

Section - XVI

IN THE SUPREME COURT OF INDIA

(CIVIL APPELLATE JURISDICTION)

CIVIL APPEAL NO. 9485 OF 2017

IN THE MATTER OF:

Odisha Power Generation Corporation Limited

Versus

Odisha Electricity Regulatory Commission & Ors

...Appellant

...Respondents

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1.	Reply on Behalf of GRIDCO Limited, Respondent No.2 to the Appeal.	1	540-568	20/-

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(RAJ KUMAR MEHTA)
Advocate for Respondent No.2,
GRIDCO Limited

Roshan Raj

T.C- 5577

9582288775

Address for Service:

32, Lawyers Chamber
Supreme Court of India
New Delhi - 110 001
9810032876

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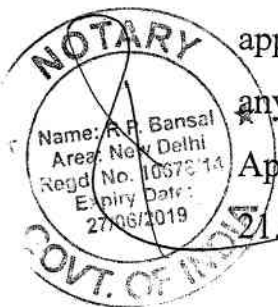
**REPLY ON BEHALF OF GRIDCO
LIMITED, RESPONDENT NO. 2.**

I, Susmita Mohanty, aged about 40 years, Assistant General Manager (Electrical), GRIDCO Limited, Bhubaneswar, Odisha, presently at New Delhi, do hereby solemnly affirm and state as under:-

1. I am conversant with the facts of the case on the basis of relevant records and am as such competent to affirm this Affidavit. I deny all allegations, averments and submissions contained in the Memo of Appeal which are contrary to or inconsistent with the records and/or what is stated hereinafter. Instead of giving a Para-wise Reply, I submit as under:-

A. Preliminary Objection:

It is submitted by way of Preliminary Objection that the present appeal under Section 125 of the Electricity Act, 2003 does not raise any substantial question of law. The impugned judgment of learned Appellate Tribunal for Electricity confirming the Tariff order dated 21.03.2016 of Odisha Electricity Regulatory Commission is a well



considered judgment in conformity with the judgments of this Hon'ble Court. The appeal is, therefore, liable to be rejected summarily.

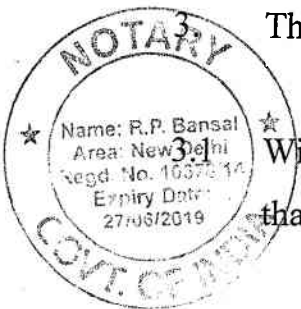
Without prejudice to the above preliminary objection, the following further submissions are made:-


2. It is denied that the Tribunal and the Commission have given a go by to the provisions of PPA or any settlement. It is also denied that the Odisha Electricity Regulatory Commission had applied any inapplicable norms/terms & conditions while determining the Tariff of the Appellant by Tariff order dated 21.03.2016 which has been upheld by the Learned Tribunal by the impugned judgment. The Tariff was determined by the Commission in accordance with the Odisha Electricity Regulatory Commission Generation Tariff Regulations, 2014 and after due consideration of all aspects of the matter, the Learned Tribunal has dismissed the Appeal filed by the appellant against the impugned judgment. It may be stated that the Appellant is getting Return on Equity (RoE) of 33% consistently since 2010-11 which is far above RoE of 16% as provided in the PPA, Notification dated 30.03.1992 as well as OERC Generation Tariff Regulations, 2014. This has also been noticed at Para 40 of impugned judgment dated 06.04.2017. The submission of the Appellant that it will suffer a loss of Rs. 50 crore per annum by the tariff order in question is, therefore, patently erroneous and baseless.

B. Reply to Questions of Law:

The questions of law as framed by the Appellant are misconceived.

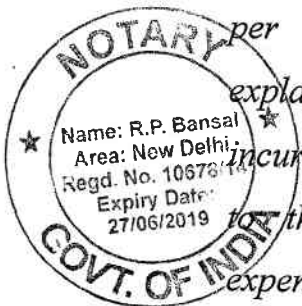
With regard to Question of Law framed in Para 2(i), it is submitted that:



- (a) Approval of Power Purchase Agreement is a statutory requirement to mandate the bulk power procurer GRIDCO (answering respondent), the only State Designated Entity entrusted with procurement and sale of power to meet the State demand.
- (b) In Clause 1.4 in OERC Tariff Regulations, 2014 effective from 10th October, 2014 the learned Commission has duly provided for Power Purchase Agreements approved after such notification. 
- (c) Under various provisions of OERC Tariff Regulations, 2014, the Commission had provided the option to determine the tariff of the Appellant from time to time.
- (d) Appellant's Power Purchase Agreement was approved by the State Commission vide order dated 27.04.2015 in Case No.13 of 2002. In the said order while approving the PPAs, the Commission had clearly stated as under:-

"11. Since the power purchase by GRIDCO from Unit 1& 2 of Ib Thermal Power Station has been continuing as per mutual agreement without approved PPA and the Commission has approved the same in the ARR of GRIDCO for the concerned year there is no need to reopen the same as per the above Regulation. The parties should, therefore, settle the power purchase process for the period prior to implementation of the above Regulation taking into account the original PPA and its supplemental one as approved by us now.

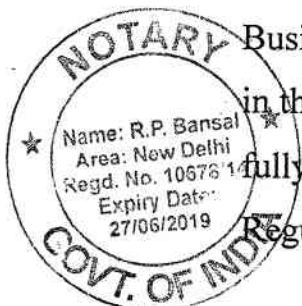
12. Provided that the OHPC and OPGC shall make an application as per the prescribed Format with necessary information and explanations, for determination of tariff based on capital expenditure incurred duly certified by the auditors or projected to be incurred up to the date of commercial operation and additional capital expenditure incurred duly certified by the auditors or projected to be



incurred during the period for which application for determination of tariff is filed of the generating station.

