

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 191 of 2011

Dated: 04th October, 2012

Present: Hon'ble Mr. Justice P.S.Datta, Judicial Member
Hon'ble Mr.V.J.Talwar, Technical Member

In the matter of:

M/S Aarti Steels Limited,
Plot No. 11/ 1B/ 41, Sector-11,
CDA, Cuttack, Odisha- 753014

... Appellant

Versus

1. Odisha Electricity Regulatory Commission
BidyutNiyamak Bhavan,
Unit-VIII, Bhubaneswar-751012
Odisha
2. GRIDCO Limited,
VidyutBhawan, Janapath,
Bhubaneswar- 751007
Odisha, India.
3. Central Electricity Supply Utility (CESU)
2nd Floor, IDCO Tower,
Janpath, Bhubaneshwar- 751022

payable to the appellant was determined. The four other respondents, namely the Central Electricity Supply Utility, (CESU, the respondent no.3), the North Eastern Electricity Company of Orissa Ltd, (the respondent no 4), the Western Electricity Supply Co. (the respondent no 5), and the Southern Electricity Supply Co. (the respondent no 6) who are the distribution licensees in the State of Odisha did not contest the appeal.

2. Under a Memorandum of Understanding (for short, MOU) executed between the ASL and the Government of Odisha on 07,02,2009 the ASL was required to set up a thermal power plant with capacity of 500 MW. The four important clauses of the MOU were that a) infirm power would be made available to the Government at variable cost; b) if coal blocks are allocated to the ASL then a nominated agency authorised by the Government will purchase 14% of power to be generated at variable cost; if not then the quantum of purchase would be reduced to 12%,c) the ASL would have the right to sell the balance power to anybody within or outside the State , d) if the Government or its nominated agency is unable to purchase power then the generator would be at liberty to sell the available power to anybody inside or outside the State of Odisha.

3. The appellant in terms of the MOU as aforesaid constructed at the first instance, 50 MW power plant and commissioned it on 05.03.2010 and it was declared as commercially operational on 24.04.2010.

4. A Power Purchase Agreement (for short, the PPA) was executed by and between the ASL and the GRIDCO on 24.10.2009 by which the ASL was recognised as IPP and the said agreement is in respect of the State's entitlement to the power to be generated by the ASL which is 12% of the electrical output. The clause 6 of the PPA dealt with the variable charges in regard to 14%/12% capacity, and the said variable cost has been said to cover the fuel cost and would be worked out on the basis of ex-bus energy sent out from the generating stations proportionate to the energy to be delivered to the GRIDCO. The methodology for determining the fuel cost shall be as per the applicable norms, guidelines and directions of the Appropriate Commission.

5. Now, the GRIDCO filed two petitions, one Petition being no. 28/2010, before the State Commission whereby it sought the approval of the PPA, and in the second petition, being Petition no.29/2010 whereby it prayed for determination of provisional tariff in respect of 12% of the

power to be supplied to the State and filed therefore a statement of calculation as per the technical and financial norms specified in the CERC (Terms and Conditions of Tariff), Regulations, 2009 as well as certain operational parameters applicable to the Talcher Thermal Power Station (TTPS), and arrived at a variable cost at 59 paisa per kWh.

6. The State Commission also passed an order on 04.05.2010 in the case no 28-29 /2010 directing the GRIDCO to pay a provisional variable cost of 59 paisa, but allegedly without looking into the relevant cost parameters of the ASL. It was the contention of the ASL in the said petitions that as per the terms and conditions of the MOU it was the State Commission that was to determine the variable cost in respect to the State's entitlement to 12% of the power to be generated by the ASL and secondly, the balance 88% of the power could only be supplied to the GRIDCO only when the parties could arrive at mutually agreed terms and conditions, or else the ASL would be at freedom to sell the said 88% of the power to anybody inside or outside the State.

7. The ASL filed a petition, being Petition no.107/2010 for determination of final variable cost and it sought the approval of the

Commission at Rs.2.12/kWh in respect of 12 % of the ASL's power to be supplied to the GRIDCO for the State. According to the ASL, the said variable cost of Rs.2.12 per unit was arrived at on the basis of cost parameters prevailing and borne by the ASL at the relevant time, and the cost parameters had to be revised subsequently as the price of coal and other consumables did increase. The ASL also filed an application under section 94(1) (f) of the Electricity Act, 2003 seeking review of the provisional variable cost of 59 paisa. The Commission then directed the ASL to submit tariff calculations along with various cost elements.

