

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No. 276/GT/2018
along with
I.A No.72/IA/2019**

Coram:

**Shri P.K. Pujari, Chairperson
Shri I.S. Jha, Member
Shri Arun Goyal, Member
Shri Pravas Kumar Singh, Member**

Date of Order: 12th February, 2022

In the matter of

Petition No.276/GT/2018 for determination of tariff of 1200 MW coal-based power project of Jindal India Thermal Power Limited for the period from 12.2.2015 to 31.3.2019

Jindal India Thermal Power Limited,
Plot No. 12, Pocket B1, Vasant Kunj
New Delhi-110070

.....Petitioner

Vs

GRIDCO Limited,
Janpath,
Bhubneswar-751020

.....Respondent

And

In the matter of

Interlocutory Application (I.A) No.72/IA/2019 on the maintainability of the Petition No.276/GT/2018

GRIDCO Limited,
Janpath, Bhubneswar-751020

.....Applicant

Vs

Jindal India Thermal Power Limited
Plot No. 12, Pocket B1, Vasant Kunj
New Delhi-110070

.....Respondent



Parties Present:

Shri R.K. Mehta, Advocate, GRIDCO
Ms. Himanshi Andley, Advocate, GRIDCO
Shri Sukanta Panda, GRIDCO
Ms. Susmita Mohanty, GRIDCO
Shri Mahfooz Alam, GRIDCO
Shri Sajan Poovayya, Senior Advocate, JITPL
Shri Matrugupta Mishra, Advocate, JITPL
Ms. Ritika Singhal, Advocate, JITPL
Shri Vignesh Srinivasan, Advocate, JITPL
Shri Pratibhanu Singh, Advocate, JITPL
Shri Pulak Srivastav, JITPL

ORDER

Jindal India Thermal Power Limited (in short 'JITPL') has filed Petition No. 276/GT/2018 seeking determination of tariff of its 1200 MW coal-based power project (in short 'the Project' or 'the generating station') in the State of Odisha for the period from 12.2.2015 till 31.3.2019, in terms of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 (hereinafter referred to as 'the 2014 Tariff Regulations').

Brief background

2. Jindal Photo Ltd (JPL) entered into Memorandum of Understanding (MOU) dated 26.9.2006 with the State Government of Odisha for setting up of the Project. Thereafter, on 28.9.2006, PPA was executed by JPL with State Government of Odisha, wherein, the nominated agency of the State Government had the right to purchase up to 25% power sent out from the Project in terms of the PPA, and tariff for such purchase to be determined by the appropriate Regulatory Commission. After JPL assigned the Project to JITPL on 14.5.2008, MOUs (Memoranda of Understanding) were signed by JITPL with the State Government on 17.10.2008 and 30.12.2010. Subsequently, JITPL signed



PPA dated 5.1.2011 and Supplementary PPA with the State Government of Odisha on 23.7.2013, which were approved by OERC (Odisha Electricity Regulatory Commission) on 4.6.2019 with some modifications. Aggrieved by order of OERC dated 4.6.2019, JITPL filed appeal (Appeal No.297/2019) before APTEL (Appellate Tribunal for Electricity) and by interim order dated 28.8.2020, APTEL has stayed the operation of the said order and all consequential action taken thereto. The said appeal is pending.

3. JITPL filed Case No. 26/2014 before OERC for determination of variable cost (Energy Charge Rate) in respect of 12% power generated from the generating station for the 2014-19 tariff period for Unit-I. Unit-I (600 MW) achieved COD on 19.4.2015 and Unit-II (600 MW) achieved COD on 12.2.2015. OERC by order dated 26.2.2018 disposed of Case No. 26/2014, observing that the issue of determination of tariff of the power to be sold by JITPL to GRIDCO falls under the jurisdiction of the Central Commission. Against OERC order dated 26.2.2018, the Applicant, GRIDCO filed appeal (Appeal No. 250/2018) before APTEL. Appeal No.250/2018 has been disposed of by APTEL vide its judgment dated 10.1.2022 upholding the jurisdiction of the Central Commission.

