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

Present: Shri U. N. Behera, Chairperson
Shri G. Mohapatra, Member

Case No. 47/2021

M/s. TPCODL …… Petitioner
Vrs.
M/s. Aarti Steel Ltd. …..... Respondent

In the matter of: **Application under Condition 86 (1) of the Electricity Act, 2003 and Paragraph 12 of Order dated 03.01.2013 in Case No. 129 of 2010 regarding determination of cross subsidy surcharge for non-maintaining of CGP status of power plants of (50 MW and 40 MW) of Aarti Steel Ltd. at Ghantikhal, Cuttack during FY 2010-11 to 2012-13.**

For Petitioner: Shri V. Wagle

Respondents: Ms. Mandakini Ghose, Advocate along with Shri Sanjay Sen, Sr. Advocate on behalf of M/s. Aarti Steel Limited, Shri P. K. Dash, CGM (PP), Ms. Susmita Mohanty, DGM (PP), GRIDCO and Shri S. K. Panda, GM (PP), GRIDCO.

ORDER

Date of hearing: 14.12.2021 **Date of order: 15.01.2022**

The petitioner M/s. Tata Power Central Odisha Distribution Limited (TPCODL) has filed the present application under Condition 86 (1) of the Electricity Act, 2003 and paragraph 12 of Order dated 03.01.2013 passed by the Commission in Case No. 129 of 2010 regarding determination of cross subsidy surcharge for non-maintaining of Captive Generating Plant (CGP) status of 40 MW and 50 MW generating unit of Aarti Steel Ltd. at Ghantikhal, Cuttack during FY 2011-12.

2. The petitioner has submitted that M/s. Aarati Steel Limited (M/s. ASL) owns and operates two coal based generating units having capacity of 40 MW and 50 MW. The generating plant is located in the license area of TPCODL (erstwhile CESU). Based on the discussion with M/s. ASL, it is found that the 40 MW unit was commissioned on 31.03.2005 and the 50 MW unit was commercially operated from 24.04.2010. The power generated from these units is used for meeting the auxiliary consumption of the power plant and consumption of the steel plant of the petitioner and the surplus power

was being sold to GRIDCO. Further, TPCODL observed that due to the manner of connections and inter connections of the 40 MW and 50 MW generating units along with the self consumption, it is not possible to determine the quantum of self consumption from the individual generating units separately. Hence, the captive status for individual units cannot be determined and that has to be determined for the entire capacity of 90 MW.

3. TPCODL has submitted that the Commission vide its order dated 16.04.2013 in Case Nos. 28, 29, 107 and 108 of 2010 in the matter related to determination of tariff of 50 MW generating unit of M/s. ASL in compliance with the order dated 04.10.2012 of APTEL in Appeal No. 191 of 2011, has observed as follows:-

"*6. After careful examination of available records and reports of Inspection Team, it is observed that*

- *The 50 MW Generating Unit was conceived as a CGP and construction power was availed from the existing 40 MW CGP as an extension of the existing CGP.*
- *Both 40MW & 50 MW Generating Units are connected to a common 132KV load bus of the Industrial unit with individual metering arrangement for recording generation of each unit. The arrangement of feeder and bus are designed in such a way that power can be exchanged between them and both 40 MW and 50 MW generating units can cater the industrial loads of M/s ASL and also can supply common surplus power to the State Grid. Thus the units are not electrically separated. The characteristics of both the generating units are the same as that of Captive Plants of the parent Industrial unit.*
- *X x x x x …….*
- *X x x x x x……..*

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

4. TPCODL submitted that the above order of the Commission was challenged in the APTEL as Appeal No. 159 of 2013. However, the findings of the APTEL in its order dated 17.10.2014 does not present the issue of methodology of determination of captive status. The summary of the findings of the APTEL in its order is given below:-

"35(i) We find that the State Commission has failed to adhere to scope of the remand ordered by this Tribunal vide Judgment dated 4.10.2012 in Appeal no. 191 of

2011. In the previous order dated 13.9.2011, the State Commission instead of determining the tariff of Appellant's power plant of 50 MW capacity on cost plus basis, decided that the 88% energy supplied by the Appellant may be paid by GRIDCO at NTPC-Eastern Region tariff. The Tribunal in Appeal No. 191 of 2011 held that linking the tariff of the Appellant's power plant with NTPC tariff was not in order and directed determination of tariff as per the provisions of the Act and its Regulations by taking into account the costs incurred by the Appellant. There was no occasion for the State Commission to institute an enquiry regarding the status of the 50 MW unit in the remand proceedings.

