

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Coram:
Shri V. S. Verma, Member
Shri M. Deena Dayalan, Member**

Petition No. 77/GT/2013

**Date of Hearing: 25.7.2013
Date of Order: 03.1.2014**

In the matter of

Petition under Section 62 and Section 79(1) (b) of the Electricity Act, 2003 read with CERC (Terms and Conditions of Tarff) Regulation, 2009 seeking determination of tariff of 262.5 MW (Gross) capacity sale from GMR-Kamalanga Energy Limited (GKEL) to GRIDCO acting as nominee of Govt. of Odisha for procuring power for the Odisha Discoms for the period from 1.4.2013 up to 31.3.2014.

**And
in the matter of**

GMR-Kamalanga Energy Limited,
Skip House, 25/1 Museum Road,
Bangalore-560 025

Petitioner

Vs

1. GRIDCO Limited
Janpath, Bhubaneswar-751 022, Orissa
2. Western Electricity Supply Company of Orissa Limited
Burla, Sambalpur, Orissa
3. Southern Electricity Supply Company of Orissa Limited
Courtmeta, Berhampur (GM) 760 004
4. North Eastern Electricity Supply Company of Orissa Limited
Januganj, Balasore, Orissa
5. Central Electricity Supply Utility of Orissa
2nd Floor, IDCO Tower, Janpath,
Bhubaneswar-751 022

Respondents



Parties Present:

1. Shri Amit Kapur, Advocate, GKEL
2. Shri Vishrov Mukerjee, Advocate, GKEL
3. Shri Tarun Mahajan, GMR
4. Shri Jatinder Kumar, GMR
5. Shri R.B. Sharma, Advocate, GRIDCO
6. Shri S.R.Sarangi, GRIDCO

ORDER

The petition has been filed for approval of tariff for supply of 262.5 MW power to GRIDCO Ltd (GRIDCO), the first respondent, from Kamalanga Thermal Power Plant (the Project) having a total capacity of 1400 MW. The power purchased by GRIDCO is further supplied by the first respondent in bulk to the other respondents for ultimate supply to the consumers. The petitioner has made certain other prayers too but it is not necessary to take note of those prayers at this stage.

Preliminary Issue

2. The preliminary issue that has arisen in the present petition is regarding the jurisdiction of the Commission to regulate the tariff of the Project.

Facts

3. At this stage itself it is pointed out that the petitioner is a subsidiary of GMR Energy Ltd which was involved with the Project at the initial stages. Therefore, for the purpose of the present order any reference to the petitioner includes GMR Energy Ltd.

4. Govt. of Odisha signed a Memorandum of Understanding dated 9.6.2006 (MoU) with the petitioner for setting up a 1000 MW thermal power plant in the State. Later on, the capacity of the Project was increased to 1400 MW and was to



be executed in two stages, Stage I comprising 3 units of 350 MW each and Stage II comprising one unit of 350 MW. Pursuant to the MoU, The petitioner executed the Power Purchase Agreement dated 28.9.2006 (PPA) with GRIDCO valid for a period of 25 years from the date of execution for supply of 25% of the power generated. Stage I of the Project has been awarded the status of Mega Power Project by the Central Government under Ministry of Power letter dated 16.3.2009. The PPA was approved by Odisha Electricity Regulatory Commission (the Odisha Commission) under clause (b) of sub-section (1) of Section 86 of the Electricity Act by order dated 20.8.2009. In the said order dated 20.8.2009 the Odisha Commission approved the PPAs executed between GRIDCO and other Independent Power Producers (IPPs) also. Subsequently, the petitioner executed a revised PPA dated 4.1.2011 whereby it was agreed that supply of power to GRIDCO would include supply from the additional capacity of 350 MW to be set up by the petitioner in Stage II.

5. The State Commission while approving the PPA by its order dated 20.8.2009 had directed GRIDCO and the IPPs (which included the petitioner) to file the petitions under Section 62 read with clause (b) of sub-section (1) of Section 79 of the Electricity Act before this Commission for approval of tariff since in the opinion of the State Commission the power projects to be established by the petitioner and other IPPs were inter-State generating stations. Pursuant to the above observations of the State Commission, the petitioner filed Petition No. 20/MP/2012 for approval of provisional tariff for supply of power to GRIDCO. During the proceedings in that petition it emerged that in addition to execution of the PPA for supply of power to GRIDCO, the petitioner had signed agreements for supply of

power to the distribution companies in Haryana through PTC and Bihar State Electricity Board (BSEB) after selection through the competitive bidding process adopted under Section 63 of the Electricity Act.