13. *Due to the above provision in the Regulation read with Regulation 7.13 of the same Regulations, OPGC shall make an application before the Commission as per the above approved PPA each year for determination of tariff for rest of the control period starting from FY:2016-17 onwards since the tariff for the FY:2014-15 and 2015-16 has already been approved by the Commission in the ARR of GRIDCO for the said year basing on the submission of GRIDCO."*

- (e) From a conjoint reading of the above observations in the order dated 27.04.2015, it is clear that for the period upto FY 2015-16 the Power Purchase had to be settled by the parties as per the approved PPA and for the period from FY: 2016-17 the appellant had to file an application for determination of Tariff as per OERC Tariff Regulations, 2014. In case the Tariff from FY 2016-17 also had to be as per the PPA, the Commission would not have directed filing of an application for determination of Tariff.
- (f) The impugned order has been passed by the Learned Commission in accordance with the Odisha Electricity Regulatory Commission (Terms & Conditions for determination of Generation Tariff) Regulations, 2014. It is the settled position of law as laid down by this Hon'ble Court that the Regulations can supersede and override the provisions of the Agreement. The jurisdiction of OERC to approve the PPA with or without modification has also been conferred by Section 11 (e), 21(4) (b) & 21(5) of the Orissa Electricity Reform Act, 1995 (OER Act) and Regulation 51 (1) & (7) of OERC (Conduct of Business) Regulations, 2004 respectively. The operational parameters in the PPA being different from the Regulations, the Commission was fully justified in following the norms stipulated in the Tariff Regulations since OPGC asked for relief under the Regulations. There



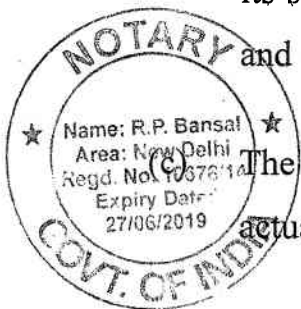
cannot be any justification for having any norms lower than the Regulations if Appellant wants relief in terms of any of the provisions of the Regulations in the Tariff.

- (g) Clause 12 of the PPA as amended by Supplemental Agreement dated 19.12.2012 only excluded the applicability of the CERC Norms. Since the OERC Regulations had come into force in 2014, in the order dated 27.04.2015 while approving the PPA, the Commission directed that in view of the Regulations, with effect from FY: 2016-17 the Appellant will file an application for determination of Tariff every year.

- (h) As a matter of fact, by order dated 14.02.2013 while allowing the appellant to withdraw the appeals, this Hon'ble Court had also directed that *the amended PPA and the Tripartite Agreement shall be considered by the Commission appropriately in accordance with law.* It is thus submitted that in view of the above facts and submissions the State Commission was fully justified in determining the tariff as per the OERC Generation Tariff Regulations, 2014.

3.2 With regard to Question of Law framed in Para 2(ii), it is submitted as under:-

- (a) The conditions laid down in the Power Purchase Agreement dated 13.08.1996 and 19.12.2012 were in line with the Tariff Notification issued by the Ministry of Power on 30th March, 1992.
- (b) Since the Appellant was not filing the Tariff application before the State Commission, the Commission was not in a position to exercise its statutory jurisdiction under Section 86(1) (b) read with Section 61 and 62 of Electricity Act, 2003.



- (c) The Hon'ble Commission had carried out prudence check of various actual operational parameters and other determinants of tariff and

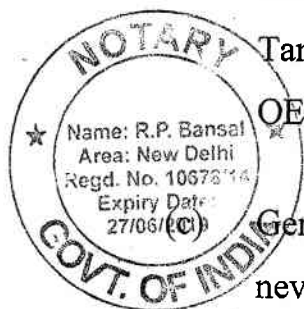
found them to be at improved level vis-à-vis provisions laid down in the Power Purchase Agreement.

- (d) Electricity Act, 2003 is a comprehensive piece of legislation under which State Regulatory Commission's have been set up with the mandate to inter alia ensure a transparent and rational tariff setting mechanism under regulated regime. Accordingly, the Commission had framed OERC (Terms and Conditions of Generation Tariff) Regulation, 2014 applicable to Thermal and Hydro Generators established in the State of Odisha. The Commission was, therefore, fully justified in determining the tariff of the Petitioner in accordance with OERC Generation Tariff Regulations, 2014.

3.3 With regard to Question of law framed in Para 2(iii) and (iv), it is submitted that:

- (a) Approval of Power Purchase Agreement and determination of Tariff are distinct from each other. The Commission had consciously incorporated provisions in the OERC Generation Tariff Regulations, 2014 (effective for the Control Period 2014-19) to deal with the Appellant's case. Accordingly, while approving the Power Purchase Agreements, the Commission directed the Appellant to file Tariff Application for FY: 2016-17 as per the OERC Tariff Regulations, 2014.

- (b) The Learned Commission in the PPA approval order dated 27.04.2015 had directed the Appellant to file the application for determination of Tariff for FY: 2016-17 in conformity with relevant provisions of OERC Generation Tariff Regulations, 2014.



Generation Tariff Regulations, 2014 notified on 8th Oct, 2014 were never been challenged by the Appellant. Subsequently, the Commission had passed the PPA approval order dated 27.04.2015 i.e.

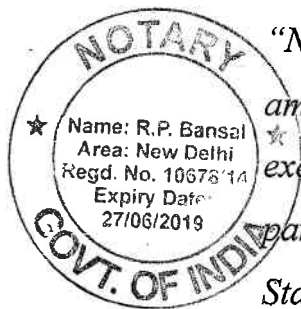
after the Regulations came into force. Regulation 1.4 of the said Regulations provides as under:

“These Regulations shall come into force on the date of publication in the Official Gazette, and unless reviewed earlier or extended by the Commission shall remain in force till 31.03.2019:

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

- (d) Clause 12 of the Supplemental PPA dated 19.12.2012 only excludes the applicability of the CERC Norms. Since OERC Generation Tariff Regulations, 2014 had come into force in 2014, in the order dated 27.04.2015 the Commission directed that in view of the said Regulations, w.e.f. 2016-17 the Appellant will file application for determination of Tariff every year. Clause 12 of the PPA is quoted below:

Quote



“Notwithstanding anything contained in this agreement, any amendment or modification regarding any clause before or after execution of this agreement can be made by mutual agreement. If both parties fail to reach an agreement, the matter shall be referred to the State Government whose decision shall be final and binding. The tariff calculation pertaining to this Agreement is based on the

principles and norms stipulated in the notification dated 30th March, 1992 (as amended from time to time) of Ministry of Power, Govt. of India. Any change made by the Government of India in the norms and principles of the said Notification from time to time will be applicable to this Agreement."

