff rate. The operative portions of the said order of Hon’ble High Court of Orissa are as hereinafter:

“1. xxx xxx xxx

2. On query from Court regarding the prayer his client would want heard first, he draws attention to, inter alia, impugned order dated 22nd June, 2021 made by opposite party no.1, Odisha Electricity Regulatory Commission. He submits, this is the main order under challenge by his client. He demonstrates from paragraph-29 that the Commission recorded its observation on the Power Purchase Agreement (PPA)-2 that the tariff norms and parameters for the project shall be as per guidelines of Central Electricity Regulatory Commission (CERC) tariff regulation. In spite thereof it was said by the Commission that the tariff pertaining to PPA-2 and its supplementary should be as per norms and parameters of Odisha Electricity Regulatory Commission (OERC) generation tariff regulation notified by the Commission from time to time. Hence, challenge to impugned order as well as the regulations.

3. Xxx xxx xxx

4. Xxx xxx xxx

5. Xxx xxx xxx

6. We find absence of reason stated in impugned order dated 22nd June, 2021 for making applicable OERC tariff regulation to PPA-2. That is sufficient for us to interfere in writ jurisdiction in spite of availability of alternative statutory remedy. Such is covered by the declaration of law by the Supreme Court in, inter alia, Whirlpool Corporation vs. Registrar Of Trade Marks, Mumbai, reported in AIR 1999 SC 22.

7. Impugned order dated 22nd June, 2021 is set aside and quashed to extent of fixation of tariff rate. The application on which it was made is

accordingly restored to the Commission for re-consideration, for hearing the parties and passing fresh order.

8. The writ petition is disposed of. Since the disposal is on the main prayer, the alternative prayer was not gone into and petitioner left to urge it separately, if on occasion it is advised to do so.”

3. In order to comply with the above directions of Hon’ble High Court, the Commission issued notices to the parties and parties have been heard afresh through hybrid arrangement on 02.01.2024.
4. The Petitioner-GRIDCO has not placed any written note of submissions. However, during the hearing, the representative of GRIDCO stated that:
 - a) GRIDCO has executed the PPA-2 dated 04.01.2011 and the Supplementary PPA-2 dated 24.01.20219 with OPGC basing on the Govt. Notifications of 21.06.2008/12.10. 2009 and 20.12.2018 respectively. In both the PPAs, it has been mentioned to adopt the CERC Tariff Regulations for determination of tariff.
 - b) As per the Supplementary PPA-2 dated 24.01.2019, GRIDCO shall procure 75% upto March, 2023 and thereafter 100% of power generated from Units-III & IV of OPGC till 2048. As per the Clause (1)(a) and 2.3 of the said approved Supplementary PPA-2, tariff is to be determined as per CERC Tariff Regulations notified from time to time.
 - c) OERC Generation Tariff Regulations, 2020 came into effect from 15.07.2020. As per Regulation 1(4) of OERC Generation Tariff Regulations, 2020 read with definition of existing project, approved PPA-2 dated 04.01.2011 stands saved. Further, GRIDCO and OPGC are bound by the long term PPAs dated 04.01.2011 and 24.01.2019.
 - d) The DoE, Govt. of Odisha, in their submissions dated 06.04.2022 in Case No. 96 of 2021, had requested OERC to determine tariff of OPGC Units-III & IV as per CERC Regulations in respect of OPGC. In its filing No. 5 dated 07.01.2023 in Case No. 96 of 2021, GRIDCO had cited Regulation 1(4) of OERC Generation Tariff Regulations, 2020 for determining tariff of OPGC Units-III & IV as per CERC Tariff Regulation. However, the Commission, vide its tariff order dated 07.01.2023, had determined tariff of OPGC Units-III & IV as per existing OERC Generation Tariff Regulations due to pendency of the writ petition before the Hon’ble High Court.