6. This Commission in its order dated 16.5.2012 after taking note of the above factual position observed that supply of power to the distribution companies through PTC after selection through the competitive bidding was outside the scope of determination of tariff and therefore, the petitioner did not satisfy the requirements of having the composite scheme for generation and sale of electricity in more than one State under clause (b) of sub-section (1) of Section 79 of the Electricity Act. Accordingly, the Commission dismissed the petition as not maintainable. The petitioner was, however, advised to approach the Commission for approval of tariff after it entered into the composite scheme for sale of power in more than one State.

7. The petitioner has filed the present petition for approval of regular tariff for supply of electricity to GRIDCO in terms of the liberty granted in the order dated 16.5.2012.

8. During pendency of present petition, the question of jurisdiction was examined by the Commission in Petition Nos. 79/MP/2013 and 81/MP/2013 filed by the petitioner for adjudication of certain issues pertaining to the Project. In the common order dated 18.12.2013, the Commission has upheld its jurisdiction to adjudicate upon the issues on a finding that the Project is an inter-State generating station whose tariff is to be regulated by the Commission by virtue of clause (b) of



sub-section (1) of Section 79 of the Electricity Act, 2003. The findings of the Commission in this regard are extracted below:

“23. On the question of maintainability, GRIDCO has relied upon the revised PPA dated 4.1.2011 between the petitioner and GRIDCO according to which the parties have agreed for determination of tariff by OERC. Based on this clause in the revised PPA, GRIDCO has argued that the jurisdiction of this Commission is ousted and is vested in OERC. The submission of GRIDCO is not based on the correct legal position. The settled principles of law are that the parties by their agreement cannot confer jurisdiction upon a forum which does not have the jurisdiction under the law and the parties by their agreement cannot oust the jurisdiction of the forum vested under the law. Therefore, what is to be seen is whether under the law this Commission has been invested with the jurisdiction to determine the tariff in the present case. It is of relevance to note that OERC in its order dated 20.8.2009 has already decided the question of jurisdiction as it advised the petitioner to approach this Commission for approval of tariff as the Project is an inter-State generating station. There is nothing on record to show that OERC has revisited its earlier direction or has approved the revised PPA dated 4.1.2011 that incorporates clause 2.2 (f). Therefore, the contention of GRIDCO on the basis of the revised PPA dated 3.1.2011 does not merit any further consideration and deserves outright rejection.

24. The substantive issue requiring examination while considering the question of jurisdiction is whether the petitioner has a composite scheme for generation and sale of electricity in more than one State. This Commission in its order dated 16.5.2012 held that the Project did not fulfill the conditions of clause (b) of sub-section (1) of Section 79 of the Electricity Act, 2003. On the basis of this finding, the petition was dismissed, though the petitioner was granted liberty to file appropriate petition for determination of tariff as and when it entered or otherwise had a composite scheme for generation and sale of electricity in more than one State.

25. There is no dispute that the petitioner has entered into PPAs for supply of electricity to the States of Odisha, Haryana and Bihar. The supply in the State of Odisha is through GRIDCO, the intra-State electricity trader and to the State of Haryana is through PTC, the inter-State trading licensee. The underlined reason for dismissal of the petition as noticed from para 14 of the order dated 16.5.2012 was that power supplied to PTC by the petitioner for further sale to the distribution companies in the States of Haryana and sale of power to Bihar does not require determination of tariff under clause (a) of sub-section (1) of Section 62 and therefore, sale of power by the petitioner to these States through PTC does not amount to sale of electricity by the generating

company. The Commission accordingly held that the petition was not maintainable as the requirement prescribed under clause (b) of sub-section (1) of Section 79 of the Electricity Act was not met.