4. During the pendency of Case No. 26/2014 before OERC, JITPL executed various long term and medium term PPAs with the distribution licensees situated in the States other than State of Odisha i.e. with KSEBL (PPA dated 29.12.2014 for 25 years), with Bihar Discoms i.e. North Bihar Power Distribution Company Limited and South Bihar Power Distribution Company Limited (vide PPA dated 6.5.2016 for 13 years) and with different zones of Indian Railways (PPAs in March 2016 and April 2016 for different



capacities for 3 years), situated in nine different States, respectively. The start dates of PPA with KSEB and the Bihar Discoms are 1.10.2017 and 18.1.2018 respectively.

5. JITPL has also filed Writ Petition No.18150 of 2018 before the Hon'ble High Court of Orissa challenging (i) MoU dated 26.9.2006, (ii) MoU dated 17.10.2008, (iii) PPA dated 5.1.2011, (iv) Supplementary PPA dated 23.7.2013 and (v) Thermal Policy dated 8.8.2008 of State Government of Odisha. The Hon'ble High Court on 16.5.2019 has directed that no coercive action should be taken against JITPL. The writ petition is pending and the interim order granted earlier has been continued till the next date of hearing.

Interlocutory Application (I.A) No. 72/IA/2019

6. During the pendency of Petition No.276/GT/2018, GRIDCO filed Interlocutory Application (I.A) No. 72/IA/2019 vide affidavit dated 22.7.2019 on the issue of 'maintainability' of Petition No.276/GT/2018 with the following main prayers:

(a) Decide the question of maintainability of the present petition at the outset as a preliminary issue:

(b) Reject the present petition as not maintainable at the admission stage;

Hearing dated 25.7.2019

7. The Petition was heard on 25.7.2019 and the Commission, after seeking certain additional information from JITPL, directed to hear on 'maintainability' of the Petition No.276/GT/2018 in view of the IA No. 72/IA/2019 filed by Applicant GRIDCO regarding 'maintainability' of the Petition No.276/GT/2018.

Submissions of GRIDCO in IA No.72/IA/2019

8. GRIDCO has, in IA No. 72/IA/2019, submitted the following:



(a) The Government of Odisha has not been impleaded in Petition No. 276/GT/2018, despite being a necessary and proper party. Therefore, the petition is liable to be dismissed on the ground of non-joinder of parties.

(b) The claim of JITPL for determination of capital cost and two-part tariff is contrary to MOU dated 17.10.2008 and PPA dated 5.1.2011/23.7.2013. From the date of MOU (17.10.2008) and PPA dated 5.1.2011 till the filing of the present petition, JITPL had never raised any objection/ dispute regarding the supply of power at variable cost. Accordingly, a settled issue cannot be unsettled at this stage.

(c) In the Writ Petition No.18150 of 2018 filed by JITPL before the Hon'ble High Court of Orissa, (i) MoU dated 26.09.2006; (ii) MoU dated 17.10.2008; (iii) PPA dated 5.1.2011; (iv) Supplementary PPA dated 23.7.2013; and (v) Thermal Policy dated 8.8.2008 of Government of Odisha have been challenged. The Petition No. 276/GT/2018 is based on identical issues as raised in the said writ petition. Hence, parallel proceedings for the same relief before two different forums are not maintainable.

(d) In Case No. 26 of 2014 filed before OERC, JITPL had only prayed for determination of variable cost (ECR) of 12% power generated by Unit-I and Unit-II to be sold to GRIDCO. Even in the said petition, JITPL did not seek determination of two-part tariff. However, vide order dated 26.2.2018, OERC held that it had no jurisdiction and that the Central Commission has the jurisdiction to determine the tariff. OERC order dated 26.2.2018 (in Case No. 26/2014) has been challenged by GRIDCO before Appellate Tribunal for Electricity in Appeal No.250 of 2018.

Reply of JITPL in IA No.72/IA/2019

9. JITPL vide reply affidavit dated 24.8.2019 has submitted the following:

(a) The State Government of Odisha is neither a proper party nor a necessary party in terms of the Order 1 Rule 10 of the Code of Civil Procedure, 1908, as the scope of the present petition is for determination of tariff of the project and no relief is sought against the Government of Odisha. No enforceable



rights or claims of the State Government or any other parties would be affected by the determination of tariff under the present petition and, hence, the need for impleading the State Government of Odisha does not arise.