- e) The direction of the Commission in its order dated 22.06.2021 for amendment of Supplementary PPA-2 also has not been executed till date in view of pendency of writ petition before the Hon'ble High Court of Orissa.
 - f) In view of the above, the Commission may consider to re-determine the tariff of OPGC Units-III & IV as per CERC Tariff Regulations as amended from time to time.
5. The Representative of the Respondent-OPGC has supported the above submissions of Petitioner-GRIDCO and further submitted that:
- a) The present proceedings are limited remand proceedings consequent to the judgement dated 09.11.2023 of the Hon'ble High Court of Orissa in WP (C) No.34663 of 2021. Having set aside and quashed the finding of the Commission in its order dated 22.06.2021 that the tariff will be determined as per OERC Generation Tariff Regulations, the Hon'ble High Court has remanded the matter to the Commission for reconsideration of the applicable tariff norms for OPGC Units III & IV. The Hon'ble High Court did not comment or interfere in any manner with the factum of the approval of Supplementary PPA-2.
 - b) The OERC Generation Tariff Regulation, 2020 was notified on 15.07.2020 which was published in the Orissa Gazette on 26.08.2020. Regulation 1(4) of OERC Generation Tariff Regulation, 2020 stipulates as under:

“(4) These Regulations shall come into force on the date of publication in the Official Gazette, and unless reviewed earlier or extended by the Commission shall remain in force till 31.03.2024:

Provided that, where the Commission has, at any time prior to the notification of these Regulations, approved a Power Purchase Agreement (PPA) or arrangement between a generating company and a Beneficiary, or has adopted the tariff contained therein for supply of electricity from an existing project then the tariff for supply of electricity by the generating company to the Distribution Licensee shall be in accordance with such PPA or arrangement for such period as may be so approved or adopted by the Commission, to the extent of existing Installed Capacity as contained in the PPA.”
 - c) The definition of 'existing project' and 'installed capacity' as used in the above Regulation 1(4) of the OERC Generation Tariff Regulation, 2020 are excerpted below:

“3. DEFINITIONS AND INTERPRETATION

(1) *In these Regulations, unless the context otherwise requires-*

Xxx xxx xxx

(t) *Existing Project means a project which has been declared under commercial operation from a date prior to 01.04.2020;*

Xxx xxx xxx

(jj) *Installed Capacity or IC means the summation of the name plate capacities of all the units of the generating station or the capacity of the generating station reckoned at the generator terminals, as may be approved by the Commission from time to time;"*

- d) On the combined reading of the proviso to Regulation 1(4) with the definition of 'existing project' and 'installed capacity' in the OERC Generation Tariff Regulation, 2020, it is clear that if the Commission had approved a PPA prior to 26.08.2020 (Gazette Notification of OERC Generation Tariff Regulation, 2020) and such approval pertains to a project that achieves COD prior to 01.04.2020, then the tariff of such project would be determined in accordance with the norms and parameters under such PPA.
- e) In the instant case both the aforesaid conditions are satisfied, as PPA-2 was approved on 04.04.2012 and the commercial operation dates (CODs) of Units III & IV of OPGC are 03.07.2019 and 21.08.2019 respectively. Since the approval of the PPA and COD were achieved well in advance of coming into force of the OERC Generation Tariff Regulation, 2020, therefore, the Units-III & IV of OPGC are beyond the purview of said Regulation 1(4) of OERC Generation Tariff Regulation, 2020. Hence, the tariff of OPGC Units-III & IV must be governed in terms of PPA-2 as approved by the Commission. Any other interpretation would be in violation of Regulation 1(4) of the OERC Generation Tariff Regulation, 2020 and order of the Hon'ble High Court, which effectively saves approved contracts executed in respect of commissioned projects. Accordingly, the tariff for OPGC Unit-III & IV ought to be determined by the Commission strictly in accordance with Schedule-4 of PPA-2, as envisaged by Regulation 1(4) of OERC Generation Tariff Regulation, 2020. Therefore, in accordance with Clause-1, Schedule-4 to PPA-2, the tariff of Units-III & IV of OPGC must be determined as per the extant tariff regulations of CERC.