8. The representatives of the ASL and the GRIDCO held talk between them on 7.8.2010 and 10.8.2010 in order to arrive at a mutual agreement with respect to the variable cost of generation of the appellant's power plant. The proposals of both the parties were recorded in the minutes of the meetings and during the discussions the ASL sought the variable cost at Rs.2.12/kWh as against the GRIDCO's 194.89 paisa /kWh According to the ASL, the said variable cost was arrived at on the basis that the ASL's power plant consumed coal procured through e-auction or imports from outside the State.

9. The Commission by order dated 18.8.2010 having taken the minutes of the meeting held between the parties raised the interim variable cost to Rs. 1.75 paisa /kWh representing 90% of 194.89 paisa /kWh as the provisional variable cost of generation and the Commission observed that the earlier fixed provisional tariff of M/S ASL @ 59 paisa /kWh was not sufficient to cover the fuel purchase cost. The revised provisional cost was, of course, subject to variable cost as may be finally determined.

10. In respect of 88% of the power the representatives of both the parties sat for mutual discussion sometime in September, 2010 and while ASL demanded 4.31/kWh as tariff for the said 88% of the power to be supplied to the GRIDCO, the latter agreed at Rs.3.77/kWh that included the variable cost component of Rs.1.95/kWh. But unfortunately, the ASL's letters dated 04.3.2011, 08.3.2011, 28.3.2011 requesting for release the payment at the GRIDCO' agreed tariff at RS.3.77/kWh remained unheeded as a result of which the ASL entered into agreement with M/S Instinct Infra & Power Limited , an inter- state trading licensee, which pursuant to such agreement applied for open access which, however , was refused by the SLDC through the letter dated 31.3.2011 on the ground that the ASL had committed to supply the entire power generated

by it to the State which had no surplus power for such supply through the open access. The matter of the fact, as contended by the GRIDCO is that the GRIDCO was not agreeable to receive power at the ASL's proposal of tariff at Rs 4.31 paisa/kWh. According to the ASL, the ASL supplied so far 280.03 MUs of power to the GRIDCO, out of which 265.23 MUs were supplied by the ASL from the date of commercial operation, i.e., 27.4.2010. Out of 265.23 MUs so supplied 12% ,i.e., 54.60 MUs represent the State's share under the MOU, and in respect of which only the actual variable cost is payable by the GRIDCO., while the ASL was entitled to receive payment of full tariff for the balance 88% which, according to the ASL constituted about 233.41 MUs.

11. In this scenario the ASL filed another petition before the Commission under section 86(1) read with section 62 of the Electricity Act, 2003 praying for, inter alia, determination of final tariff at Rs.431/kWh. Thus came before the Commission four petitions, 28/2011, 29/2011, filed by the GRIDCO, and 107/2011 & 108 /2011 filed by the ASL, in respect of all of which the Commission passed a final order fixing a final tariff at Rs.3.02/kWh in respect of 88% of the balance power.

12. On the basis of the tariff fixed by the Commission the balance sum of more than 12.21crore is payable by the GRIDCO to the ASL, and further, on the basis of tariff of Rs. 3.77/ kWh which has been agreed to by the GRIDCO a balance sum of more than Rs.29.72 crore has been remaining outstanding against the GRIDCO.

13. This order of the Commission dated 13.9.2011 is the subject of the matter of challenge in this appeal under section 111 of the Act at the instance of the ASL on the following amongst other grounds:-

a) The Commission ignored the cost parameters applicable to the ASL, and also the operational parameters

b) The commission was not justified in fixing tariff on the basis of GRIDCO's average cost of power purchase from the NTPC-ER.

c) The Commission ignored the fact that in terms of the PPA the fuel cost (variable cost) was to be determined on the basis of applicable norms, guidelines, and directions. As per the Tariff Regulations, 2004 “ *all non-controllable costs as checked by the Commission with due diligence and prudence shall be treated as pass through.*” Thus the Commission ought to have taken note of the cost of generation of power by the ASL after carefully examining each element of cost.