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

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

5. TPCODL submitted that thereafter the Commission in its order dated 09.06.2015 determined tariff for the 50 MW unit for FY 2010-11 and 2011-12. In the meantime GRIDCO has made an appeal before the Hon'ble Supreme Court of India against the aforesaid order of the APTEL, which has been noted in the Commission's order dated 09.06.2015 as given here under:

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

6. TPCODL submitted that the judgements of the APTEL have not provided any finding whether the 50 MW unit is a CGP or an IPP. It has merely asked the Commission to determine the tariff of 50 MW unit on cost plus basis. Further the Commission has also not determined the status (whether captive or not) of any unit or both the units together using the electricity rules of the Government of India. Further, due to the manner of connections and interconnections of 40 MW & 50 MW generating units of

M/s. ASL, it is not possible to determine the quantum of self consumption from the individual units and hence the captive status of individual unit cannot be determined. The captive status has to be determined for the entire 90 MW capacity as such. As per the Rules of Government of India, to qualify as CGP, the user of power from the CGP is required to hold 26% of equity in the company which owns the CGP and 51% of energy generated from the CGP in a financial year should be consumed for the captive use. However, the Government of Odisha has invoked Section 11 of the Electricity Act, 2003 for supply of power to the state grid during the period from FY 2010-11 to FY 2012-13 (From April, 2010 to October, 2010 and from 25.11.2011 to July, 2012). The Commission vide its order dated 03.01.2013 in case No.129 of 2010 has considered that the power supply during the period of invocation of Section 11 would be considered towards the computation of self consumption for assessment of captive status and directed as follows:

"12. Hence, it is directed that GRIDCO/ DISCOMs have to verify the CGP status of the industries supplying power to the State Grid for the FY 2009-10, 2010-11and 2011-12 in line with the aforesaid Resolution of the State Govt. and on actual basis for the FY 2012-13 i.e. not considering the sale of power by CGPs to the State Grid as self consumption of the parent Industry. In case it is found that any CGP has lost its status in spite of such computation of power transaction, the DISCOMs may approach the Commission on the issue of the Cross-subsidy in case to case basis."

Further the Commission in its order dated 23.12.2014 in case No.26 of 2013 has directed as follows:

"11. Out of various issues raised by the petitioner, we find that the application of the order for FY 2012-13 was an error apparent on the face of record depriving CGPs of their claims. Therefore, we direct that injection made by CGPs to the State Grid during the period of invocation of Section-11 of the Electricity Act, 2003 as per Govt. Order should also be considered as deemed self-consumption in the FY 2012-13."

Further the Commission in its order dated 01.02.2021 in case No.01 of 2019 has observed as follows:

"20. Xxxxxxxxxxx. Hence the application of section 11 of the Act ceases w.e.f. 31.07.2012. As a corollary any injection of CGPs to the Grid beyond that date shall not be accounted for determination of CGP status. Therefore we are of the opinion that injection to the State Grid upto 31.07.2012 only shall be treated as self-consumption for determination of CGP status for the year 2012-13. Therefore, it was necessary for the petitioner TSIL to accordingly adjust its self-consumption in the months beyond July 2012 to attain CGP status for FY 2012-13 since the said status is determined annually."