- f) On interpretation of proviso to Regulation 1(4) of OERC Generation Tariff Regulation, 2020, OPGC has relied upon the following case laws where similar carve outs were interpreted by the Courts.
- Bangalore Electricity Supply Company Limited Vrs. Konark Power Projects Limited & Anr., (2016) 13 SCC 515 (Paras 4-5, 11-12).
 - Himachal Pradesh State Electricity Board Limited Vrs. M/s. Jai Prakash Power Ventures Limited and Ors., Judgement dated 06.02.2012 of the Hon'ble APTEL in Appeal No.43 of 2011 (Paras 81-86)
 - Hon'ble Supreme Court's Constitutional Bench Judgement in PTC India Ltd. Vrs. Central Electricity Regulatory Commission [(2010) 4 SCC 603].
 - Judgement of the Hon'ble Supreme Court in M.P. Sugar Mills Co. Ltd. Vrs. State of Uttar Pradesh [(1979) 2 SCC 409]
 - Judgement dated 15.03.2022 in Walwhan Renewable Energy Limited Vrs. State of Andhra Pradesh & Ors. and batch matters, Writ Appeal No. 383 of 2019, paras 63, 65, 67-68, the division bench of the Hon'ble High Court of Andhra Pradesh.
- g) In view of the foregoing, the Commission may clarify that the tariff of Units-III & IV of OPGC shall be determined as per the extant tariff regulations of CERC mentioned in approved PPA-2 dated 04.01.2011 and Supplementary PPA dated 24.01.2019 and also the Commission may re-determine the tariff of Units-III & IV of OPGC from the COD of Unit-III upto FY 2023-24 as per the CERC Generation Tariff Regulations in compliance with the judgement dated 09.11.2023 of the Hon'ble High Court of Orissa.
6. The Representatives of the Department of Energy, Government of Odisha and OPTCL submitted that they have no views to submit in the instant case. The Respondents Shri P. K. Pradhan and Shri R. P. Mohapatra have not given any written submission before this Commission though they have been allowed to do so.
7. Heard the parties through hybrid mode. The written submissions of the Respondent-OPGC are taken on record. After hearing the parties, we do observe as stated hereinafter:

- (a) The Commission, vide its order dated 04.04.2012 in Case No. 113/2011, had approved the PPA dated 04.01.2011 (referred to as PPA-2 by OPGC in its petition) executed between GRIDCO and OPGC for procurement of power from OPGC expansion Units-III & IV towards allocated share of 50% of the installed capacity of 1320 MW (2x660 MW), wherein it was agreed for determination of tariff basing on the CERC's Tariff Regulations. In the said order, the Commission had directed GRIDCO to incorporate the observations of the Commission including clarity on evacuation system and submit the amended agreement (PPA-2) before this Commission for perusal. It is pertinent to mention that OERC's Generation Tariff Regulation came into force in the year 2014. Pending amendment of the said PPA-2, GRIDCO had filed an application seeking approval of a Supplementary Power Purchase Agreement dated 24.01.2019 to the PPA-2 (referred to as Supplementary PPA-2 by OPGC in its petition), according to which GRIDCO shall purchase 75% of the power from the said OPGC's expansion project capacity of 1320 MW (2x660 MW) effective from the COD of Unit-3&4 till 31.03.2023 and 100% power from the said expansion project from 01.04.2023 for a period of 25 years thereafter. This action was taken by GRIDCO basing on the decision of the State Government vide their Notification dated 20.12.2018. The Commission, vide its order dated 22.06.2021, had accorded in-principle approval to the Supplementary PPA-2 dated 24.01.2019 and directed both GRIDCO and OPGC to amend the PPA-2 accordingly incorporating the observations of the Commission in that order and earlier order dated 04.04.2012 passed in Case No.113 of 2011 and submit the same before this Commission for perusal. At that time, OPGC was fully owned by Govt. of Odisha (GoO) after acquiring 49% equity from AES and the COD of the Units III & IV of its expansion project were declared w.e.f. 03.07.2019 and 21.08.2019 respectively. At para 29 of the said order dated 22.06.2021, the Commission had observed that since 100% power shall be procured by GRIDCO from this expansion project of OPGC, the tariff should be as per the norms and parameters of OERC Generation Tariff Regulations notified by the Commission from time to time.