d) The Commission was not justified in adopting average NTPC_ER tariff, even though it had previously revised tariff upwards.

e) The impugned order was passed in violation of the principles of natural justice, as tariff fixation on the basis of average power purchase cost of the GRIDCO from NTPC_ER during FY2010-11 was neither urged nor even in issue before the Commission. It was nobody's case the GRIDCO average' power purchase cost should be the basis of determination of the tariff payable to the ASL.

f) The Commission failed to take note of the fact that the ASL having been refused open access to supply power to a company with which it has contracted to supply power after the GRIDCO backed out from its commitment did find no other way than supplying power to the GRIDCO in this adverse situation.

14. The GRIDCO's affidavit- in – reply contains the following points:-

a) The PPA is the guiding factor that followed the MOU, and both the two documents have to form the basis of the deliberation.

b) The PPA provided clause for 'Dispute Resolution Mechanism' through arbitration in accordance with section 86(1) (f) read with section 158 of the Electricity Act, 20093.

c) The GRIDCO was agreeable to enhance the tariff at Rs.2.75paise after considering all the necessary factors, which cannot be faulted with. In this circumstances, the Commission on the petitions as aforesaid fixed rightly the tariff at Rs.3.02/kWh. The award of the Commission is binding to the parties.

d) With regard to the variable cost in relation to 12% of the power the GRIDCO has been paying Rs. 1.75/kWh as determined by the Commission.

e) The question of grant of open access in inter-state transmission is covered under the CERC(Open Access in inter- State Transmission) Regulation, 2008 and these regulations are applicable only for grant of short term open access for energy transfer, and these regulations are not applicable to the case of the appellant.

15. The State Commission has filed a counter affidavit challenging the contentions of the ASL and contends as follows:-

- a) The Commission has duly taken note of the relevant provisions of the MOU.
- b) In terms of the MOU dated 07.02.2009 the ASL is a multi-State IPP, who executed a PPA on 24.10.2009 but the details of which were not made known to the Commission, but the 50 MW generating set was not a part of IPP rather was constructed as a part of ASL's CPP having common auxiliaries with the existing CGP unit and availing construction power only from its existing CGP unit. Since the status of the 50 MW power plant is yet to be decided the Commission is not in a position to determine the variable charges of 12 % of the power.
- c) In the impugned order dated 13.9.2011 the Commission has not fixed the tariff of the 50 MW generating unit of M/S ASL since its status is yet to be determined. However, the Commission has made an endeavour to settle the disputes between the GRIDCO and the ASL regarding the rate for the power already purchased by the GRIDCO out of the remaining 88% generation of the subject 50 MW generating unit of the ASL.
- d) The 50 MW generating set was not a part of the IPP rather it was constructed as a part of the ASL's Captive Generating Plant having common auxiliaries with the CGP unit and availing construction power only from its existing CGP unit.

e) The Commission has not fixed the tariff of the 50 MW generating unit of the ASL since its status is yet to be determined, and the Commission has made an endeavour to settle the disputes between the parties regarding the rate for the power already purchased by the GRIDCO out of the remaining 88% generation of the 50 MW generating unit of the ASL.

f) During the hearing the ASL submitted that the original MOU was for the capacity of 500 MW with the two units in two phases of 250 MW each, but now the capacity configuration had undergone changes and the present capacity proposed to be installed is of the order of 3x335 MW and 1x50 MW. It was further contended before the Commission that the ASL was not only engaged in the business of manufacturing steel having own power generation through an existing CGP but also now establishing a generation station of 1055 MW capacity operating as a separate business unit of M/S SAL, and out of the total capacity of 1055 MW the first unit of 50 MW has been synchronized to the grid on 05.3.2010 and commercially operated on 24.4.2010 by supplying power to GRIDCO. GRIDCO during hearing submitted that the capacity configuration of the ASL be finalized in the first instance based on which a fresh MOU/PPA was to be signed, and further, the various elements of cost may be submitted by the ASL to the Commission for necessary approval of the generation tariff for the variable costs. It was the stand of

the State Government that the MOU was based on the total capacity of 500 MW only, and the PPA with the GRIDCO was based on this capacity.