Unquote

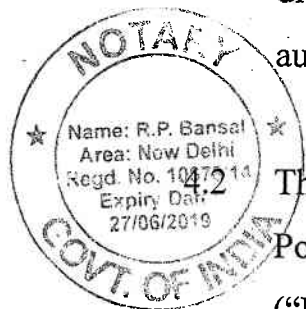
- (e) Enforcement of any PPA contrary to the Regulations would be contrary to the provisions of Section 61 to 64 of the Electricity Act, 2003. It is pertinent to mention here that it is trite law that agreement cannot override statutory provisions. Therefore, the Appellant cannot take shelter of the agreement to insulate itself from the statutory norms.

It is thus submitted that the Appeal does not raise any substantial question of law and is devoid of any merit.

C. Facts of the case:

4. The facts of the case have not been stated by the Appellant in the correct perspective. The contents of Para 3.1 to 3.3, except in so far as the same are a matter of record and denied as incorrect. The true and correct facts of the case are stated hereunder:

- 4.1 The Appellant is a Government of Odisha Undertaking & Government of Odisha retains 51% share in the Company after divesting 49% share with the AES Corporation, having been authorised for day to day operation and management of the Company.

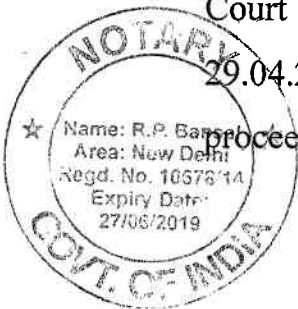


The Appellant and Respondent No. 2 GRIDCO executed a Bulk Power Supply Agreement dated 13.08.1996 effective from 01/01/1995 ("PPA") for the sale of entire quantum of power from the Appellant's

Generating Station to Respondent No.2 on the terms and conditions contained therein. The PPA dated 13.08.1996 was approved by Government of Odisha in exercise of powers conferred under Section 43 of the Electricity (Supply) Act, 1948 by order dated 24.12.1996. Respondent No. 2 in turn was to sell the power purchased from the Appellant to the Distribution Companies of Odisha through appropriate power sale arrangements.

4.3 Disputes arose between the parties in respect of the enforcement of the Escrow Agreement. The Appellant invoked the writ jurisdiction of Hon'ble Orissa High Court in OJC No.13338 of 2001 seeking a direction to Respondent No. 2 and Central Electricity Supply Utility of Odisha ("CESCO") to comply with its inter se escrow arrangement with Respondent No. 2. The Appellant also raised a ground that the State Commission had no jurisdiction to approve the Escrow Agreement or the PPA dated 13.08.1996.

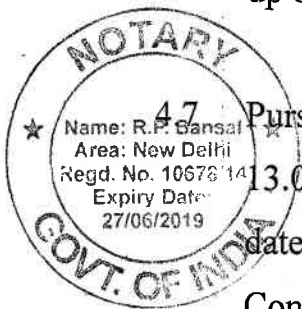
4.4 In the meanwhile, Respondent No. 2 GRIDCO approached the State Commission in Case No. 13 of 2002 seeking approval of the PPA dated 13.08.1996 and the Escrow Agreement which was opposed by the Appellant on the ground that the State Commission had no jurisdiction to do so. In its order dated 22.02.2005 in OJC No.13338 of 2001, Hon'ble Orissa High Court, inter-alia held that the State Commission had jurisdiction to approve the PPA dated 13.08.1996 and determine the Tariff for the Appellant's Generating Station. The Appellant challenged the said order before this Hon'ble Court in SLP (C) No. 6812-13 of 2005 and prayed for a stay of the Orissa High Court order and Tariff determination proceedings. By order dated 29.04.2005 this Hon'ble Court stayed the Tariff determination proceedings pending before the State Commission.



4.5 In Writ Petition being O.J.C No.13338 of 2001, the matter was remanded by Hon'ble Orissa Court to OERC vide order dated 22.02.2005 with the following observations:

".....Hence, it is now open for the Commission to examine the provisions of the Escrow Agreement along with the PPA between OPGC and GRIDCO and grant consent with or without consent to the ESCROW Agreement keeping in mind its functions in Section 11 of the Act, 1995 as discussed above and this can be done on the application which has now been filed by GRIDCO numbered as Case No.13 of 2002."

4.6 In the meanwhile, the Appellant, Respondent No. 2 and Government of Odisha entered into discussions to resolve the disputes. With a view to resolving the disputes Government of Odisha constituted a Task Force chaired by the Chief Secretary, Government of Odisha and other top ranking Officials. Based on the recommendations of the said Task Force, Department of Energy, Government of Odisha issued Notification dated 21.06.2008 and Notification dated 12.10.2009 to resolve all disputes between the parties, inter-alia, on the condition that the PPA dated 13.08.1996 would be amended to state that the terms, conditions and norms of tariff set out at Schedule-II of the said PPA would stand frozen for its entire term. The said Notification also stipulated that the Appellant and Respondent No.2 GRIDCO would file the amended PPA before the State Commission for its approval and withdraw the SLP pending before the Supreme Court. As a part of the settlement the Appellant agreed to invest and finance the setting up of the expansion project.