- (b) Being aggrieved by the aforesaid order dated 22.06.2021 of this Commission, OPGC had filed a Writ Petition before the Hon'ble High Court of Orissa in WP(C) No.34663 of 2021. The Hon'ble High Court of Orissa in their order dated 09.11.2023 in WP(C) No.34663 of 2021 have set aside and quashed the impugned order of this Commission dated 22.06.2021 in the present case to the extent of fixation of tariff rate and accordingly, this case restored to the Commission for re-consideration, for hearing the parties and passing fresh order. At para 6 of the aforesaid order dated 09.11.2023 of the Hon'ble High Court, it has been observed as follows:

“6. We find absence of reason stated in impugned order dated 22nd June, 2021 for making applicable OERC tariff regulation to PPA-2. That is sufficient for us to interfere in writ jurisdiction in spite of availability of alternative statutory remedy. Such is covered by the declaration of law by the Supreme Court in, inter alia, Whirpool Corporation vs. Registrar of Trade Marks, Mumbai, reported in AIR 1999 SC 22.”

- (c) In the above-stated observations, the Hon'ble High Court has mentioned about absence of sufficient reasons for applicability of OERC Generation Tariff Regulations to the PPA-2 executed between GRIDCO and OPGC. The reasons for applicability of OERC Generation Tariff Regulations for determination of tariff for OPGC's expansion project (Units III & IV) basing on the power purchase agreement (PPA-2) between GRIDCO and OPGC, are elaborately described in the following paragraphs.

- (i) Under the Electricity Act, 2003, the Regulatory Commissions have been established at both National/Central and State level to deal with inter-state and intra-state matters respectively. One of the major functions of Central Commission and State Commission specified under Sections 79 and 86 respectively of the Electricity Act, 2003 is the determination of generation tariff for purchase of power from Generating company by the distribution companies (GRIDCO in case of Odisha). Section 79 of the Electricity Act, 2003 which deals with function of the Central Commission reads as follows:

“79. Functions of Central Commission

(1) The Central Commission shall discharge the following functions, namely:-

(a) to regulate the tariff of generating companies owned or controlled by the Central Government;

*(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise **have a composite scheme for generation and sale of electricity in more than one State;***

xxxxxxxx”

Similarly, Section 86 which deals with function of State Commission reads as follows:

“86. *Functions of State commission*

(1) The State Commission shall discharge the following functions, namely: -

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Provided that where open access has been permitted to a category of consumers under Section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

Xxxxxxx”

- (ii) Hon’ble Supreme Court in Civil Appeal Nos.5399-5400 of 2016 (Energy Watchdog Versus Central Electricity Regulatory Commission and Ors.) has defined the composite scheme for which Central Commission (CERC) has jurisdiction.

“22. *The scheme that emerges from these Sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in sub- sections (c), (d) and (e) speaks of inter-State transmission and inter- State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression “within the State” in sub-clauses (a), (b), and (d), and “intra-state” in sub- clause (c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. **The State Commission’s jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act.** What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as*

argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression “composite scheme” does not mean anything more than a scheme for generation and sale of electricity in more than one State.”

- (iii) From the conjoint reading of both the provisions of the Act as stated above and decision of Hon'ble Apex Court, it is clear that Central Commission has jurisdiction for determination of the tariff for the generating station which are owned by Government of India or have a composite scheme to sale power in more than one State.
- (iv) In the instant case, the Generating Company (OPGC) had initially executed a PPA with GRIDCO on 04.01.2011 (referred to as PPA-2 by OPGC in its petition) for sale of power to GRIDCO from its expansion Units-III&IV having installed capacity of 1320 MW (2 x 660 MW). As per Clause 7.2 of the said PPA-2, the entitlement of GRIDCO (the State Government Agency) was 50% of the installed capacity of the said expansion units of OPGC. Since only 50% of the power was agreed to be sold inside the State through GRIDCO, obviously it could come within the definition of a composite scheme under Section 79 (1) (b) of the Electricity Act, 2003. Therefore, Central Commission was the appropriate Commission to regulate its tariff. In consonance to the above provision of law, it was mentioned under Clause-1 of Schedule-4 of the said PPA-2, that tariff would be based on the norms and parameters of the Central Electricity Regulatory Commission (CERC) as amended from time to time. Accordingly, the earlier agreement i.e. PPA-2 was approved by this Commission, vide its order dated 04.04.2012 passed in Case No. 113 of 2011, giving liberty to the petitioner to approach CERC for determination of tariff as per their tariff norms. The Central Commission has been framing its own Regulation for determination of tariff under Section 178 of the Electricity Act, 2003 from time to time and the current Regulation in force being CERC (Terms and Condition of Tariff) Regulations, 2019 as amended from time to time.