7. TPCODL has submitted that considering the above notifications of GoO and findings of the Commission in different orders in the matter of determining captive status of the generating plant and the quantum of self consumption (including the energy supply to GRIDCO under Section 11), the captive status of M/s. ASL is worked out as follows:

FY	Gross Generation (MU)	Net Generation (MU)	Self Consumption (MU)	Self Consumption + Energy sold under Section 11 (MU)	Fraction of self consumption for captive test (%)	Whether the plant is a captive plant (yes/no)
1	**2**	**3**	**4**	**5**	**6 (5/3)**	**7**
2010-11	493.46	441.64	138.47	304.98	69.10 %	Yes
2011-12	347.85	311.33	123.24	145.43	46.70 %	**No**
2012-13	337.56	302.12	152.26	171.50	56.80 %	Yes

8. The TPCODL has submitted that as seen from the above table the generating units of M/s.ASL have not passed the captive test under the Electricity Rules for the FY 2011-12 and hence the entire electricity generated shall be treated as if it is a supply of electricity by a generating company. Accordingly, the self consumption of M/s.ASL under this condition is liable to attract cross subsidy surcharge (CSS) at the rate applicable for FY 2011-12. TPCODL stated that since the load factor of Aarati Steel for the FY 2011-12 was less than 20%, TPCODL has considered the rate of CSS at the load factor of 20% while computing the amount of CSS for the FY 2011-12.

9. TPCODL has submitted that the erstwhile CESU vide its letter dated 24.08.2013, had levied a CSS on M/s. ASL for the FY 2011-12 (Rs.29.88 Cr.) and for FY 2012-13 (Rs.12.77 Cr.), which has not been paid by them. TPCODL stated that the above computation of CSS was based on the readings provided by GRIDCO which was incorrect due to wrong interpretation of energy sold to GRIDCO and on open access. Now TPCODL has revised the CSS at Rs.42.15 cr. towards failure of captive status of the CGP of M/s. ASL for the FY 2011-12 only as stated in earlier paragraphs. In view of the above, TPCODL has prayed the Commission to direct M/s. ASL to pay the CSS of Rs.42.15 cr. to TPCODL within 10 days of the order failing which a late payment surcharge of 1.25% per month be applicable.

10. The respondent M/s. ASL has submitted that it owns a CGP of 40 MW capacity to meet the power requirement of its steel plant. It also operates a thermal power plant of 50 MW capacity set up as on IPP under MoU between M/s. ASL and Government of

Odisha on 07.02.2009 which requires M/s. ASL to set up the thermal power plant with capacity of 500 MW. At first instance they have constructed the 50 MW generating plant and executed PPA with GRIDCO on 24.10.2009. Both the 40 MW CGP and 50 MW generating plant are located in the same premises. As per the PPA the State entitlement of power is 12% of the electrical output and balance 88% power could be supplied to GRIDCO only when the parties could arrive at mutually agreed terms and conditions, or else M/s. ASL would be at freedom to sell the said 88% power to anybody inside or outside the State. The Additional Secretary to Government of Odisha, Department of Energy vide letter dated 23.11.2009 asked GRIDCO to accord IPP status to the 50 MW power project (under erection) of M/s. ASL. The 50 MW unit was synchronized on 05.03.2010 and its commercial operation was declared on 24.04.2010. The Commission had directed GRIDCO to pay a provisional variable cost of 59 paisa/KWh for the energy supplied by M/s. ASL from the 50 MW power plant. A meeting was arranged between erstwhile CESU, GRIDCO and M/s. ASL on 23.09.2010 regarding billing of 50 MW IPP and 40 MW CGP, wherein CESU had agreed to separate billing protocol for both IPP and CGP loads. Further, CESU has complied with the MoM dated 23.09.2010 and recasted the energy bills of M/s. ASL for the period from December, 2010 to July, 2012. Therefore, M/s. ASL denies the submission of the petitioner that due to the manner of connections and inter connections of the 40 MW CGP and 50 MW IPP, it is not possible to determine the quantum of self-consumption from the individual units separately. Further, on 26.09.2012, CESU (the present petitioner) asked M/s. ASL to execute a separate agreement for emergency drawal of power as an EHT consumer, as per the provision of OERC Supply Code, 2004 as the Commission in its RST order has stipulated that the IPPs are consumer of DISCOM for emergency drawal purpose only. Hence, CESU had recognised the IPP status of the 50 MW unit of M/s. ASL.