g) The 50 MW generating unit is not the entire capacity of the proposed generating station , and there was no clear picture before the Commission regarding the balance 88% of the generation of the entire capacity of the thermal station. The ASL has not executed PPA with the GRIDCO or any third party for the balance 88% of the power station. Further, the status of the 50 MW generating unit as an IPP, the capacity configuration of the entire generating station has not been clarified by the GRIDCO and the State Government , and the MOU and the PPA have not been revised accordingly. In such a scenario the State Commission was not in a position to determine the final tariff for the ASL. The State Commission was yet to receive satisfactory explanation from the SAL as to why 50 MW generating unit required to be considered as first phase of its 500 MW/1055MW IPP and not as a part of its CGP when it has common auxiliary with the existing units of the CGP and it has not availed of any construction or start-up power from the distribution company to established the generating unit as an IPP Also, the question remains as to why the 500 MW/1055 MW IPP of the ASL cannot be considered as a multi-state IPP in which case the appropriate Commission is the CERC.

16. The ASL filed a rejoinder to the counter affidavit of the GRIDCO and we will consider the averments made therein as we will proceed with the deliberations of the appeal.

17. The point for consideration in the appeal is whether the Commission was legally justified in passing the impugned order whereby it determined the tariff at Rs.3.02 in respect of 88% of the power supplied by the ASL to the GRIDCO.

18. We have heard Mr. Sanjay Sen, learned counsel for the appellant, Mr. R.B.Sharma, learned counsel for the GRIDCO, and Mr. Rutwik Panda, learned counsel for the State Commission. The learned counsels for the parties argued thoroughly in the lines as reflected in their respective pleadings, and on the facts and circumstances of the case it is not necessary to reproduce what they have orally submitted because that will be repetitive of the pleadings.

19. The MOU entered into by and between the ASL and the State Government , which is a 14-page document contains diverse aspects, but

for the purpose of the appeal it is relevant to see the preamble and the subsequent five paragraphs from which it is revealed that the project of the ASL consisted of two phases each having capacity of 500 MW, and the time schedule for commissioning the first phase was 36 months and the second phase 42 months from the date of signing the MOU which was 7.2.2009. As per the agreement the infirm power would be available to the State at variable cost and a nominated agency of the State Government will purchase 14 % of the power to be generated out of the project if the coal block are allocated to the ASL, and if not then the ASL will supply 12% of the power at variable cost to be determined by the Commission. As regards the balance power, meaning 88% of the power to be generated by the generator, the ASL would have the right to sell the same to anybody inside or outside the State subject to the applicable laws and regulations for which the ASL may enter into contractual arrangements with the intended buyer. If the nominated agency is found unable to honour the terms of the PPA the ASL would have the right to sell such power (i.e. 12% or 14% as the case may be) to any party either inside or outside the State. There is, of course, another clause that in case the ASL evacuates power through the State Transmission Utility or Central Transmission Utility, the entire capital cost for strengthening such transmission lines for evacuation of the entire power of the thermal power

plant would be borne by the ASL. Further, the work done by the ASL till establishment of the thermal power plant shall be treated as project.

20. This MOU , when anatomized, clearly reveals that a) in the very paragraph no 1(ii) the ASL has been recognized as IPP b) in respect of the supply of 14% or 12% as the case may be of the total power only variable cost are payable c) the State Commission reserves to itself the power to determine tariff in respect thereof d) the ASL and the GRIDCO may enter into PPA therefor, e) if the GRIDCO is unable to honour the terms of the PPA then the ASL may sell such power also to any party ,inside or outside the State, f) balance 88% of the power may be sold by the ASL to anybody, either inside or outside the State and the ASL may enter into contractual obligations on account thereof.

21. The MOU , properly construed, is a sort of contract between the State Government and the ASL, and though the GRIDCO is not a party to this bilateral MOU , it being purely a Government entity is bound by the terms thereof and the power has been given to the GRIDCO to enter into PPA with the ASL in respect of supply of 12% or 14% as the case may be, of the total power and also the power given to the ASL to enter

into PPA with any party in respect of the balance 88% of the power are unquestionably subject to the statutory jurisdiction of the State Commission as provided in section 86(1)(a)&(b) which we by way of reminder to us reproduce below:

“86. Functions of State Commission-(1) The State Commission shall discharge the following functions, namely:-

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

Provided that *** (Omitted being not necessary for the present)**

(b) Regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State.”