- (v) Thereafter, OPGC has entered into a Supplementary Power Purchase Agreement (referred to as **Supplementary PPA-2** by OPGC in its petition) with GRIDCO on 24.01.2019, wherein the contracted capacity with GRIDCO from the said expansion Project (Units-III & IV) of OPGC was enhanced to 75% from 50% of the installed capacity (1320 MW) from the date of commercial operation till 31.03.2023. Thereafter, the contracted capacity of GRIDCO would be enhanced to 100% of the installed capacity from 01.04.2023 for period of 25 years. This Supplementary PPA-2 has completely changed the power purchase arrangement from OPGC Unit-III & IV which was earlier envisaged in PPA-2. The entitlement of GRIDCO (State Designated Agency) from said power plant of OPGC has been raised from 50% of the installed capacity as mentioned in PPA-2 to 100% of the installed capacity in Supplementary PPA-2. Therefore, the '**Composite Scheme**' in PPA-2 has lost its relevance. Since the '**Composite Scheme**' does not exist anymore in Supplementary PPA-2, the jurisdiction of the Central Commission (CERC) to regulate tariff as mentioned in Section 79 (1) (b) of the Electricity Act, 2003 no more continues/cease to exist.
- (vi) As per Supplementary PPA-2, since the entire power purchase from the expansion project (Units-III & IV) of the power plant has been contracted with GRIDCO (State Designated Agency) and these generating units of OPGC are fully dedicated to the State, therefore, State Regulatory Commission (OERC) has assumed jurisdiction to regulate the said power purchase of GRIDCO as well as for determination of the tariff of such generation project.
- (vii) OERC had framed Regulation called OERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2014 (in short Generation Tariff Regulation, 2014) in exercise of its power under Section 181 of the Electricity Act, 2003 which has subsequently been replaced by OERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2020 (in short Generation Tariff Regulation, 2020). There was a paradigm shift in the power purchase arrangement of GRIDCO from OPGC in Supplementary PPA-2 and the

Commission (OERC), vide its order dated 22.06.2021 in Case No. 67/2019 has observed that since 100% power shall be procured by GRIDCO from this expansion project (Units-III & IV) of OPGC, the tariff shall be as per the norms and parameters of OERC's Generation Tariff Regulation, 2020 as amended from time to time.

- (viii) OERC by its order dated 04.04.2012 in Case No.113/2011 had approved PPA-2 on the premises that the 50% of the contracted capacity is dedicated to the State of Odisha (GRIDCO) and accepted the agreement with stipulation that the Central Commission (CERC) norms as specified in their Regulation would be applicable in view of the provision of Section 79 of the Electricity Act, 2003. Subsequently, the Respondent-OPGC enhanced entitlement of GRIDCO (State designated agency) from 50% to 100% on its own accord in Supplementary PPA-2 and did urge to adopt CERC norms of tariff determination even after dedication of generation of both units (Unit-III & IV) to the State which is contrary to the provisions of Section 79 & Section 86 of the Electricity Act, 2003 as well as to the judgement of the Hon'ble Supreme Court in Civil Appeal Nos.5399-5400 of 2016 (Energy Watchdog Versus Central Electricity Regulatory Commission and Ors.). Therefore, the plea of the Respondent to apply CERC norms for determination of tariff even if the power plant is fully dedicated for State use dehors Section 181 and Section 62 of the Electricity Act, 2003. Afterall, contractual obligations cannot override the statutory mandates.