(b) The scope of the present petition is for determination of tariff of the generating station under Section 62 of the Electricity Act, 2003 (in short, 'the Act') which is entirely distinct from the submissions in the writ petition, pending before the Hon'ble High Court, wherein the policies and MOUs executed with the State of Odisha have been challenged. The prayers sought by JITPL before the Hon'ble High Court of Orissa in writ petition and the issues in the present petition are substantially different. The field of controversy and reliefs sought do not overlap and a decision in the subsequent matter being writ petition or vice versa would not act as *res judicata* and, thus, would not amount to any 'parallel litigation' or multiplicity of proceedings. Neither the policies of the State Government nor the MoUs executed with the State Government have been challenged before this Commission.

(c) Case No.26/2014 was filed by JITPL before OERC for 'variable cost' as JITPL was of the belief that the State Government of Odisha would obtain a 'policy' for enabling GRIDCO to procure 12% of the total power generated at 'variable cost' from the generating station. However, as the State Government of Odisha had failed to fulfill its obligations under Clause I (xiii) of MOU dated 26.9.2006, the same has been challenged by JITPL in the said writ petition (W.P. No.18150 of 2018) filed by it before the Hon'ble High Court of Orissa.

(d) JITPL is entitled to tariff as contemplated under Section 62 of the Act read with the MOU dated 26.9.2006. Accordingly, the present petition has been filed for both fixed cost as well as for variable cost. Further, the present petition before the Commission is a *de novo* proceeding, as OERC had disposed of the earlier petition on the ground of jurisdiction.

Rejoinder of GRIDCO to the reply of JITPL in IA No.72/IA/2019

10. The Applicant GRIDCO vide its rejoinder affidavit dated 7.9.2019 has submitted that OERC has the exclusive jurisdiction to approve the PPA as per Section 86(1)(b) of



the Act and for any dispute with regard to the same, OERC is the adjudicating body as per Section 86(1)(f) of the Act read with clause 10.0 of the PPA dated 5.1.2011. By order dated 4.6.2019, OERC had approved the PPA for supply of power at variable cost, but did not accept the proposal of JITPL for reimbursement of transmission cost by GRIDCO for evacuation of its power through CTU, since JITPL is bound to bear the same as per the MoU and PPA. After approval of the PPA by OERC, the scope of tariff determination is confined to determination of tariff in line with the approved PPA.

Hearing dated 13.4.2021

11. The Petition along with IA No.72/IA/2019 was heard on 13.4.2021 and the Commission after hearing the parties, admitted the petition, subject to the decision on 'maintainability'.

Interim order dated 14.7.2021 of APTEL

12. During the pendency of the petition, APTEL vide its interim order dated 14.7.2021 in I.A No.361/2019 and IA No.1074/2021 in Appeal No.250/2018 directed as under:

"Heard learned senior counsel arguing for the Appellant on Urgent listing and interim direction sought, pertaining to the matter coming up before the CERC on 16.07.2021. We make it clear that CERC shall hear only on the maintainability of the Petition pending before them and nothing on merits pertaining to tariff issues. The decision of the CERC on maintainability is subject to the outcome of this Appeal.

Hearing dated 16.7.2021

13. In terms of the above interim order dated 14.7.2021 of APTEL, the learned counsel for the Applicant GRIDCO and the learned Senior counsel for JITPL were heard at length on the 'maintainability' of the petition and order was reserved in IA No.72/IA/2019. Both the parties were also permitted to file their written submissions in the said IA.



Written Submissions of the Applicant GRIDCO in IA No. 72/IA/2019

14. The Applicant GRIDCO in its written submission dated 6.8.2021 has mainly submitted that the case of JITPL is not covered under Section 79(1)(b) of the Act since it does not fall within the definition of 'composite scheme' under explanation to para 5.11(j) of the Tariff Policy 2016 as amended on 28.1.2016. The Applicant GRIDCO has also submitted that JITPL did not have long term/ medium term PPA for sale of at least 10% of capacity prior to COD of the project (19.4.2015) through PPA outside the host State (Odisha). Referring to paragraphs 28 & 29 of the judgment of the Hon'ble Supreme Court in Energy Watchdog case, the Applicant GRIDCO has submitted that section 64(5) of the Act does not bar the jurisdiction of OERC to determine tariff in case of intra-State supply, in case the generator does not have a 'composite scheme' like in the present case. The Applicant GRIDCO has added that JITPL is required to raise a dispute in terms of clauses 9 & 10 of the PPA dated 5.1.2011 (settlement of disputes) and in case the parties are unable to resolve the disputes mutually within 90 days, the same has to be referred to arbitration/ adjudication to OERC, in terms of clause 10 of the PPA. The Applicant GRIDCO has relied upon the judgment of the Hon'ble Supreme Court in OPTCL v Asian School of Business Management (2013) 8 SCC 738 and has submitted that parallel proceedings for the same relief, on the same cause of action, before two different forums are not maintainable, as identical issues have been raised by JITPL with regard to the validity of MOUs/PPAs, before the Hon'ble High Court of Orissa and in the present petition. The Applicant GRIDCO has contended that 'forum shopping' cannot be permitted, as deprecated by the Hon'ble Supreme Court in its judgment reported in 1998 4 SCC 577. Further, relying on the judgment of the Hon'ble Supreme Court in State of Punjab v Dhanjit Singh (2014) 15 SCC 144, the Applicant