11. M/s. ASL has submitted that the Commission vide its order dated 13.09.2011 directed GRIDCO to make payment @ Rs.3.02 per unit for the energy purchased by GRIDCO towards balance 88% generation from the 50 MW unit, which was determined based on the average rate of power purchase from the Eastern Region NTPC Stations. Being aggrieved by the order of the Commission M/s. ASL filed an Appeal No. 191/2011 before the APTEL and the APTEL vide their judgment dated 04.10.2012 remanded the matter to this Commission with a direction to determine the tariff of the 50 MW

power plant of M/s. ASL and to pass fresh order in accordance with law, after hearing the parties. Thereafter, on 16.04.2013, this Commission passed order in compliance to the order dated 04.10.2012 of APTEL in Appeal No. 191/2011 and held that both the 40 MW and 50 MW plants are connected to a common 132 KV bus of the industrial unit and are not electrically separated. Hence, it is not possible to separately treat the 50 MW unit as an IPP. Thus, both the 40 MW and 50 MW units are to be treated as CGP of M/s. ASL. Pursuant to this order of the Commission SLDC stopped accepting separate schedules for these two generating units. Thereafter, M/s. ASL challenged the said order of the Commission before APTEL in Appeal No. 159/2013 and the APTEL in their judgement dated 17.10.2014 set aside the Commission's order dated 16.04.2013 and remanded the matter is again to the Commission to determine the tariff as per the earlier directions within three months.

12. Thereafter, the Commission in its order dated 09.06.2015 determined the cost plus tariff of the subject 50 MW Unit of ASL in Case Nos. 28, 29,107 & 108 of 2010 as per APTEL judgement dated 17.10.2014. M/s. ASL has submitted that the Commission vide its order dated 13.09.2011 and the APTEL in its judgements dated 04.10.2012 and 17.10.2014, though rendered no findings regarding the status of the 50 MW unit, have noticed the IPP status of the 50 MW generating plant of M/s. ASL. Further, the Government of Odisha has accorded IPP status to this 50 MW plant. Further, as per the MoM dated 23.09.2011, CESU and GRIDCO had recognised the IPP status of the 50 MW generating plant and agreed to separately bill for the 50 MW IPP and 40 MW CGP. Hence, the petitioner (erstwhile CESU) cannot now argue that both the units must be looked at collectively as they are not electrically separated.

13. M/s. ASL has submitted that the present petition is hit by delay and laches and is barred by the principles of esstoppels, in as much as, the petitioner is seeking to recover alleged dues towards imposition of CSS on M/s. ASL for FY 2011-12. Notwithstanding the fact that the claims raised by erstwhile CESU's letter dated 24.08.2013 is in any event null and void due to setting aside of this Commission's order dated 16.04.2013 by the APTEL's order dated 17.10.2014. It has been 9 years since the claim has arisen and any recovery of the same is therefore, barred by limitation. Since the claims towards alleged CSS accrued in FY 2011-12 and the present petition has been filed in May, 2021, the present petition is hit by delay and

laches. Accordingly, M/s. ASL has prayed the Commission to reject the present petition as being time barred.

14. M/s. ASL has submitted that the APTEL's remand order dated 04.10.2012 clearly holds that this Commission while passing the order dated 13.09.2011 treated the 50 MW generating plant as IPP. Further, the Commission's order dated 16.04.2013, holding that the entire 90 MW has to be treated as CGP, was set aside by the APTEL's order dated 17.10.2014, which notes that the Commission in its order dated 13.09.2011 has proceeded treating the 50 MW unit as an IPP. The APTEL's order dated 04.10.2012 has attended finality and there was no dispute in any forum regarding its IPP status and the APTEL's order dated 17.10.2014, against which there is no operational stay by the Hon'ble Supreme Court .Hence, M/s. ASL denies that the captive status has to be determined for the entire 90 MW capacity as such.

15. In view of the above M/s. ASL has stated that there is no bar either legally or technically for this Commission to treat its 40 MW CGP unit as distinct from its 50 MW IPP unit and accordingly determine the cross subsidy liability, if any. M/s. ASL further submitted that in light of the Government Notifications and orders of this Commission in the matter of imposition of Section 11, the power injected by the CGPs only to the State grid will be treated as self consumption for determination of CGP status. The consumption pattern of the 40 MW CGP of M/s. ASL is given hereunder:-