Under such scenario, this Commission assumes the jurisdiction for such changed arrangement of power purchase and consequential tariff determination under OERC Generation Tariff Regulations instead of the tariff norms of CERC.

- (ix) The relevant provision under Regulation 1 (4) of OERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2020 and provision is read as follows:

“1. (4) These Regulations shall come into force on the date of publication in the Official Gazette, and unless reviewed earlier or extended by the Commission shall remain in force till 31.03.2024:

Provided that, where the Commission has, at any time prior to the notification of these Regulations, approved a Power Purchase Agreement (PPA) or arrangement between a generating company and a Beneficiary, or has adopted the tariff contained therein for supply of electricity from an existing project then the tariff for supply of electricity by the generating company to the Distribution Licensee shall be in accordance with such PPA or arrangement for such period as may be so approved or adopted by the Commission, to the extent of existing Installed Capacity as contained in the PPA.”

- (x) Had there been no amendment to PPA-2 in the form of Supplementary PPA-2, then it would have been saved under the above provision of OERC Generation Tariff Regulations and the CERC would have assumed the jurisdiction for determination of tariff as per norms specified in their Regulation. Therefore, the claim of OPGC that the Supplementary PPA-2 is also saved under the above provision of OERC Generation Tariff Regulations, even after allocation of 100% capacity of the said expansion project to GRIDCO, is incorrect as OERC has assumed jurisdiction of determination of tariff by virtue of provisions of Supplementary PPA-2 which was otherwise with CERC. The Petitioner cannot submit application to the Commission (OERC) for determination of tariff as per norms & Regulations of CERC particularly when the matter comes under jurisdiction of OERC and corresponding Regulation of the Commission (OERC) which is in force.
- (xi) We observe that the Government has already acquired the 49% equity of AES and OPGC is now fully owned by the State Government. Further, the coal supply position to this expansion projects (Unit III & IV) of OPGC is expected to be very smooth since coal blocks are allocated to this project through OPCL, a joint venture company of OPGC and OHPC along with arrangement for bridge linkage supply by MCL.

- 8. Considering the above scenario, we are of the view that GRIDCO may procure the quantum of power from OPGC's expansion Units-III & IV as decided by the State Government. However, the tariff norms and parameters for this project cannot be

governed on the guidelines of CERC Tariff Regulations as indicated in the PPA-2 and reiterated in the supplementary agreement to the PPA-2. Since 100% power from the said expansion project of OPGC (Unit III & IV) shall be procured by GRIDCO for the State, the tariff shall be as per the norms and parameters of OERC's Generation Tariff Regulations, 2020 as amended from time to time. The reason for applicability of OERC norms is elaborately explained in the above foregoing paragraphs. Being fully owned by the State Government, OPGC should not have any objection to above observations of the Commission as the power generation from OPGC expansion project (Unit III & IV) is dedicated for the State's consumption and application of the norms of OERC's Generation Tariff Regulations will be in the overall interest/benefit of the consumers of the State in terms of electricity tariff.

9. As indicated in the impugned order dated 22.06.2021 (earlier order of the instant case) of the Commission, the payment liability of any POC charges and losses associated with the usage of CTU network in respect of additional capacity beyond 50% of the station capacity if scheduled from Unit-IV will be mutually settled between GRIDCO and OPGC. The Commission is of the view that both the parties shall finalise the matter and incorporate the same in the proposed amendment to the PPA-2.
10. Accordingly, the Commission does accord in principle approval to the Supplementary PPA-2 dated 24.01.2019 and directs GRIDCO and OPGC to amend the PPA-2 incorporating the observations of the Commission in the present order as well as in earlier order dated 04.04.2012 passed in Case No. 113/2011 and submit the same before this Commission for approval.
11. With the above observations and directions, the petition is disposed of.

Sd/-
(S. K. Roy Mahapatra)
Member

Sd/-
(G. Mohapatra)
Officiating Chairperson