Pursuant to the above, the Appellant agreed to amend the PPA dated 13.08.1996 and the Tripartite Agreement in terms of Notification dated 21.06.2008 and Notification No.10061 dated 12.10.2009. Consequently the Appellant and Respondent No. 2 also executed a Supplementary Agreement dated 06.09.2012 to the Tripartite

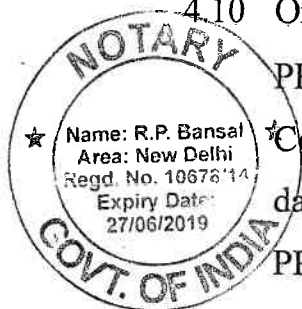
Agreement. The Appellant and Respondent No. 2 also executed a Supplementary Agreement dated 19.12.2012 to the PPA dated 13.08.1996 which inter alia provided that the tariff norms would be frozen for the entire remaining period of the PPA dated 13.08.1996.

- 4.8 The PPA dated 13.08.1996 was duly amended on 19.12.2012 pursuant to Notification dated 21.06.2008 of Govt. of Odisha. Para 3 (c) of the said Notification is reproduced below:

"In order to avoid any ambiguity with regard to tariff norms and parameters for Units 1 & 2, the provisions for calculation of incentive in the existing PPA shall stand amended to enhance the Plant Load Factor (PLF) from 68.49% to 80%. All other terms and parameters for determination of tariff for Units 1 and 2 shall be as per the existing PPA. Suitable amendments will be made in the PPA accordingly including deletion of reference to change in tariff parameters in future. In other words, all tariff parameters will stand frozen till validity of amended PPA notwithstanding modification in tariff norms by CERC from time to time."

- 4.9 The Civil Appeals filed before this Hon'ble Court were withdrawn by the Appellant based on the Government Notification dated 21.06.2008. By order dated 14.02.2013, while allowing the appellant to withdraw the appeals, this Hon'ble Court directed that *the amended PPA and the Tripartite Agreement shall be considered by the Commission appropriately in accordance with law.*

- 4.10 On 26.02.2014 the Appellant and Respondent No. 2 jointly filed the PPA dated 13.08.1996 as amended on 19.12.2012 before the State Commission for approval. By order dated 27.04.2015 ("PPA Order dated 27.04.2015") the State Commission accorded its approval to the PPA dated 13.08.1996 (as amended on 19.12.2012) and the amendments.



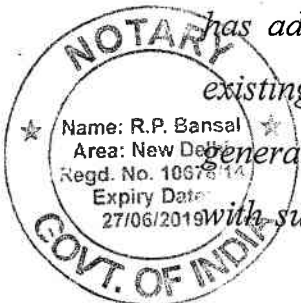
4.11 In Para 10, 11 and 13 of PPA order dated 27.04.2015 with regard to the Tariff for FY: 2014-15 and FY 2015-16, the State Commission specifically noted that it had already approved the Tariff for the Appellant's Generating Station as part of Respondent No. 2's Annual Revenue Requirement ("ARR") and that there was no need to re-open the same under the OERC Regulations. After approving the PPA dated 13.08.1996 and its amendments, the State Commission directed the Appellant to file an application for Tariff determination for rest of the Control Period starting from FY:2016-17 onwards since the Tariff for FY:2014-15 and 2015-16 had already been approved by the State Commission in the ARR of Respondent No.2 for the said year based on the submission of Respondent No. 2. The relevant extract from said Tariff order is quoted below:

Para 10:

"The Commission in the meantime has published in the Gazette OERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2014 on 10.10.2014 for control period of FY 2014-19. The Regulation 1.4 of the said Regulations provides as follows:

"These Regulations shall come into force on the date of publication in the Official Gazette, and unless reviewed earlier or extended by the Commission shall remain in force till 31.03.2019:

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



adopted by the Commission, to the extent of existing Installed Capacity as contained in the PPA."

Para 11:

"Since the power purchase by GRIDCO from Unit 1 & 2 of Ib Thermal Power Station has been continuing as per mutual agreement without approved PPA and the Commission has approved the same in the ARR of GRIDCO for the concerned year there is no need to reopen the same as per the above Regulation. The parties should, therefore, settle the power purchase process for the period prior to implementation of the above Regulation taking into account the original PPA and its supplemental one as approved by us now."

Para 13:

"Due to the above provision in the Regulation read with Regulation 7.13 of the same Regulations, OPGC shall make an application before the Commission as per the above approved PPA each year for determination of tariff for the rest of the control period starting from FY 2016-17 onwards since the tariff for the FY 2014-15 and 2015-16 has already been approved by the Commission in the ARR of GRIDCO for the said year basing on the submission of GRIDCO."

From a conjoint reading of the above observations in the order dated 27.04.2015, it is abundantly clear that:

- (i) For the period upto F.Y 2015-16 the Power Purchase had to be settled between the parties as per the approved PPA;



In accordance with OERC Tariff Regulations, 2014, for the period from FY 2016-17 the appellant had to file an application for determination of Tariff.

4.12 In compliance with the PPA order dated 27.04.2015 the Appellant approached the State Commission in Case No. 53 of 2016 for determination of its Generation Tariff for FY: 2016-17 vide application dated 05.12.2016 on the basis of norms set down in the approved PPA and also relying upon some of the provisions of the OERC Generation Tariff Regulations, 2014 favourable to the Appellant. However, the State Commission determined the Tariff for the Appellants' Generating Station vide Tariff order dated 21.03.2016 applying the Tariff Norms stipulated in the OERC Generation Tariff Regulations, 2014.

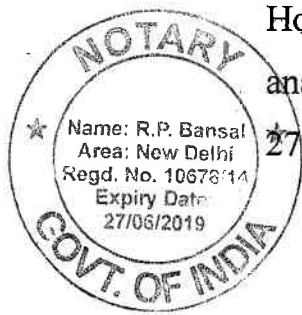
4.13 The Appellant attempted to avail the advantage of both PPA and Regulations by cherry picking the specific provisions from both PPA and Regulations favourable to it for Tariff determination and ignoring the other provisions of the Regulations.