POWER GENERERATION AND CONSUMPTION FROM 40 MW CGP								
FY	**Gross Gen. (MU)**	**Aux. Consmp. (MU)**	**Net Gen. (MU)**	**Self Consmp. (MU)**	**Energy Supplied to GRIDCO u/S.11 (MU)**	**Energy Supplied to GRIDCO other than Sec.11 (MU)**	**Self Consmp. + Energy sold under Sec.11 (MU)**	**% of self consmp. (%)**
2010-11	244.937	26.82687	218.1101	132.4442	51.14295	34.523	183.5871	84.17176
2011-12	221.848	24.8704	196.9776	118.3226	19.232	59.423	137.5546	69.83261
2012-13	219.708	24.83146	194.8765	144.6061	16.904	33.36649	161.5101	82.87814

16. M/s. ASL has submitted that it has consumed 84.17 %, 69.83% and 82.88% of power during the FY 2010-11, 2011-12 and 2012-13 respectively. Hence, the criterion as per the Electricity Rules has been met by M/s. ASL in respect of its 40 MW CGP requiring no payment of any CSS. Further, since the 50 MW IPP of M/s. ASL supplied 100% power to GRIDCO during FY 2011-12 there can be no levy of CSS

for sale of power by a generating company to an Intra-State license. In view of the above, M/s. ASL has prayed the Commission to dismiss the present application of TPCODL out rightly because of lack of maintainability as submitted earlier. Even otherwise, the 40 MW unit of M/s. ASL qualify as a CGP and the APTEL has already held that the 50 MW unit is an IPP and the entire power from it 50 MW IPP has been consumed by GRIDCO. Hence, as per Electricity Act, 2003 and Electricity Rule, 2005 there can be no levy of CSS.

17. The respondent GRIDCO has submitted that the main issue of contention raised by TPCODL in the present application is that the (40+50) 90 MW CGP of ASL has lost the captive status during the FY 2011-12 and thus ASL is liable to make payment of Cross Subsidy Charges (CSS). As desired by the Commission during the hearing the chronology of events pertaining to 40 MW and 50 MW units of ASL for better appreciation of the matter have been submitted by GRIDCO.

18. GRIDCO has submitted that M/s. ASL had signed MoU with GoO on 01.10.2003 for developing an integrated project having 2X25MW (50MW) CGP and a steel plant. Later on configuration of CGP changed to one 40MW Unit which was commissioned on 31.03.2005. GRIDCO was procuring surplus power from this CGP as per CGP price determined by the Commission from time to time. In the meantime State Thermal Policy was notified on 08.08.2008, wherein an IPPs shall supply 14% power at variable cost if coal block allotted within the State else shall provide 12% power at variable cost to be determined by OERC. Thereafter, M/s. ASL signed MOU with GoO on 07.02.2009 for developing 500 MW (4X125MW) IPP in the State. In the mean time M/s. ASL got environmental Clearance from MoEF for 50MW CGP for expansion of integrated steel plant. Thereafter, on 28.08.2009 M/s. ASL approached GoO to confer IPP status to the 50MW capacity CGP Unit of which was simultaneously developed to cater its need for power requirement of its proposed expansion of Steel Plant. On 31.08.2009 M/s. ASL intimated GRIDCO regarding its proposed 50 MW IPP.

19. GRIDCO stated that on 24.10.2009 PPA was signed between GRIDCO and M/s. ASL to procure power from 500 MW IPP and proposed 50 MW IPP as well. The State Government vide their letter dated 23.11.2009 requested GRIDCO to take necessary action for according of IPP status to 50 MW power plant. On 13.01.2010, GRIDCO intimated to Government of Odisha that ASL yet to intimate the unit

configuration of its proposed IPP. Thereafter, on 20.02.2010, GRIDCO filed petition No. 28/2010 for approval of said PPA with M/s. ASL and another petition No. 29/2010 for determination of tariff for the 12% power to be procured at variable cost. The 50 MW thermal plant of M/s. ASL was synchronised with the grid on 05.03.2010 and COD was declared on 24.04.2010. The Commission vide its interim order dated 04.05.2010 directed GRIDCO to make payment at a provisional rate of 59 Paise/kWh to M/s. ASL for supply of power from the 50MW thermal Unit pending determination of its legal status. On 30.07.2010, M/s. ASL filed petition No 107 of 2010 for determination of final tariff in respect of 12% power to be supplied to the State. M/s. ASL had also filed another petition No. 108 of 2010 for review of the aforesaid interim order dated 04.05.2010.