22. It is noteworthy that supply of 88% of the balance power, as per the MOU, rests with the discretion of the ASL, and there has been put no embargo to sale of such 88% of the balance power even to the GRIDCO. Under the law any PPA, if entered with the GRIDCO in respect of any intended supply by the ASL of the 88% of the balance power, will be subject to the regulation as provided above in clause (b) of sub-section (1)

of section 86. In the event of the parties failing to arrive at any mutually agreed terms and conditions including those of tariff if and when supply is made by the ASL and the GRIDCO then also the State Commission is the final say in the matter, and in no circumstances whatsoever the authority of the State Commission is not diluted in any way, and the MOU, fairly speaking, has not transgressed the law.

23. The argument of Mr. Panda, the learned counsel for the State Commission is elaborative somewhat of what has been contended in the affidavit- in- reply of the State Commission, but we want to make it clear that as the law now stands, the averments made in the counter affidavit of the State Commission , if transcends beyond what has been factually observed in the impugned order; cannot be taken in to consideration because the counter affidavit of the Commission cannot be supplementary to the order impugned particularly when the role of the Commission is not adversarial in nature.

24. It is not difficult to decipher that both the State Commission and the GRIDCO are quite alive to the situation that the order impugned is not strictly in accordance with the law, and in fact at more than one place of

the counter affidavit the State Commission has admitted to this situation, but it has its own explanations in this regard which we will be deliberating upon, but it is imperative to dispel the argument of the learned counsel for the GRIDCO, Mr. Sharma, at the very outset that the order impugned is treatable as an award. Neither of the parties sought for advisory role of the Commission, and when the petitions were filed for determination of the tariff according to the law before the statutory authority having adequate jurisdiction in this regard the Commission would have had no concern for distraction from the law. The auxiliary argument that since this is an award no appeal lies arising therefrom is also not acceptable.

25. Now, the PPA dated 24.10.2009 between the ASL and the GRIDCO which was almost six months before the declaration of commercial operation of the ASL's power plant relates to the variable charges in regard to 12% or 14% as the case may be, capacity entitlement to the GRIDCO and also for the infirm power, and the clause 6 provides that the variable cost shall cover fuel cost and shall be worked out on the basis of ex-bus energy sent out from the generating stations proportionate to the energy delivered to the GRIDCO, and the methodology for determining the fuel cost i.e., variable cost shall be as per the applicable norms, guidelines and directions of the Commission. The PPA does not

relate to 88% of the balance power which the ASL delivered to the GRIDCO, and in respect of which the dispute has arisen.

26. The Commission by the impugned order disposed of four petitions, namely 28/2010, 29/2010, 107/2010 & 108/2010, although the contents of the four petitions are not one and the same. Let it be made clear that the petition no 28 of 2010 was filed by the GRIDCO praying for approval of the PPA. This petition is not relevant because it followed another petition, being no 29/2010 whereby the GRIDCO prayed for determination of the provisional tariff for procurement of the State's share of power from ASL's 50 MW thermal power plant. There was nothing to be objected to the approval of the PPS because it followed the MOU and it recognised the Commission's power to intervene in the event of the parties failing to arrive at an agreement in respect of the quantum of variable cost, which in fact the Commission did in the impugned order. The matter of the fact is that the GRIDCO filed a statement of calculations as per the technical and financial norms specified in the CERC (Terms and Conditions of Tariff) Regulations, 2009 and arrived at a variable cost of about 59 paisa/kWh. According to the ASL, the calculation was not consistent with the agreement between the parties as it expressly stated that the variable cost shall cover fuel cost. In respect of the petition nos. 28&29 of 2010 the