4.14 The Appellant had challenged the State Commission's Tariff order dated 21.03.2016 in Appeal No.126 of 2016 before Learned Appellate Tribunal for Electricity (APTEL). However, Learned APTEL after thorough consideration of all aspects dismissed the appeal by the impugned judgment dated 6th April, 2017 upholding the tariff order in its entirety.

Reply to Grounds:

5. The grounds raised by the Appellant is misconceived. In reply, the answering respondent submits as under:

Hon'ble Tribunal while adjudicating the Appeal has thoroughly analysed the Power Purchase Agreement (PPA) approval order dated 27.04.2015 wherein the Commission had held as under:



Para 10:

"The Commission in the meantime has published in the Gazette OERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2014 on 10.10.2014 for control period of FY 2014-19. The Regulation 1.4 of the said Regulations provides as follows:

These Regulations shall come into force on the date of publication in the Official Gazette, and unless reviewed earlier or extended by the Commission shall remain in force till 31.03.2019:

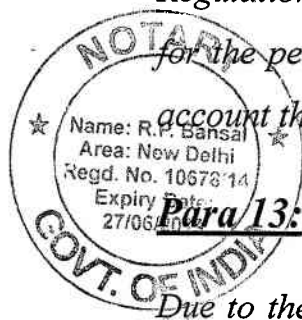
Provided that, where the Commission has, at any time prior to the notification of these Regulations, approved a Power Purchase Agreement (PPA) or arrangement between a generating company and a Beneficiary, or has adopted the tariff contained therein for supply of electricity from an existing generating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

Para 11:

Since the power purchase by GRIDCO from Unit 1 & 2 of Ib Thermal Power Station has been continuing as per mutual agreement without approved PPA and the Commission has approved the same in the ARR of GRIDCO for the concerned year there is no need to reopen the same as per the above Regulation. The parties should, therefore, settle the power purchase process for the period prior to implementation of the above Regulation taking into account the original PPA and its supplemental one as approved by us now.

Para 13:

Due to the above provision in the Regulation read with Regulation 7.13 of the same Regulations, OPGC shall make an application before the



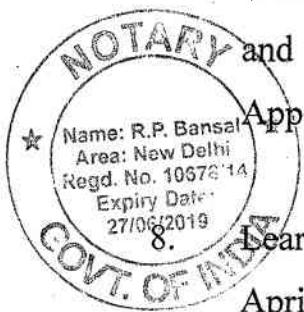
Commission as per the above approved PPA each year for determination of tariff for the rest of the control period starting from FY 2016-17 onwards since the tariff for the FY 2014-15 and 2015-16 has already been approved by the Commission in the ARR of GRIDCO for the said year basing on the submission of GRIDCO."

5.1 From a conjoint reading of the above observations in the order dated 27.04.2015 of the Commission, it is abundantly clear that for the period upto FY 2015-16 the Power Purchase had to be settled between the parties as per the approved PPA and for the period from FY 2016-17 onwards the appellant had to file an application for determination of Tariff as per the OERC Generation Tariff Regulations, 2014. In case the Tariff from FY 2016-17 also had to be as per the PPA, **the Commission would not have directed for filing of an application for determination of Tariff.**

6. The submission of the appellant that PPA dated 13.08.1996 and supplemental Agreement dated 19.12.2012 are saved from the applicability of OERC Generation Tariff Regulations, 2014 by virtue of Regulation 1.4 thereof, is misconceived. This is amply clear from the provisions of Regulation 4.21, 4.26, 4.35, 5.3(b) (ii), 5.3 (d) (iii) and 5.3 (e) (ii).

7. The Appellant has considered the normative interest rate as per Regulation 4.26 and 4.27 of the OERC Generation Tariff Regulations, 2014. The appellant is thus trying to avail the benefit of the OERC Generation Tariff Regulations, 2014 wherever it is favourable to it and relying on the PPA for other matters. Such cherry picking by the Appellant is not permissible.

8. Learned Tribunal's interpretation in the impugned judgement dated 6th April, 2017 is as follows:



Para 39:**Quote**

"It is the Appellant's contention that if the OERC Regulations were to be rigidly interpreted then it would have been possible for the Appellant to file an application for tariff determination for F.Y. 2014-15 and F.Y. 2015-16 as well. However, the State Commission relied on its power under Regulation 7.13 to relax the stipulation under Regulation 2.7 which requires the generating plants to make an application as per Format prescribed for determination of tariff as per annual schedule. The State Commission exempted the parties from approaching the State Commission for F.Y. 2014-15 and F.Y. 2015-16. For the future period, the State Commission directed the parties to make an application for tariff determination for future years as per the approved PPA. It is contended that the State Commission has therefore relaxed the OERC Tariff Regulations. We do not find any substance in this submission. It is true that technically the State Commission could have reopened the tariff for F.Y. 2014-15 – F.Y. 2015-16 if the OERC Regulations were rigidly interpreted. But the State Commission has given a valid reason why it did not do so. It has taken into consideration the fact that since power purchase by Respondent No.2 from Unit 1 and 2 of the Thermal Power Station has been continuing as per mutual agreement without approved PPA and since the State Commission has approved the same in the ARR of Respondent No.2 for the concerned year there was no need to reopen the same as per Regulation 1.4. On this valid reason, for this period, the State Commission appears to have used its power under Regulation 7.13. So far as the rest of the control period is concerned, the State Commission has rightly directed the Appellant to make an application as per Regulation 2.7. There is no relaxation of the OERC Regulations for this period."



9. The contention of the Appellant that Learned Tribunal failed to consider the Appellant's stand to preserve the sanctity of the Terms

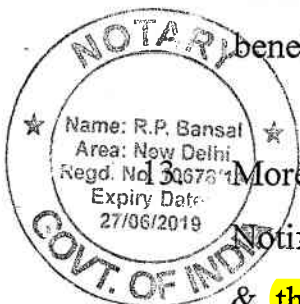
and Conditions of Tariff under PPA for its entire term i.e. upto 30.06.2016 is misconceived since the Appellant itself had deviated from the provisions of the Power Purchase Agreements (PPA dated 13.08.1996 & 19.12.2012) by making claims on the basis of the OERC Generation Tariff Regulations, 2014 in the Tariff Petition filed for FY:2016-17 before the State Commission.