26. The question whether sale of electricity by a generating company to the distribution licensees in the States through PTC arose for consideration before Single Judge Bench of the Hon^{ble} Delhi High Court in OMP No 677/2011 (PTC India Ltd Vs Jaiprakash Power Ventures Ltd). In that case, Jaiprakash Power Ventures Ltd, a generating company, had entered into PPA with PTC for sale of power. The PPA provided that the tariff for sale of power would be determined by this Commission. PTC in turn executed the Power Supply Agreement with the distribution companies in the States of Punjab, Rajasthan, Haryana and Uttar Pradesh. The question arose whether this Commission had power to determine tariff for sale of electricity by Jaiprakash Power Ventures Ltd to PTC since Section 62 of the Electricity Act does not provide for fixation of tariff for sale of electricity by a generating company to the trading licensee. The Hon^{ble} High Court in its judgment dated 15.5.2012 held that when the trader intervenes in the supply of power by a generating company to the distribution licensee, the transaction would still form the subject matter of regulation by the Appropriate Commission within the meaning of Section 62 read with Para 4(x) of the Statement of Objects and Reasons of Electricity Act, 2003. The Hon^{ble} High Court rejected the argument that where a trading licensee sells power to a distribution licensee and not directly to a consumer, the tariff for such a supply by the generating company to the trading licensee would not be amenable to the regulatory jurisdiction of the Regulatory Commission at the Central and State levels under Section 62 of the Electricity Act, 2003. The Hon^{ble} High Court directed Jaiprakash Power Ventures Ltd to approach this Commission for approval of tariff for supply of electricity to PTC. The judgment of the Hon^{ble} High Court leads to an inference that when the generating company, other than that owned or controlled by the Central Government, sells electricity to distribution licence in more than one State, whether directly or through the electricity trader, this Commission has the jurisdiction to regulate the tariff of the said generating company.

27. Jaiprakash Power Ventures Ltd filed appeal before the Division Bench of the Hon^{ble} High Court. It has been brought to our notice that appeal has since been withdrawn and thereby the judgment of the learned Single Judge has become final. For sake of record it is mentioned that the judgment of the Hon^{ble} High Court dated 15.5.2012 was not within the knowledge of this Commission when the order dated 16.5.2012 in Petition No 20/MP/2012 was passed.

28. This Commission in its order dated 3.9.2012 in Petition No 184/2009 examined the question whether sale of electricity by NTPC Ltd to



GRIDCO, the intra-State trading licensee, was amenable to tariff determination by the Commission under Section 79 of the Act. This Commission by relying upon the judgment of the Hon^{ble} Delhi High Court dated 15.5.2012 *ibid*, in the order dated 3.9.2012 upheld its jurisdiction to determine tariff for sale of electricity by NTPC, a generating company owned or controlled by the Central Government, from Talcher TPS to GRIDCO under clause (a) of sub-section (1) of Section 79 of the Electricity Act, 2003. The relevant para of the said order dated 3.9.2012 reads as under:

“20. The issue of jurisdiction of the Commission to determine the tariff of the generating companies for supply of power to the traders and from the traders to the distribution licensees has received judicial attention from time to time as noted above. We notice that the Appellate Tribunal in Noida Power Company Ltd v Uttar Pradesh Power Corporation Ltd and in Lanco Power Ltd v Haryana Electricity Regulatory Commission has taken the view that when power is supplied to a trading licensee which has back to back arrangement for supply of the same power to the distribution licensees, the appropriate Commission has the power to determine the tariff. The High Court of Delhi in PTC India Ltd v Jai Prakash Power Ventures Ltd has categorically held that when the trading licensee intervenes in the process of supply of electricity by a generating company to the distribution licensee, the transaction would be subject matter of regulation under section 62 of the Act. In the context of JP Power Venture Ltd, the High Court has held that the transactions involving the supply of power by the generating company to PTC would be regulated by CERC since PTC is selling the power to the distribution licensees for eventual supply to the consumers. The appeal against the said judgment is pending and therefore, the issue has not attained finality. However, considering the fact that the present petition has been filed in 2009 for determination of additional capital expenditure for the years 2007-08 and 2008-09, we propose to dispose of the petition in the light of the judgment of the High Court dated 15.5.2012. We intend to clarify that if the issue decided in the said judgment is modified in appeal, the Commission will reopen issue and decide the question of jurisdiction in accordance with law.”

29. In the present case, the petitioner has arrangements for sale of power to the State of Odisha through MoU route and to the States of Bihar and Haryana by competitive bidding through an intermediary, PTC in case of supply to the State of Haryana. In view of the legal position emerging out of the judgment of the Hon^{ble} High Court and followed by this Commission in its order dated 3.9.2012 in Petition No. 184/2009, the decision in the order dated 16.5.2012 needs to be revisited, particularly in

view of the fact that this Commission had granted liability (sic liberty) to the petitioner to approach the Commission after a composite scheme for generation and supply of power emerges in case of the petitioner.