GRIDCO has submitted that JITPL, after having availed the benefits under the MOU and the PPA, is estopped from challenging the validity of the same.

Written Submissions of Respondent JITPL in IA No. 72/IA/2019

15. JITPL, in its written submission dated 7.8.2021, has mainly submitted that in the present case there is no occasion to rely on Section 64(5) of the Act, as there was no mutual consent between the Applicant GRIDCO and JITPL to get the tariff determined by OERC and, for this reason, OERC vide its order dated 26.2.2018 in Case No. 26/2014, directed the parties to approach the Central Commission for determination of tariff. Any reference to Tariff policy, whenever statute has a provision, is immaterial even if the policy is statutory in nature akin to Section 3 of the Electricity Act, 2003. Also, the APTEL vide its judgment in Appeal No.45/2016 (GRIDCO v GMRKEL) has dealt with the issue of jurisdiction and the same is no more res integra. JITPL has also submitted that it is settled principle of law in terms of the judgment of the Hon'ble Supreme Court in PTC v CERC (2010) 4 SCC 603, that a statute overrides the provisions of a contract. JITPL is, therefore, entitled to tariff as guaranteed under the tariff principles contained in Section 61 of the Act, which specifically mention that generation of power has to be done on commercial principles and that the generator is entitled to its entire cost of generation. JITPL has contended that the Act as well as the relevant regulations do not make any distinction between 'fixed cost' and 'variable cost', either as components of tariff or otherwise. However, the State Government and GRIDCO have abused their dominant position and introduced provisions which are not contemplated under the Act and regulations thereunder. JITPL has contended that that it is settled law that statute overrides the provisions of contract and, hence, in the light of misrepresentation by the State Government, based on which JITPL executed the



PPA at variable cost, the tariff has to be determined as per the statutory provisions and not by the contents of the contract, which are hit by section 23 of the Contract Act, 1872. It has submitted that the scope of the present proceedings is limited under the vires of Section 62 read with Section 79(1)(b) of the Act and relevant regulations for determination of tariff, which is entirely distinct from the writ petition filed JITPL. JITPL has further argued that when the policy of the State Government is to be challenged, the same can only be made by virtue of a writ petition before the concerned High Court whereas the determination of tariff is a quasi-judicial function vested in this Commission by virtue of the Act, which is a special statute. It has stated that neither the policies of the State Government nor the MOUs executed with the State Government is challenged before this Commission and, hence, the argument of GRIDCO alleging forum shopping is bereft of any legal basis.

Analysis and Decision

16. As noted above, the Applicant GRIDCO, in its written submissions, has confined its arguments on the question of 'maintainability' of the petition, on three issues viz.,

- (A) Jurisdiction of this Commission to determine the tariff of the generating station;*
- (B) Parallel proceedings for the same relief /same cause of action pending in the Writ Petition filed by JITPL, before the Hon'ble High Court of Orissa; and*
- (C) JITPL is estopped from challenging the validity of the MOU and PPA after having availed the benefits under the same.*

Issue (A): Jurisdiction of this Commission to determine the tariff of the generating station

17. APTEL vide its judgment dated 10.1.2022 has upheld the jurisdiction of this Commission to determine the tariff of the generating station in terms of Section 79(1)(b) of the Act. The relevant portion of the order is extracted hereunder:



“18. As has been pointed out the contractual arrangements with other entities outside the State of Odisha were entered upon after filing of the tariff petition. In these circumstances, it is observed that, the generator was within its right, as reserved in the above quoted pleadings, to contend that the tariff determination exercise would consequently now vest in the Central Commission in terms of Section 79(1)(b) of the Electricity Act, 2003.”