10. Admittedly, the Appellant relied upon the provisions of OERC Tariff Regulations, 2014 in the Tariff Application for FY:2016-17. The provisions under different Regulations relied upon by the appellant are as follows:


- (a) Regulation 3.40 - Additional Capitalisation after cut-off date (Rs.95.65Crores);
- (b) Regulation 4.26 & 4.27 – Interest on Working Capital;
- (c) Regulation 4.34 - Computation of Landed Cost of fuel.

11. The plea of the Appellant that since there were no specific provisions in the approved PPA regarding the above three items, it opted to adopt provisions of OERC Regulation is false and misleading.


12. Tariff Regulations framed by the State/Central Commission from time to time for Generators under Cost Plus Tariff, do have the provision of Additional Capitalisation along with stringent Operating Norms to maintain a balance between the cost incurred in Thermal Units and benefits availed by the ultimate Consumers.



Moreover, PPA dated 13.08.1996 was signed in line with the MoP Notification dated 30th March, 1992 wherein relaxed norms were fixed & there was no scope for Additional Capitalisation. However, for Tariff determination purpose, actual or normative operational


parameters whichever was lower was to be considered as mentioned above. 

14. In the above backdrop, the Appellant cannot cherry-pick the provision of Additional Capitalisation under the Regulations and at the same time not accept the Operational Parameters as per the Regulations.

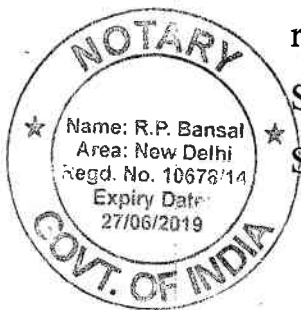
15. As a matter of fact, by order dated 14.02.2013, while allowing the appellant to withdraw the appeals (4031 of 2009), this Hon^{ble} Court had also directed that the amended PPA and the Tripartite Agreement shall be considered by the Commission appropriately in accordance with law. Accordingly, the Hon^{ble} State Commission had acted as per law while considering the Power Purchase Agreements and tariff determination exercise respectively. 

16. It is pertinent to quote the summary of submissions made by the State Commission in Appeal No.126 of 2016 (as mentioned at Para 25 of the judgement dated 6th April, 2017) as follows:

(a) The norms followed in the OERC Regulations are set on the basis of empirical studies by CEA and CERC etc and on the basis of views of different stakeholders.

(b) The norms are set to bring about certainty  and efficiency in the fixation of tariff which is ultimately passed on to the consumers.

(c) Any bilateral agreement which is beyond the scrutiny through regulations by the beneficiaries who are the consumers of the State cannot be accepted by the Commission since it violates Section 61(b), (c) and (d) of the said Act.

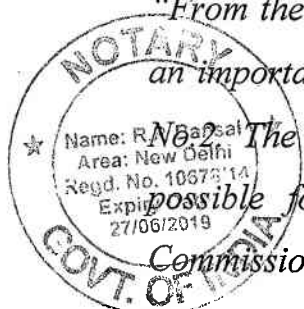


- (d) The said Act is a comprehensive piece of legislation. Cherry picking of the provisions of the said Act would lead to chaos in the Regulatory regime.
 - (e) When a cost plus tariff is determined under a particular provision of the said Act and its related policies it is not possible to overlook other provisions of the said Act to the advantage of the Appellant.
 - (f) Agreements cannot override statutory provisions. The Appellant cannot take shelter of the agreement to insulate itself from the statutory norms.
 - (g) The notification of the Government dated 21/06/2008 also favours tariff fixation in line with the CERC Regulations in absence of any regulations by the State Commission.
 - (h) Since in the meantime the OERC Regulations have come into force the State Commission has to be guided by them.
17. Hon'ble Tribunal was also not convinced with the fact that the tariff shall stand frozen as per the terms of the PPA for rest of the useful life of the plant i.e. 30.06.2026. The relevant extract from the impugned judgement dated 6th April, 2017 is reproduced below:

Para 32

Quote

"From the above events it is clear that the freezing of the tariff norms was an important term of the settlement between the Appellant and Respondent No.2. The State Commission had no role to play in it. It would not be possible for us to hold that such private agreements bind the State Commission. On 26/02/2014 the Appellant and Respondent No.2 filed a joint application before the State Commission for approval of the amended PPA.



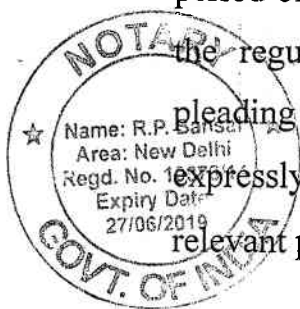
The State Commission approved the amended PPA by PPA order dated 27/04/2015. Till then it was not in the loop. The Appellant's contention is that because the amended PPA was approved by the State Commission and the Appellant was directed to make application for determination of tariff as per the approved PPA, the State Commission ought to have applied the tariff norms prescribed under the PPA. We are unable to accept this submission. Because the State Commission approved the amended PPA, the Appellant does not acquire immunity from regulatory interference in the terms and conditions of the amended PPA. We shall soon refer to Tarini which will substantiate this conclusion. Besides it bears repetition to state that the OERC Regulations framed by the State Commission under the authority of delegated legislation must be followed once they are in the field. Any approach contrary to this will be in the teeth of PTC India and cannot be countenanced.

Unquote

Para 33

Quote

It was submitted by the Appellant that the Appellant is not contracting out of statute. The Appellant remains subject to the prudence check of the State Commission in every tariff determination cycle. It is submitted that tariff shall not remain constant only the terms and conditions for determination of tariff shall remain constant. We are not impressed by this submission. The insistence of the Appellant that terms and conditions of the tariff contained in the PPA cannot be changed and shall remain frozen for the rest of the period of the PPA itself, establishes that the Appellant wants to stay outside the regulatory framework of the State Commission. The Appellant is pleading inviolability in terms of the PPA. The said contention was expressly rejected by the Supreme Court in Tarini. Following are the relevant paragraphs of the said judgment.