20. The Commission vide its order dated 13.09.2011 in Case Nos. 28/2010, 29/2010, 107/2010 and 108/2010 fixed a tariff of Rs.3.02/kWh for 88% of power procured by GRIDCO with disclosure of some of the crucial facts by CESU. Being aggrieved by the above order dated 13.09.2011 M/s. ASL filed an appeal No. 191/2011 before APTEL on 28.09.2011. The APTEL passed order dated 04.10.2012 in Appeal No.191 of 2011 remanding the matter back to OERC to pass a fresh order in accordance with law within six months and provisionally allowed the tariff of Rs.3.02/kWh as an interim measure. Thereafter, complying to the directions of APTEL in its order dated 04.10.2012, the Commission passed an order dated 16.04.2013 observing that, "*In supersession of all interim order(s) on adhoc rate of 50 MW Generating Unit, GRIDCO should clear all the bills of M/s ASL for the surplus power received from the 90 MW (40 MW + 50 MW) CGPs as per the prevalent CGP Pricing approved by the Commission from time to time.*"

21. GRIDCO has stated that the Commission in the above order dated 16.04.2013 has disapproved the PPA dated 24.10.2009 executed between GRIDCO and M/s. ASL. But M/s. ASL, being aggrieved by the said order dated 16.04.2013, filed a petition before APTEL in appeal No. 159/2013. and the APTEL vide their judgment dated 17.10.2014 in Appeal No.159/2013, set aside the impugned order and the matter is again remanded to the Commission to determine the tariff as per the directions given by the Tribunal within three months. Thereafter, the Commission in its order dated 09.06.2015 determined the cost plus tariff of the subject 50 MW Unit of ASL in Case Nos. 28, 29,107 & 108 of 2010 as per APTEL judgement dated 17.10.2014. However,

in the meantime, on 19.07.2012, M/s. ASL had executed Fuel Supply Agreement (FSA) with MCL for supply of coal to its 50 MW captive power plant.

22. GRIDCO has submitted that on 15.12.2014 GRIDCO challenged the above APTEL judgment dated 17.10.2014 before Hon'ble Supreme Court of India in C.A.No.1298 of 2015, which is now pending before the Hon'ble Apex Court. GRIDCO has further submitted that as per the MoM dated 07.08.2010 of the meeting between GRIDCO and M/s. ASL, the capacity configuration submitted by M/s. ASL is (1X50MW+1X350MW+1X660MW). However, as per the MoM of the meeting held on 25.02.2012 under the Chairmanship of Secretary, DoE, Govt. of Odisha on the issues relating to M/s. ASL, it is clearly indicated that the matter relating to conversion of 50 MW CGP to IPP has not yet attained finality.

23. With the above background of the case GRIDCO has submitted the following:-

a) Vide letter dated 14.07.2011, GRIDCO had intimated ASL that it did not intend to purchase 88% power from the IPP of M/s. ASL at the rate proposed by them as it is not commercially viable.

b) The APTEL judgement dated 17.10.2014 directs for determination of tariff of 50 MW Unit of ASL on cost plus basis as GRIDCO had procured power beyond its entitlement of 12% energy sent out at variable cost/ ECR in view of power shortage scenario prevailing at that time.

c) As per APTEL judgement dated 17.10.2014, GRIDCO is to make payment of cost of power for the period from March, 2010 to June, 2011 (during which additional 88% power was procured from ASL) at cost plus tariff determined by the Commission. Currently, GRIDCO is not procuring any power from 50 MW thermal unit of M/s. ASL.

d) Civil Appeal No. 1298 of 2015 filed by GRIDCO against APTEL judgement dated 17.10.2014 is sub-judice before Hon'ble Supreme Court of India.

e) PPA executed between M/s. ASL and GRIDCO was disapproved by the Commission vide order dated 16.04.2013;

f) Department of Energy, Government of Odisha has not yet notified 50MW unit of ASL as IPP;

g) No revised MOU with Government of Odisha or Revised PPA with GRIDCO has been signed in respect of 50 MW Unit of ASL till date.

h) Till date Respondent M/s. ASL has not challenged the issue of status of 50 MW power plant concluded as CGP by the Commission vide their order dated 16.04.2013 and they were only concerned about the tariff/cost of 88% additional power supplied to GRIDCO during March, 2010 to June, 2011 from the 50 MW unit on cost plus basis.

