

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 50 of 2013

Dated: 23rd April, 2014

Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice Surendra Kumar, Judicial Member

In the matter of:

GRIDCO Limited
Janpat,
Bhubaneswar – 751 022
Odisha

...Appellant (s)

Versus

- 1. M/s. Oricon Equipments (P) Ltd. ...Respondent(s)**
Kalinga Complex, Plot no. B, Unit-I
Rajpath, Bhubaneswar – 751 009

- 2. Odisha Power Transmission Corporation**
Limited (OPTCL)
Janpat, Bhubaneswar – 751 022
Odisha

- 3. State of Odisha**
Department of Energy, Govt. of Orissa
Bhubaneswar – 751 001
Odisha

4. **Central Electricity Supply Utility of Orissa
Bhubaneswar – 751 012
Odisha**
5. **Western Electricity Supply Company of Orissa
Burla – 768 017
Odisha**
6. **Northern Electricity Supply Company of Orissa
Jhunganj, Balasore – 756 019
Odisha**
7. **Southern Electricity Supply Company of Orissa
Courtmeta, Berhampur – 760 004
Odisha**
8. **Odisha Electricity Regulatory Commission
Bidyut Niyamak Bhawan, Unit-VIII
Bhubaneswar – 751 012, Odisha**

Counsel for the Appellant(s): Mr. Raj Kumar Mehta
Mr. Antaryami Upadhyay
Ms. Ishita C. Dasgupta
Mr. Elangbam
Mr. R.R. Pathak

Counsel for the Respondent(s): Mr. Prashanto Chandra Sen
Mr. Anurag Sharma
Mr. Hemant Singh
Ms. Shikha Ohri
Ms. Surbhi sharma
Mr. Rutwik Panda
Mr. Priyabrat Sahu
Ms. Rajkumari Banjo

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

The present Appeal has been filed by GRIDCO Ltd. against the order dated 1.1.2013 passed by Odisha Electricity Regulatory Commission allowing the application of M/s. Oricon Equipments (P) Ltd., the Respondent no. 1 herein for grant of intra-State trading licence to trade upto 10 MU per month (120 MU per annum).

2. The Appellant is a wholly owned company of the Government of Odisha and is carrying on the function of bulk supply of electricity to four Distribution Companies in the State of Odisha. M/s. Oricon Equipments (P) Ltd. which has been granted intra-State trading licence is the Respondent no. 1. Odisha Electricity Regulatory Commission is the Respondent no. 8.

3. The brief facts of the case are as under:
 - 3.1 In the year, 2011, the Respondent no. 1 filed an application before the State Commission for grant of intra-State trading licence. On 29.7.2011, the Respondent no. 1 published public notice under Section 15(2) of the Electricity Act, 2003. The Appellant submitted objections to the application of the Respondent no. 1 on the ground that GRIDCO was exclusively carrying out the functions of bulk supply of electricity to the four distribution licensees as the sole designated entity by the State Government to purchase power from the generators and grant of trading licence to a private trader would be detrimental to its interest. The Appellant also filed detailed objections before the State Commission.
 - 3.2 By the impugned order dated 1.1.2013, the State Commission rejected the objections raised by the

Appellant and allowed the application of the Respondent no. 1 for grant of intra-State trading license to trade upto 10 MU per month (120 MU per annum).

4. Aggrieved by the order of the State Commission, the Appellant has filed this Appeal.

5. GRIDCO, the Appellant, has made the following submissions:

a) The State Commission has been approving the ARR and bulk supply tariff of GRIDCO by leaving huge revenue gap, year after year, with the stipulation that the gap is to be recouped by GRIDCO by way of trading and Unscheduled Interchange (UI) of surplus power.

b) The State Commission did not appreciate that grant of intra-State trading licence to Respondent no. 1 will cut into and adversely affect the availability of power from the Captive Generating Plants in the State

with whom GRIDCO does not have Power Purchase Agreements (PPAs). Consequently, the GRIDCO will not be able to bridge the huge gap left by the State Commission in the bulk supply price orders. This would seriously upset the scheme evolved by the State Commission in order to protect the larger public interest of the consumers of the State. Therefore, grant of intra-State trading licence in favour of the Respondent no. 1 would be seriously prejudicial to the larger public interest of the consumers of the State of Odisha.

c) Having recognized that the apprehension of GRIDCO in the impugned order, the State Commission was not justified in directing grant of intra-State trading licence to the Respondent no. 1.

d) The State Commission was not justified in directing grant of intra-State trading licence on the basis that in future when some of the IPPs and the

- State Generating Companies start generation and Ultra Mega Power Projects come into operation there would be substantial power in the State for trading. This is contrary to the earlier order dated 23.9.2011 of the State Commission in which the State Commission came to conclusion that the deficit power situation in the State is likely to continue till 2015-16.
- e) Having left huge gap in the Annual Revenue Requirement of GRIDCO in successive years to be bridged through trading of surplus power, the State Commission was not justified in directing grant of intra-State Trading Licence to the Respondent no. 1.
- f) There is an urgent need that GRIDCO may be provided with an opportunity to have the exclusive power trading rights in Odisha for the time being to enable it to garner the much required revenue to cover up its deficits which have occurred in the past.

g) Trading by private traders cannot be promoted at the cost of the consumers of the State and between the private trader and the consumers of the State, the larger public interest of the consumers of the State must prevail.