Commission passed an interim order on 04.5.2010 whereby it approved the GRIDCO' proposal for provisional tariff at 59 paisa pending further and final order in this regard and it secondly observed that the GRIDCO and the ASL may come to a PPA in respect of the balance 88% of the power , but in case the ASL decides to sell such quantum of the balance power to outside the State it would be subject to the CERC's jurisdiction, and in case the intending buyer is within the State then the State Commission might have role to play. This order, though resented by the ASL in so far as it related to the approval of the provisional variable cost at 59 paisa/kWh, is not virtually the subject matter of the present appeal. For, the Commission passed another order on 04.8.2010 directing the ASL to submit the tariff calculations, and meanwhile the ASL filed petition no 107 of 2010 praying for final determination of tariff and another petition, being no 108 of 2010 praying for review of the order dated 4.5.2010. Meanwhile, the ASL and the GRIDCO sat together and the ASL agreed to deliver the balance 88% of the power to the GRIDCO and in respect of the tariff, therefore, there was no resolution, but in respect of the variable cost in relation to 12% of the power the ASL demanded Rs.2.12/kWh, while the GRIDCO agreed to pay at Rs.1.94/kWh. The Commission's order dated 18.8.,2010 which is also not the subject matter of the present appeal may not , of course, be out of place , for by this

order the provisional variable cost was raised to Rs.1.75 /kWh It is better to quote the Commission's order:" *Taking into pragmatic view that earlier fixed provisional tariff of M/S ASL @ 59 paisa/kWh for variable cost is not sufficient to cover the cost of fuel purchase and taking into consideration of the minutes of the meeting of experts of GRIDCO and M/S ASL held on 10.8.10 we agree to revise the provisional rate to 175 paisa/unit (90% of 194.89 paisa/unit which is projected by the GRIDCO i.e., 178.50 paisa or say 175.00paisa/unit)towards the variable cost of the generating unit.. The above rate shall be applicable from 5.3.2010 (the date of synchronization) up to 24.04.2010 (the date and time of COD) for the entire ex-bus power generated as infirm power and from 25.4.2010 (after the date and time of the COD) for the 12% of the ex-bus power generated by the 50 MW generating unit. GRIDCO, at its discretion, in order to reduce the accumulated arrears may pay provisionally the cost of balance power over and above 12% @ 175paisa /unit to M/S ASL subject to adjustment. We hereby make it clear that the provisional payment at the rate of 175 paisa per unit for the power in excess of 12% is without any prejudice to the outcome of the negotiation between GRIDCO and M/S Aarti Steel Ltd. And this provisional rate of 175 paisa per unit shall not be taken as any reference price for arriving at the negotiated rate to be mutually agreed keeping in view the interest of the consumers of the State and*

financial viability of the project along with the commercial interest of the GRIDCO .Further, the provisional payment at the rate of 175 paisa per unit both in respect of 12% of the ex-bus power generated by the 50 MW generating unit and the power supplied in excess of that 12% is subject to adjustment against the final rate to be determined in respect of 12% of the ex-bus power generated by the 50 MW generating unit and the mutually agreed and the negotiated rate for the balance power beyond the aforesaid 12%.” This order dated 18.8.2010 is provisional and subject to final order in respect of 12 % of the ex-bus power that may be passed by the Commission , and also provisional in respect of the power beyond 12% and subject to final tariff as may be mutually agreed upon by the parties. By the letter dated 20.9.2010 the ASL urged upon the GRIDCO to come to a mutually agreed tariff beyond 12% but in vain. Then by the letter dated 04.03.2011 the GRIDCO was requested to release payment in respect of the 88% of the balance power at least at the rate of Rs.3.77 per unit. Further letter followed on 04.3.2011, 08.3.2011 and 28.3.2011/ At this juncture the ASL entered into contract with M/S Instinct Infra & Power Limited and then applied for open access, but the SLDC by letter dated 31.3.2011 refused the prayer.

27. In this scenario the merit of the impugned order has to be assessed. In the impugned order nothing further has been said as to the quantum of variable cost in respect of 12% of the ex-bus power being delivered by the ASL though of, course, the Commission in its order dated 18.8.2010 said that the rate of Rs.1.75 /per unit was also provisional subject to further order as may be passed by the Commission. The Commission confined itself to the determination of tariff in respect of the 88 % of the power which was not in the purview of the PPA. Ostensibly, the 88% of the power has been delivered to the GRIDCO, but in respect of the tariff payable therefor the parties could not come to any agreement. According to the ASL, the GRIDCO agreed during the meeting to pay @3.77 per unit, while the GRIDCO denied any such concession, and the Commission's order reveals that the GRIDCO agreed to pay at the rate of Rs.2.43 per Unit, while the ASL by calculation of the cost of generation demanded at the rate of Rs.4.13 /kWh.