24. In response to the submissions of the respondents, the petitioner TPCODL has reiterated that as per the nature of connections and interconnections existing at the power plant of M/s. ASL, the two units are not electrically separated and hence it is not possible to determine the Captive Generation Status separately for the two units. Regarding the matter of delay of raising of the matter as stated by M/s. ASL, TPCODL has submitted that quantum of Cross Subsidy Surcharge levied to Aarti Steel for the period under consideration i.e. FY 2010-11 to FY 2012-13 was informed through the letter dated 24th August 2013 itself. Further even the Electricity Bill of September 2013 from erstwhile CESU includes this amount as one of the elements. The amount due is continued to be shown even in the current bill. In the bill of September 2013, the amount shown in the bill is about Rs 42.86 Crores and even the bill served as late as in August 2021, the amount of Rs. 86.53 Crores has been shown as disputed amount and includes the DPS.

25. Hence there is no delay in raising of the claims. Further while the matter pertains to the three years viz FY 2010-11 , FY 2011-12 and FY 2012-13, TPCODL has not prayed to the Commission for paying any Late Payment Surcharge (LPS) from levy of the CSS amount in September 2012 (i.e the year for which the Captive Status has not been achieved). The LPS is being prayed to be levied if the due amount is not paid within 10 days of the Order.

26. TPCODL has submitted that M/s. ASL has proceeded on the premise that the APTEL in its judgement dated 16th April 2013 in Appeal No 159 of 2013 had treated the 50 MW Unit as an IPP and hence the only question that remained was whether 40 MW unit is an CPP or not. In this regard TPCODL has stated that the Electricity Act 2003 envisages two types of power plants viz (a) Captive Power Plant (CPP) and (b) Independent Power Plant (IPP). The Government of India Rules of 2005 has clearly

explained the conditions (or "Captive Test") under which a plant or a Unit can be called a CPP. On the other hand, unlike for Captive, there are no rules or judgement to call any plant an IPP. Further, the APTEL in its judgement dated 16th April 2013 has not arrived at the conclusion that the 50 MW unit is an IPP as there is no test to categorise a plant as IPP or not. Hence TPCODL submits that the 50 MW Unit cannot be automatically granted a status of an IPP. Further, the direction of APTEL had for purchase of power from the 50 MW unit on a Cost Plus principle, does not automatically grant the Unit a status of IPP and preclude this unit from the Captive Test. The Commission has from time to time arrived at tariff ("generic tariff") for purchase of power by GRIDCO from the CGPs. Therefore, TPCODL submits that the direction of the APTEL was only to direct OERC for not applying the generic tariff to the 50 MW Plant of ASL. The relevant extracts from the order dated 16th April 2013 is as follows:

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

27. TPCODL further submitted that the argument that 50 MW Unit is an IPP and therefore the Captive test should be made applicable only to 40 MW Unit needs to be rejected by the Commission. TPCODL submits that not-withstanding the manner of sale of power from the two units i.e 40 MW and 50 MW and the subsequent billing and accounting, the moot question is whether the power consumed by M/s. ASL for its own can be identified with a particular unit. From the arrangement of these Units, it is not possible to segregate the self-consumption into two parts viz (a) Consumption from 40 MW Unit and (b) Consumption from 50 MW Unit.

28. Further, as per the Captive Rules, if 51% of the power generated from a Unit is consumed for self use, the unit will qualify as captive and otherwise not. As mentioned above, since the segregation of power is not possible, it is consequently not possible to compute which of two Units has a captive status. The only way by which such computations can done, is through the aggregation of power of 40 MW and 50

MW. Therefore, the status of 40 MW and 50 MW units together can be determined as worked out in the present petition. TPCODL further submitted that while GRIDCO had purchased power from the two units separately, the same was for the purpose of Tariff only i.e the Tariff for power sold from 50 MW unit was different from the power sold from 40 MW unit. In this regard, from the extracts of the reply of M/s. ASL, it can be seen that the total power purchased by GRIDCO is on the energy recorded by the meter on Bay-4.. Hence this does not in any way confer the status of "IPP" on 50 MW unit. Further, the APTEL in its judgment dated 16.04.2013 has not arrived at the conclusion that the 50 MW is an IPP. In view of the above, the petitioner TPCODL has submitted that the Captive Status for the 40 MW and 50 MW Units cannot be determined individually and has to be done so for the entire 90 MW Plant. Hence, TPCODL has prayed the Commission to consider the computations given in its petition.