18. Accordingly, in terms of the decision of APTEL, the issue of jurisdiction of this Commission in the matter for determination of tariff of the generating station stands settled.

Issue (B): Parallel proceedings for the same relief/ same cause of action pending in the Writ Petition filed by JITPL, before the Hon’ble High Court of Orissa

19. The issue for consideration is whether parallel proceedings for the same relief/ cause of action is pending in the writ petition filed by JITPL before the Hon’ble High Court of Orissa, as contended by the Applicant.

20. The Applicant has referred to averments of JITPL in the tariff petition (*paragraphs 8 to 17, pages 12 to 16*) and the Writ Petition (*paragraphs 21 to 29, Page 948 to 952, Prayer at page 954 to 955*) and has submitted that identical issues have been raised by JITPL with regard to the validity of MOUs/ PPAs in the writ petition pending before the Hon’ble High Court of Orissa and also in the petition filed before this Commission and, therefore, the present petition is not maintainable. This, according to the Applicant, amounts to forum shopping, which has been deprecated by the Hon’ble Supreme Court in (1998) 4 SCC 577. Referring to the judgment of the Hon’ble Supreme Court in OPTCL v Asian School of Business Management (2013) 8 SCC 738, the Applicant has submitted that parallel proceedings for the same relief, on the same cause of action, before two different forums are not maintainable.



21. *Per contra*, JITPL has submitted that the scope of the present proceedings is limited to determination of tariff under Section 62 and Section 79(1)(b) of the Act read with the 2014 Tariff Regulations, which is entirely distinct from the prayers in the writ petition filed before the Hon'ble High Court of Orissa. Referring to the prayers made in the writ petition, JITPL has submitted that neither the policies of the State Government nor the MOUs executed with the State Government is challenged before this Commission and, hence, the argument of forum shopping as raised by the Applicant is bereft of any legal basis.

22. We have examined the submissions of the parties and the documents available on record. JITPL has filed Petition No.276/GT/2018 before this Commission, with the following prayers:

- (a) *Admit the present petition and permit the Petitioner to file such additional information/ submissions as may be necessary for the purpose of determination of tariff for 2014-19 under Sections 62 and 79(1)(b) of the Electricity Act, 2003 read with the CERC (Terms and Conditions of Tariff) Regulations, 2014;*
- (b) *Approve the actual capital cost of the project as submitted in this petition towards Unit-I and II of 1200 MW power plant;*
- (c) *Approve the final generation tariff (annual fixed charges and energy charges) of 1200 MW project of the Petitioner from the date of COD till 2018-19;*
- (d) *Allow the Petitioner to charge final generation tariff on month on month basis as per CERC (Terms and Conditions of Tariff) Regulations, 2014;*
- (e) *Allow pass through at actual any cess, duty, tax, government levy, royalty etc. including Electricity Duty on Auxiliary Consumption applicable to the Petitioner for supply of power to GRIDCO as per the provisions of PPA;*
- (f) *To permit the Petitioner to recover the filing fee and publication expenses of the Petition from the respondents.*
- (g) *Condone any inadvertent omissions / errors / rounding off difference / shortcomings and permit the Petitioner to add / alter this filing and make further submissions as may be required by the Hon'ble Commission;*

23. In the Writ Petition (W.P(c). No.18150/2018) filed by JITPL before the Hon'ble High Court of Orissa, the following reliefs have been sought by JITPL:

- (a) *Admit the Writ Application;*
- (b) *Issue Rule nisi calling upon the Opp. Parties to show cause as to why the Notification*



No. 8960-OPGC-PPD-TH-97/07/E dated 08.08.2008 (Annexure - 8) issued by Department of Energy, Government of Odisha (Opp. Party No. 1) providing for supplying power at variable cost shall not be quashed being illegal, arbitrary, without authority of law, violative of Article 265, 300A and 14 of the Constitution of India and ultra vires the provisions of Sections 61 and 62 of the Electricity Act and Regulations made thereunder;