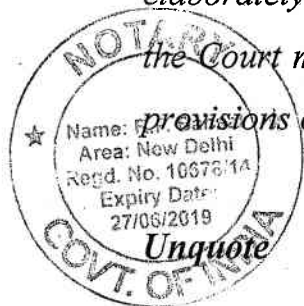


"16. When the tariff order itself is subject to periodic review it is difficult to see how incorporation of a particular tariff prevailing on the date of commissioning of the power project can be understood to bind the power producer for the entire duration of the plant life (20 years) as has been envisaged by Clause 4.6 of the PPA in the case of Junagadh. That part, modification of the tariff on account of air cooled condensers and denying the same on account of claimed inadequate pricing of biogas fuel is itself contradictory.

17. As already noticed, Section 86(1)(b) of the Act empowers the State Commission to regulate the price of sale and purchase of electricity between the generating companies and distribution licensees through agreements for power produced for distribution and supply. As held by this Court in Sri Venkata Setaramanjaneya Rice & Oil Mills v. State of A.P. (supra). K. Ramanathan v. State of T.N. (supra) and D.K. Trivedi & Sons v. State of Gujarat (supra) the power of regulation is indeed of wide import. The following extracts from the reports in the above cases would illuminate the issue.

xxx xxx xxx

21. All the above would suggest that in view of Section 86(1)(b) the Court must lean in favour of flexibility and not read inviolability in terms of the PPA insofar as the tariff stipulated therein as approved by the Commission is concerned. It would be a sound principle of interpretation to confer such a power if public interest dictated by the surrounding events and circumstances require a review of the tariff. The facts of the present case, as elaborately noted at the threshold of the present opinion, would suggest that the Court must lean in favour of such a view also having due regard to the provisions of Sections 14 and 21 of the General Clauses Act, 1898.....".



18. The contention of the Appellant that the State Commission approved the PPA for its entire term but looked to reverse its own decision in its subsequent tariff determination process is misconceived and incorrect in view of the following:

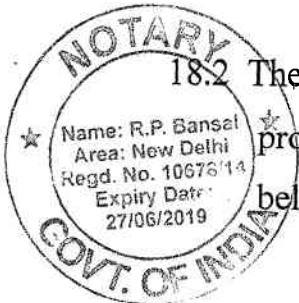
- 18.1 Regulation 1.4 of the said OERC Generation Tariff Regulation, 2014 provides as under:

“These Regulations shall come into force on the date of publication in the Official Gazette, and unless reviewed earlier or extended by the Commission shall remain in force till 31-03-2019:

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

The provisions under said Regulation were never challenged by the Appellant. The Commission was, therefore, fully justified in determining the tariff as per the Regulations in force for the Generators whose PPAs are approved after the OERC Tariff Regulation, 2014 came into force.

- 18.2 The Hon'ble State Commission has further provided the following provisions under the OERC Tariff Regulation, 2014, as mentioned below:



Regulation 4.4:

"The Annual Fixed Cost for OHPC and OPGC will be determined by the Commission by taking into account the notification(s) issued by the Government of Odisha from time to time."

Regulation 4.21:

"Provided further that for existing plants of OPGC, the applicable depreciation rate shall be as determined by the Commission from time to time."

Regulation 4.26:

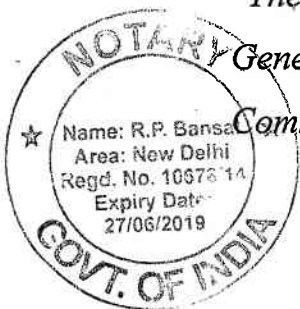
"Provided that for the existing generating plants of OHPC and OPGC the rate of interest on working capital shall be on normative basis and shall be equal to the SBI Base Rate plus 300 basis points as on 1st April of the year for which the application of tariff is being made."

Regulation 4.35:

"The computation and payment of capacity charge and energy charge for existing plants of OPGC will be determined by the Commission from time to time."

Regulation 5.3 (b) (ii):

"The Normative Annual Plant Load Factor for existing Thermal Generating Stations of OPGC Ltd will be determined by the Commission from time to time."



Regulation 5.3 (d) (iii):

"The Secondary Fuel Oil consumption for existing Thermal Generating Stations of OPGC Ltd will be as determined by the Commission from time to time."

Regulation 5.3 (e) (ii):

"The Auxiliary Energy Consumption for existing Thermal Generating Stations of OPGC Ltd will be as determined by the Commission from time to time."

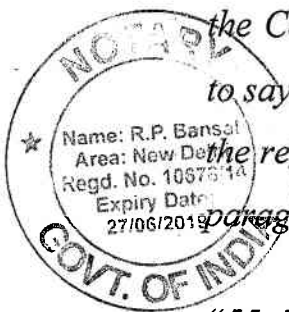
18.3 It is thus submitted that the Hon'ble Tribunal was fully justified in confirming State Commission's Tariff order.

18.4 The rationale of the impugned judgement of Hon'ble Tribunal as contained in Para 27 and 28 is as under:

Quote

"We must begin with the relevant judgments of the Supreme Court. The OERC Regulations have been framed by the State Commission under Section 181 of the said Act. They are made under the authority of delegated legislation. In PTC India Ltd. the Constitution Bench of the Supreme Court has discussed the nature and scope of regulations made by the Appropriate Commission. The Supreme Court clarified that when there is a regulation in the field the Appropriate Commission is bound by it and it has no discretion left in the matter. In that case the Supreme Court was dealing with regulations made by the Central Commission under Section 178 of the said Act. Needless to say that the observations of the Supreme Court will be applicable to the regulations made under Section 181 of the said Act also. Relevant paragraphs of the said judgment could be advantageously quoted:

"55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not

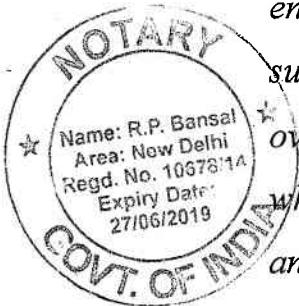


a precondition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178.....”