29. Heard the parties and their written note of submission are taken into record. It is observed that the Commission in its order dated 16.04.2013 complying to the direction of the APTEL's order dated 04.10.2012 had observed that " *In supersession of all interim order(s) on adhoc rate of 50 MW Generating Unit, GRIDCO should clear all the bills of M/s ASL for the surplus power received from the 90 MW (40 MW + 50 MW) CGPs as per the prevalent CGP Pricing approved by the Commission from time to time."*

30. M/s. ASL being aggrieved by the above order of the Commission made an appeal No. 159 of 2013 before the APTEL and the APTEL in its judgment dated 17.10.2014 in Appeal No. 159 of 2013 observed as follows:-

"35. Summary of our findings:

(i) We find that the State Commission has failed to adhere to scope of the remand ordered by this Tribunal vide Judgment dated 4.10.2012 in Appeal no. 191 of 2011. In the previous order dated 13.9.2011, the State Commission instead of determining the tariff of Appellant's power plant of 50 MW capacity on cost plus basis, decided that the 88% energy supplied by the Appellant may be paid by GRIDCO at NTPC-Eastern Region tariff. The Tribunal in Appeal No. 191 of 2011 held that linking the tariff of the Appellant's power plant with NTPC tariff was not in order and directed determination of tariff as per the provisions of the Act and its Regulations by taking into account the costs incurred by the Appellant. There was no occasion for the State Commission to institute an enquiry regarding the status of the 50 MW unit in the remand proceedings.

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

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

36. The Appeal is allowed and the impugned order is set aside. The State Commission is directed to pass consequential order as per the directions given in this judgment. No order as to costs."

31. Thereafter, the Commission in complying to the above order of the APTEL, passed the order dated 09.06.2015 in Case Nos. 28, 29, 107 & 108 of 2010 determining the cost plus tariff of 50 MW unit of M/s. ASL and observed as follows:

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

32. The Commission is of the view that there is no bar in Electricity Act, 2003 for existence of one unit as CGP and another unit as IPP of a generating company. However, the connections and inter-connection facilities should be such that both the units are electrically separated. From the above orders dated 16.04.2013 and 09.06.2015 of the Commission in Case Nos. 28, 29, 107 & 108 of 2010, it is observed that, the Commission was of the view that the subject 50 MW generating unit of M/s. ASL cannot be treated as an IPP until it is electrically separated from the 40 MW CGP of M/s. ASL. However, the Commission in complying with the judgment dated 17.10.2014 of the APTEL in Appeal No. 159 of 2013, has determined the tariff of the 50 MW generating unit of M/s. ASL treating it as an IPP, though in the judgments of the APTEL, it is not concluded that the 50 MW generating unit is an IPP with all considerations.

33. The Commission observed that the judgment dated 17.10.2014 of the APTEL passed in Appeal No. 159 of 2013 has been challenged by GRIDCO before the Hon'ble Supreme Court of India in Civil Appeal No. 1298 of 2015 and the Hon'ble Apex Court has admitted the said Civil Appeal. Since the matter is sub-judice before the Hon'ble Apex Court, the Commission at this stage does not feel appropriate to entertain the present application. However, the Petitioner is at liberty to renew the application after disposal of the matter by the Hon'ble Apex Court. It needs no mention that the decision of Hon'ble Apex Court shall be binding on all parties and the application if any to be filed by the present Petitioner after disposal of the matter by Hon'ble Apex Court, the same shall be decided in right perspective.

34. With the above observations the case is disposed of.

Sd/-
(G. Mohapatra)
Member

Sd/-
(U. N. Behera)
Chairperson