(c) Issue Rule nisi calling upon the Opp. Parties to show cause as to why Clause 3 of the Supplemental Memorandum of Understanding dated 17.10.2008 (Annexure-9) executed between State of Orissa and the Petitioner herein amending clause 1.(iii) of the MOU dated 26.09.2006, Clause 2.2.1 and Clause 6.1 and 6.4 of the Power Purchase Agreement dated 05.01.2011 (Annexure-11) between the Petitioner and GRIDCO pursuant to Notification No. 8960-OPGC- PPD-TH-97/07/E dated 08.08.2008 as well as Clause 1.0 of the Supplementary Power Purchase Agreement dated 23.07.2013 (Annexure-12) amending Clause 4.0 of the Power Purchase Agreement dated 05.01.2011 by providing for the Petitioner Company to bear the necessary interstate transmission charges, including transmission losses and other applicable charges while supplying State's share of power, shall not be declared as illegal and void and non-est in law and contrary to the provisions of Section 61 and 62 of the Electricity Act and Regulations made thereunder;

(d) Issue Rule nisi calling upon the Opp. Parties to show cause as to why the Opp. Parties shall not be directed to implement Clause 5(l)(xiv) {wrongly printed as Clause 5(l)(xiii)} of the Memorandum of Understanding dated 26.09.2006 in its true letter and spirit;

(e) Issue Rule nisi granting consequential relief to the Petitioner;

24. As is seen from the above, while JITPL has sought for determination of tariff of the generating station under Section 62 and Section 79(1)(b) of the Act read with the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 ('the 2014 Tariff Regulations') in the Petition No.276/GT/2018, before this Commission, it has, in the Writ Petition (c) No.18150/2018 filed before the Hon'ble High Court, sought a declaration that the MOUs, PPAs and the notification dated 8.8.2008 (providing for supplying power at variable cost) are violative of the statutory provisions of Sections 61 and 62 of the Act read with the Regulations and, therefore, void.

25. However, in order to appreciate whether the matter in issue in the two proceedings are directly and substantially the same, we take note of the submissions made by JITPL, in support of its prayers before the two forums as under:



<p align="center">Submissions of JITPL in Writ Petition [W.P(c). No.18150/2018] before the Hon'ble High Court of Orissa</p>	<p align="center">Submissions of JITPL in Petition No.276/GT/ 2018 and IA No.72/IA/2019 before this Commission</p>
<p>The opposite parties No.1 and 2 in seeking to purchase power from the Petitioner at variable cost and entering into Supplementary MOU and the Power Purchase Agreements and further in enforcing the said agreements are also acting in violation of the provisions of Section 61 and 62 of the Act read with the Regulations which mandate that the Tariff is to be determined in terms of chapter-5 of the 2014 Regulations (paragraph 3)</p>	<p>In view of the above submissions the MOU dated 17.10.2008 and PPA dated 5.1.2011 are not enforceable in law so far as it provides for purchase of power at variable cost only. As per provisions of Section and 62 of the Electricity Act read with the CERC (Terms and conditions of Tariff) Regulations 2004, 2009, 2014 and 2019, the total tariff including fixed charges and variable charges has to be determined by this Commission (paragraph 7(vi) of rejoinder in petition)</p>
<p>Regulation 20 of 2014 Regulations categorically provides that the tariff for supply of electricity from a thermal generating station shall comprise two parts namely, capacity charges(..) and energy charges (variable charges...)</p>	<p>...It is stated that as per Sections 61, 52 and 86(1)(b) of the Act, the distribution licensees are mandated to procure power by payment of cost of generation, which includes variable as well as fixed cost (paragraph 22, page 12 of WS)</p>
<p>...Payment of fixed cost is mandatory as per the Regulations which have been notified under Section 178 read with Section 61 of the Act. In fact, the Regulations extensively dealt with the mode and manner of computation of annual fixed cost in Chapter 6 thereof. That similar provisions were also made in 2004 and 2009 Regulations</p>	<p>...When an enactment read with the Regulations made under the enactment, has laid down a manner in which tariff to be determined, there cannot be any other methodology of determination of tariff, mutually decided by the parties in contract, since, that tariff at which a distribution licensee shall have to procure power from a generator, is regulated and determined by the appropriate Commission in consonance with due process of law and not otherwise. (paragraph 29 page 17 of WS)</p>
<p>...The impugned MOU, PPAs and the Notification dated 8.8.2008 are violative of the statutory provisions being Section 61 and 62 of the Electricity Act, 2003 read with Regulations and are liable to be declared as void by this Hon'ble Court (paragraph 21).</p>	<p>..It is further submitted that this Hon'ble Commission is a creature of Electricity Act, 2003 and as such, is bound by its provisions. Hence, this Commission cannot travel beyond the provisions of the Act while adjudicating the present petition (paragraph 32, page 21 of WS)</p>
<p>That it is submitted that under the Electricity Act, 2003 there are only two methodologies through which tariff can be determined viz., under Section 623 ...and under Section 63...While the Act makes reference of tariff throughout the enactment, it does not refer to variable cost and fixed cost. Tariff is always composite of which these aforementioned two are components. Therefore, only variable cost is neither recognised under the Act nor under any Regulation. Hence, variable cost is a misnomer and the distribution licensees or any party cannot by virtue of an agreement make other party agreeable only for variable cost, which is itself violative of the concept of tariff conceived under the Electricity Act, 2003.It is not only violative of the provisions of the Act but also against public policy since the parties by virtue of a contract are taking departure from the provisions of the Act thereby introducing a concept which is not available under the provisions of the Act.(paragraph 22)</p>	<p>It is further submitted that under the Electricity Act, 2003 there are only two methodologies through which tariff can be determined viz., under Section 623 ...and under Section 63...While the Act makes reference of tariff throughout the enactment, it does not refer to variable cost and fixed cost. Tariff is always composite of which these aforementioned two are components. Therefore, only variable cost is neither recognised under the Act nor under any Regulation. Hence, variable cost is a misnomer and the distribution licensees or any party cannot by virtue of an agreement make other party agreeable only for variable cost, which is itself violative of the concept of tariff conceived under the Electricity Act, 2003.It is not only violative of the provisions of the Act but also against public policy since the parties by virtue of a contract are taking departure from the provisions of the Act thereby introducing a concept which is not available under the provisions of the Act. (paragraph 17 of petition and paragraph 26 of WS)</p>
<p>...Moreover, Section 61 of the Act specifically mentions that the generation and transmission of electricity are to be conducted on commercial principles (paragraph</p>	<p>In view of the above, the Petitioner is entitled to tariff as guaranteed under the tariff principles contained in Section 61 of the Electricity Act 2003, which specifically mentions</p>