30. It is seen that the PPAs with the entities in the three States were executed on different points of time and for different quantum. The PPA with GRIDCO for supply of 262.5 MW of power was initially executed by the petitioner on 28.9.2006. Later on the revised PPA was entered into on 4.1.2011 for supply of power from Stage II of the Project having capacity of 350 MW. PTC signed agreements dated 7.8.2008 with the Haryana utilities and also signed the PPA dated 12.3.2009 with the petitioner as a back-to-back arrangement for supply of power. On 9.11.2011, the petitioner entered into PPA with Bihar State Electricity Board for supply of 282 MW gross power at Bihar STU bus-bar interconnection point. The tariff agreed to under the PPA was adopted by Bihar Electricity Regulatory Commission on 27.11.2012. Based on these facts, GRIDCO has urged that since PPAs have been entered into on different points of time, it cannot be said that the petitioner has the composite scheme for generation and sale of electricity in more than one State. The objection raised by GRIDCO should not detain us longer as this issue has already been decided by this Commission in its order dated 19.10.2012 in Petition No 155/MP/2012 (Adani Power Limited vs. Uttar Haryana Bijli Vidyut Nigam Ltd). This Commission has held that for the purpose of jurisdiction under clause (b) of sub-section (1) of Section 79 of the Electricity Act, 2003, it is not necessary that the composite scheme for generation and sale to more than one State should be in existence at the beginning. It has been held by this Commission that the composite scheme can be entered into by the generating company at any stage subsequently and the jurisdiction gets vested in this Commission as and when the generating company enters into the composite scheme. The relevant para of this Commission "s in its order dated 19.10.2012 is extracted hereunder:

"23. ... Therefore, it is our considered opinion that a generating company may enter into the composite scheme for generation and sale of electricity in more than one State at any time during the life of the generating station(s) owned by it. Any other interpretation will also impinge on the policy of common approach on the matters of tariff of the generating companies supplying electricity to more than one State enshrined in clause (b) of subsection (1) of Section 79. In this view of the matter, it is concluded that Adani entered into composite scheme for generation and sale of electricity in more than one State on 7.8.2008 when it signed PPAs with the distribution companies in the State of Haryana. Adani has also stated that it is in the process of establishing generating stations in different States. For this reason also, Adani as a generating company, has the composite scheme for generation and sale of electricity in more than one State. Therefore, regulation of

tariff of Adani as a generating company is within the jurisdiction of this Commission.”

31. *Another objection that has been taken by GRIDCO is that the fact of sale of power by the petitioner to the States of Haryana and Bihar through the process of competitive bidding impinges on the jurisdiction of this Commission since in these cases there is no determination of tariff by this Commission and the tariff has already been adopted by the respective State Commission. It was argued by learned counsel for GRIDCO that the judgment of the Hon’ble High Court did not apply to the facts of the present case because in that case the tariff was not determined by the competitive bidding process. It is clarified that in Petition No. 155/MP/2012, reference to which has been made in the preceding para, the tariff was discovered through the process of competitive bidding for supply of power in the States of Gujarat and Haryana. This Commission held that regulation of tariff of Adani Power Ltd is within the jurisdiction of this Commission. It is also pointed out that power of this Commission under clause (b) of sub-section (1) of Section 79 of the Electricity Act is not limited to determination of tariff. The power conferred upon this Commission is to “regulate” the tariff which power is much wider than the power of determination of tariff under Section 62 and covers other aspects in addition to determination of tariff. Viewed in the background of these facts, the objection by GRIDCO is without any force.*

32. *There is yet another fact which bears notice. The Project has been accorded the status of Mega Power Project by Ministry of Power by letter dated 16.3.2009. One of the essential conditions for grant of Mega Power Project status under the Mega Power Policy of the Central Government is that the supply from the generating station would be to more than one State. Therefore, it is implicit in the Mega Power Project status that the petitioner supplies power to more than one State. Such supply has necessarily to be through the composite scheme.*

33. *To sum up, it is held that supply of electricity by the petitioner to the States of Odisha, Haryana and Bihar is under the composite scheme for generation and sale of electricity in more than one State. Accordingly, this Commission has power to regulate the tariff of the generating station of the petitioner under clause (b) of sub-section (1) of Section 79 of the Electricity Act, 2003. As a corollary it follows that the powers of adjudication of the claims and disputes involving force majeure and Change in Law events under the PPAs is vested in this Commission.”*

9. In view of the above findings, the present petition for determination of final tariff is amenable to the jurisdiction of the Commission and as such the petition is



maintainable. The petition shall be taken up for hearing on 11.3.2014. Meanwhile, the respondents may file their replies on merits of the petitioner's claim for tariff, latest by 31.1.2014 with advance copies to the petitioner who may file its rejoinder, if any, by 21.2.2014.

Sd/-
(M. Deena Dayalan)
Member

sd/-
(V S Verma)
Member