28. The Commission's first objection, though not explicitly revealed in the impugned order behind not determining the tariff in terms of the provisions of the statute, is that the status of the 50 MW power plant was yet to be ascertained, and it raised the question during the hearing before the final hearing took place. It was not the objection of the GRIDCO so

far as the counter affidavit of the GRIDCO is concerned, It was not the case of the GRIDCO before the Commission that in respect of either 12% of the ex- bus energy or in respect of the 88% of the balance power the 50 MW power plant is a captive generating unit, and not the IPP. That it was an IPP has not been disputed at any forum. The principal question is if the parties would fail to arrive at any mutual settlement, subject of course to final approval of the Commission in respect of variable cost of 12% of the power or in respect of 88 % of the power then what should have been price in respect of the either, and whether in deciding the issue the Commission has to take note of the cost of generation of the energy incurred by the Sal and other parameters. It was because of acute power shortage that the GRIDCO by letter dated 30. 11.2011 agreed to take the entire generation of the ASL as against the rate approved or approvable by the State Commission. Both the GRIDCO and the SLDC treated the 50 MW power plant of the ASL as IPP.

29. It may be stated that in the counter affidavit the Commission admitted to the fact that it did not determine the tariff on the grounds as were stated in the interim orders, but in the impugned order the Commission did not take the stand that since the queries raised by the Commission in its order 4.5.2010 or 18 .8.2010 were not complied with it

was unable to determine the tariff. The impugned order, if divided into three parts would reveal, a) submission of the ASL, b) submission of the GRIDCO, and c) the Commission's reasoning which begins from paragraph 16 of the order. The paragraph 16 of the order urges the parties to come to a negotiated price or the GRIDCO would adhere to the competitive bidding process in case the GRIDCO would agree to take full 88% of the balance power. Paragraph 17 of the impugned order recommended that the Government and the GRIDCO should decide the status of the 50 MW generating unit as an integral part of the IPP of 500MW/1060 MW and then the MOU may be revived and the PPA should be finalized accordingly for the 12 or 14% as the case may be, of the generation as the case may be. So far as the materials made available before the Commission is concerned, it was apparent that the ASL's power plant was an IPP, and the 50 MW power generation was part of the project. It was the CESU that raised the question. If the capacity of the project goes for revision then changes may be necessary in the MOU or in the PPA, but that cannot be the ground for not determining the tariff according to the law. The Commission in paragraph 17 did not say that the order impugned is a provisional one, nor did it say that because of the queries not being allegedly complied with final determination of the tariff was impossible. In fact, it determined the tariff, but according to a method

which cannot be agreed upon. Paragraph 18 of the order under challenge recorded the contesting claim of the parties with regard to the rate per unit. It is difficult to appreciate the observation of the Commission that it did not wish to enter into the question of determining the tariff for 50 MW unit of the ASL because additional power would have to be procured after all the contracted supplies have been procured and such additional supplies obviously would be priced for higher than the already contracted supplies especially when power is procured from an IPP whose fuel supply is dependent purely on the open market or E-auction or even imports. When supply has already been made as the GRIDCO all along maintained that the State was experiencing acute shortage of power, when the MOU did not put any embargo to the GRIDCO purchasing the balance 88% of the power generation of the ASL, when the Commission did not question the GRIDCO's purchase of power from the IPP on the ground of the possible higher tariff, when on the other hand the Commission all along in its previous order wished for a negotiated settlement, when the spirit of the present order is for a negotiated price, and when the parties fail to arrive at the negotiated price the responsibility rested with the Commission to exercise its statutory power and determine the tariff in terms of the principles laid down in the provisions of the Act and also in terms of the Commission's own Regulations as may be