23)	that generation of power has to be done on commercial principles and that the generator is entitled to cost of generation (paragraph 10, page 14 of the petition and paragraph 23, page 13 of WS)
That its is settled principles of law that statutory provisions override the provisions of a contract. Hence, the tariff has to be determined as per the aforementioned statutory provisions and not be the contents of the contract which are hit by Section 23 of the Contract Act, 1872 (paragraph 24)	It is a settled principle of law that statute overrides the provisions of a contract. Hence, in the light of above representation by the State Government, the Petitioner executed the PPA at variable cost, the tariff has to be determined as per the aforementioned statutory provisions and not by the contents of the contract which are hit by Section 23 of the Contract Act, 1872 (para 14 of petition, paragraph 9(v), page 17 of rejoinder to petition and paragraph 24 of WS)
...The principal MOU referred to the possibility of purchase of 12% of total power generated at variable cost from the Petitioner upon a suitable statutory arrangement having been brought by the Central Government. In the absence of any such statutory arrangement and in view of the fact that the Electricity Act, 2003 provides for fixation of tariff by the appointed authority which includes both fixed charges and energy charge, such an amendment to the MOU dated 26.9.2006 confining the tariff to variable cost is violative of the provisions of the Act and is not sustainable in law. (paragraph 26)	..However, the insistence of the Respondent to follow the variable cost only clause of the PPA is arbitrary and illegal since in the absence of statutory policy by the Central Government in support of such provision, the said clause is void, being violative of the provisions of the Electricity Act, 2003 (paragraph 11, page 18 of rejoinder to petition) ...In the absence of any such statutory arrangement or policy made by the Government of India, the Petitioner is not bound to supply power at variable cost only and the claim of GRIDCO is not enforceable being violative of the Electricity Act. (paragraph 19, page 31 of rejoinder to petition)
That it is submitted that when the basis premise on which the provisioning of supply of power only on variable cost was to be introduced, in the absence of statutory backing, the entire gamut of supplying power on variable cost only, has no sanction whatsoever, hence non-est in the eyes of law. Therefore, no exception can be drawn in the present case and the Petitioner is entitled to tariff as enumerated under Section 62 of the Electricity Act, 2003 (paragraph 31)	That it is submitted that when the basis premise on which the provisioning of supply of power only on variable cost was to be introduced, in the absence of statutory backing, the entire gamut of supplying power on variable cost only, has no sanction whatsoever, hence non-est in the eyes of law. Therefore, no exception can be drawn in the present case and the Petitioner is entitled to tariff as enumerated under Section 62 of the Electricity Act, 2003. (paragraph 13 of petition)