“56. Similarly, while exercising the power to frame the terms and conditions for determination of tariff under Section 178, the Commission has to be guided by the factors specified in Section 61. It is open to the Central Commission to specify terms and conditions for determination of tariff even in the absence of the regulations under Section 178. However, if a regulation is made under Section 178, then, in that event, framing of terms and conditions for determination of tariff under Section 61 has to be in consonance with the regulations under Section 178. “

xxx xxx xxx

“58. One must understand the reason why a regulation has been made in the matter of capping the trading margin under Section 178 of the Act. Instead of fixing a trading margin (including capping) on a case-to-case basis, the Central Commission thought it fit to make a regulation which has a general application to the entire trading activity which has been recognised for the first time, under the 2003 Act. Further, it is important to bear in mind that making of a regulation made under Section 178 became necessary because a regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. A regulation under Section 178 is in the nature of a subordinate legislation. Such subordinate legislation can even override the existing contracts including power purchase agreements which have got to be aligned with the regulations under Section 178 and which could not have been done across the board by an order of



the Central Commission under Section 79(1)(j)."

Unquote

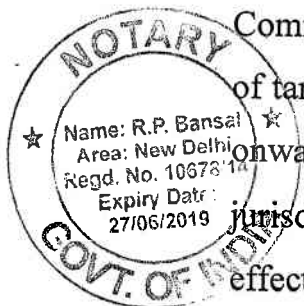
Quote

28. *From the above paragraphs following propositions can be deduced:*

- (a) *While exercising the power to frame the terms and conditions for determination of tariff under Section 178 or 181 of the said Act the Central Commission or the State Commission has to be guided by the factors specified in Section 61. If a regulation is made under Section 178 or 181 of the said Act, then, in that event, framing of terms and conditions for determination of tariff under Section 61 has to be in consonance with the regulation under Section 178 or 181 of the said Act.*
- (b) *A regulation under Section 178 or 181 of the said Act has the effect of interfering with and overriding the existing contractual relationship.*
- (c) *A regulation under Section 178 or 181 is in the nature of a subordinate legislation. Such subordinate legislation can even override the existing contract including PPAs which have got to be aligned with the said regulation.*

Unquote

19. While approving the PPA by order dated 27th April, the State Commission had given sufficient justification regarding the procedure of tariff determination to be under taken with effect from FY:2016-17 onwards. It is submitted that the State Commission had the jurisdiction to determine the tariff as per the Regulation from the effective date of implementation of the Regulations. However, in the



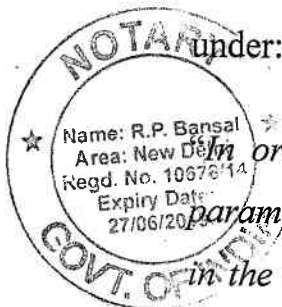
present case, the State Commission preferred not to reopen already settled Tariff matter as per ARR orders for the past period and directing to file the Tariff application prospectively as per the provisions of the Regulations.

20. Infact, the Appellant's PPA with Respondent No. 2 was in a way as per the Regulations from the inception itself. The provisions of the PPA dated 13.08.1996 were as per the Ministry of Power Notification dated 30th March, 1992. Subsequently while resolving the dispute between the parties the Task Force insulated the Tariff determination exercise from CERC Regulation and not from OERC Regulations.

The relevant Clause 12.4 of the PPA dated 13.08.1996 provided as under:

"Notwithstanding anything contained in this agreement, any amendment or modification regarding any clause before or after execution of this agreement can be made by mutual agreement. If both parties fail to reach an agreement, the matter shall be referred to the State Government whose decision shall be final and binding. The tariff calculation pertaining to this Agreement is based on the principles and norms stipulated in the notification dated 30th March, 1992 (as amended from time to time) of Ministry of Power, Govt. of India. Any change made by the Government of India in the norms and principles of the said Notification from time to time will be applicable to this Agreement."

21. Para 3 (c) of Govt. Notification dated 21.06.2008 is also provided as under:-



"In order to avoid any ambiguity with regard to tariff norms and parameters for Units 1 & 2, the provisions for calculation of incentive in the existing PPA shall stand amended to enhance the Plant Load Factor (PLF) from 68.49% to 80%. All other terms and parameters for determination of tariff for Units 1 and 2 shall be as per the

existing PPA. Suitable amendments will be made in the PPA accordingly including deletion of reference to change in tariff parameters in future. In other words, all tariff parameters will stand frozen till validity of amended PPA notwithstanding modification in tariff norms by CERC from time to time."

22. The submission of the Petitioner that the judgement in the case of Gujarat Urja Vikas Nigam Vs. Tarini Infrastructure (2016) 8 SCC 743 is not applicable to the facts of the present case is misconceived and untenable. The said judgment is squarely applicable to the present case.
23. Anything not specifically admitted or dealt with shall be deemed to have been denied. The answering respondent craves leave and reserves its right to make further submissions at the time of hearing.
24. No facts which were not pleaded before the Forums below have been pleaded in this Reply.
25. In the above premises, it is most respectfully submitted that the appeal is devoid of any merit and is liable to be dismissed.

IDENTIFIED BY

Susmita Mohanty
DEPONENT

Verification:

I, the Deponent above named, do hereby verify that the facts stated in the above Affidavit are true and correct to my knowledge based on the records and the submissions contained therein are based on legal advice. Nothing is false and nothing material has been concealed.



Verified at New Delhi on this 24th day of March, 2018.

ATTESTED
Notary Public, Delhi
(As Presented)

Susmita Mohanty
DEPONENT

27/03/18