applicable in the given situation. On the other hand, the Commission adopted a peculiar method, namely the probable cost of purchase, if made from the CGPs/ NTPC-ER generating stations or through power exchange and as the average rate of the NTPC-ER stations during the Financial Year 2010-11 was Rs.3.02 the said rate was determined as the rate payable by the GRIDCO to the ASL in respect of 88% of the balance power from the 50 MW generating unit of the ASL. It cannot be forgotten that the ASL's petition was one under section 86(1)(a),(b) &(f) read with section 62 of the Electricity Act,2003. This petition invoked the complete jurisdiction of the Commission for exercise its power in respect of 88% of the ASL's power being supplied by the ASL to the GRIDCO in respect of which there was no concluded contract. The presence or absence of agreement enforceable by the law is not of paramount importance. The Commission was absolutely within its power to take into account all aspects of the matter, to take cognisance of any relevant consideration, but determining the rate by taking into consideration the exact rate payable to NTPC-ER/CGPs at the relevant time is certainly to overlook the parameters usually taken in to account by the Commission while determining the tariff. The law is uniform and uniformly applicable. Cost structure applicable to the NTPC may or may not be similar to the ASL. The submission of Mr. Sen that because of denial of open access the ASL

did not find no other way than agreeing to the request of the GRIDCO in the matter of supplying the balance 88% of the ASL's power, and in such circumstances, the Commission's refusal to consider all relevant aspects of the matter for the purpose of determining tariff is to put the ASL to jeopardy cannot be brushed aside at one stroke without any reason whatsoever. Again, the impugned order is silent as to the final order so far as the variable cost in relation to 12% is concerned. The Commission was free to observe but only on analysis of the relevant data that the parameters insisted upon by the ASL were not acceptable. As said above, in course of the proceedings, the Commission was occupied with various queries, namely, a) whether the IPP has taken up with the distribution companies the issue regarding its requirement of construction power and start-up power for commissioning its unit of 50 MW and what are the conditions of the implementation agreement when the IPP started the construction of the project, b) at what date construction of the project has been started, c) what was the date of application of the ASL with DPR to IPICOL to set up 4x125 MW IPP in the State, d) what was the date when the configuration changed from 4x125 MW to 2x250 MW and the basis of change of such configuration, e) what was the configuration of the project in PPA, f) what was the date of in-principle approval of the Government of Odisha to change 1st unit of the project from 1x125 MW or 1x1250 to 1x50

MW, g) when did the construction of 1x50 MW unit start and the details of the construction power arrangement, h) the details of arrangement of connectivity of IPP with STU's network and similar other questions which perhaps do not appear to have direct nexus with the tariff determining process, though we do not say for the moment that the Commission was not competent to raise the questions, but at least it does not appear from the Commission's order that because they could not be satisfied with the information they could not determine the tariff. The Commission recommended the parties to sit with the Government in order that the MOU and the PPA could be revised. This is altogether a different issue which probably did not confront the Commission in discharging its statutory powers. Mr. Sharma has submitted that the ASL has derived huge benefits in terms of acquisition of land, allotment of coal, drawl of water, assistance in law and order, construction power, environment clearance etc. We do not think, these are at all relevant for us in deciding upon the appeal. Mr Sharma argues that the parameters on station heat rate and auxiliary consumption as suggested by the ASL were without any foundation of facts. It is the Commission that has the exclusive jurisdiction to say so, but the Commission did not dwell upon any parameter at all. It has been argued further by Mr. Sharma that the appellant has all along been resisting the determination of tariff on the basis of the fully allocated

costs which means nothing but 'cost plus' basis . The materials on the record do not suggest so.

30. What we would say, finally, is that the order lacks reasonableness which is the soul of justice and a decision according to the law. The result is that the appeal has to be allowed, and so we do and by setting aside the order under challenge we remand the matter back to the Commission with direction to pass afresh an order in accordance with the law upon hearing the parties and on the basis of the materials as were made available before the Commission and as may be produced further by the parties to the extent of relevancy. Since the appellate order is an order of remand it is deemed appropriate that the Commission complete the exercise within six months from the date of communication of the order and report of compliance with this order within a month thereafter. Meanwhile, the Commission's determination of tariff @ Rs. 3.02 shall be treated as an interim order till an order is passed afresh within the time-frame as given. No costs.

(V.J.Talwar)
Technical Member

(P.S. Datta)
Judicial Member

Reportable/Not-reportable

Pratibha