26. Though JITPL has stated that it has only challenged the policy of the State Government before the Hon'ble High Court in the writ petition and the issues raised are substantially different, we observe that in both forums, JITPL has placed submissions with regard to its entitlement to tariff (both fixed cost and variable charges) in terms of Section 62 read with the Tariff Regulations notified by this Commission. We notice that the issues raised by JITPL in both the forums are substantially the same. Section 10 of the Civil Procedure Code, 1908 provides as under:



“Stay of suit

No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India have jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court”.

27. As the identity of the subject matter and the field of controversy between the parties in the proceedings before both the forums (i.e. Hon’ble High Court and this Commission) are directly and substantially the same, there is no reason for JITPL to in parallel seek the determination of tariff of this generating station by this Commission, under Section 62 of the Act read with the 2014 Tariff Regulations notified by this Commission.

28. Also, from the prayers and submissions placed by JITPL, in writ petition [W.P(c). No.18150/2018], it is evident that the question as to ‘whether the tariff of the generating station is to be determined in terms of the MoU/ Notification of the State Government or in terms of the provisions of the Act (Sections 61 and 62) read with the regulations notified by this Commission’, is pending consideration before the Hon’ble High Court. This view gets support from the order dated 16.5.2019 passed by the Hon’ble High Court in IA No.5439/2019 in W.P (c) No.18150/2018, wherein, the Hon’ble Court, has opined that the submission of JITPL that in the absence of statutory arrangements, the opposite party is bound to follow Regulation 15 of the 2004 Tariff Regulations, covering both fixed charges as well as variable charges, is required to be examined. The relevant portion of the order is extracted hereunder:

“Heard Mr. Rath, learned Senior Counsel for the petitioner and Mr. Tripathy, learned Addl. Government Advocate.

Mr. Rath, learned Senior Counsel submits that though as per MOU under Annexure-5 dated 26.9.2006 it was agreed that suitable statutory arrangements are to be made for making available 12% of the total power generated at the variable cost, however till date



no statutory arrangements have been made. In absence of such statutory arrangements, the opposite parties are bound to follow the Regulation-15 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 which speaks of a Tariff covering both fixed charges as well as variable charges. Further, he submits till dated even Central Electricity Regulatory Commission has not fixed any tariff. In such background, he submits that insisting on supplying of power only at variable cost/ charge is impermissible under law.

Considering such submissions, this Court is of the opinion that the matter requires examination by this Court.

Issue notice.

Since Mr. Tripathy, learned Addl. Government Advocate accepts notice on behalf of opposite party no.1 and Mr. Pradipta Kumar Mohanty, learned Senior Counsel accepts notice on behalf of opposite part no.2, required number of copies be served on them within a week.

List this matter on 12.07.2019.

In the interim, it is directed that no coercive action shall be taken against the petition till the next date.”

29. Since JITPL's entitlement to tariff for the generating station is being examined by the Hon'ble Court, as noted above, the prayer of JITPL to determine the tariff of the generating station under Section 62 of the Act read with the 2014 Tariff Regulations, in Petition No.276/GT/2018, is not maintainable at this stage. In the above background, we dispose of IA No.72/2019, by holding that the Petition No. 276/GT/2018 filed by JITPL before this Commission for determination of tariff of the generating station for the period 2014-19 is not maintainable.

30. Also, since we have held that the Petition is not maintainable, the contention of GRIDCO that State Government of Odisha is a necessary and proper party has not been examined.

31. Further, since we have held that the Petition is not maintainable, the Issue (C) raised by the Applicant has not been considered.



32. Petition No.276/GT/2018 along with IA No.72/IA/2019 stands disposed of in terms of the above.

Sd/-
(Pravas Kumar Singh)
Member

Sd/-
(Arun Goyal)
Member

Sd/-
(I.S. Jha)
Member

Sd/-
(P.K. Pujari)
Chairperson