5. In reply, the Respondent no. 1 has submitted as under:

a) The State Commission after going into the merits and bonafides of the Respondent no.1 with respect to technical and financial requirements as per the Electricity Act, 2003 and other relevant rules and regulations, granted an intra-State trading licence to it for trading upto 120 Million Units per annum. The Appellant has filed an appeal against the grant of license, without even questioning the technical and financial abilities of the Respondent no. 1, only based on the presumptions that the same will hurt the Appellant financially. The trading licence granted to the

Respondent no.1 cannot be revoked on the grounds raised by the Appellant.

- (b) The poor financial health of the Appellant is no reason that the Respondent no. 1 be denied grant of a trading licence, when otherwise it fulfils all the conditions of grant of trading licence.
- (c) The consumers of the State of Odisha have a right to choose an electricity trader who can efficiently supply electricity at competitive rates and the Appellant cannot take away such right of the consumers. The same is also against the concept of open access and the choice of a consumer to take electricity from a different source.
- (d) The Electricity Act, 2003 mandates development of electricity industry and promotion of competition. The entire submissions of the Appellant, if accepted, amount to creation and continuation of monopoly rights which is not the objective of the Electricity Act, 2003.

- (e) The Respondent no. 1 also referred to the provisions of the Act and relevant Regulations which we shall be considering in the subsequent paragraphs.
6. The State Commission has also filed written submissions in support of the order of the State Commission.
7. We have heard Shri R.K. Mehta, learned counsel for the Appellant, Shri Hemant Singh, learned counsel for Respondent no. 1 and Shri Prashanto Chandra Sen, learned counsel for the State Commission.
8. In light of the submissions made by the parties, the only question that arises for our consideration is **“whether the State Commission is justified in granting an intra-State trading license in favour of Respondent no. 1 inspite of the objections raised**

by GRIDCO that granting such license would be prejudicial to its interest?”

9. Let us first examine the findings of the State Commission in the impugned order dated 1.1.2013. The relevant extracts are reproduced below:

“19. The National Electricity Policy notified by Central Govt. under section 3 of the Act, emphasizing the need for development of competitive power markets, provides as under vide para-5.7.1.

“5.7.1 To promote market development, a part of new generating capacities, say 15% may be sold outside long-term PPAs. As the power markets develop, it would be feasible to finance projects with competitive generation costs outside the long-term power purchase agreement framework. In the coming years, a significant portion of the installed capacity of new generating stations could participate in competitive power markets. This will increase the depth of the power markets and provide alternatives for both generators and licensees/consumers and in long run would lead to reduction in tariff.”

In the light of the above policy provisions, GRIDCO’s contention to remain as a sole trading licensee in the State for some more time is against the spirit of the Electricity Act, 2003 and the National Electricity Policy. It is a fact that due to its

historical legacy, the GRIDCO is burdened with heavy past liabilities and the Commission has carefully evolved a Scheme through its tariff orders in order to give adequate relief to GRIDCO. But this cannot be considered as a proper and sufficient ground for refusal of grant of Intra-State trading license in the State, if otherwise eligible. The provision of Electricity Act, 2003, which is in force since 10th June, 2003, has to be followed in letter & spirit. In the present scenario, GRIDCO has to cope up and act according to the changing circumstances and it has to be more efficient and dynamic to face future challenges. Considering the volume of transaction carried out by GRIDCO, we are of the view, that grant of a Intra-State trading license upto 10 MU per month will not destabilize the system in any manner. Rather the introduction of competition will boost the power generation capacity of the State which will be highly beneficial to the sector as a whole. Hence objection of GRIDCO in the name of public interest is not worthy for consideration.

20. *The Commission appreciates and recognizes the present financial difficulties being faced by GRIDCO, but, at the same time the Commission is duty bound to act so as to ensure compliance of the provisions of Statute u/S.66 of the Electricity Act, 2003 which imposes a high responsibility on the Commission for the development of the market (including trading) in the power sector. In promoting market development, a part of new generating capacity may be sold outside the long term PPAs. As the power market develops, it would be feasible to encourage projects with*

competitive generation cost outside the long term power purchase framework. In the coming years, a significant portion of the installed capacity of new generating stations would participate in competitive power market which is upcoming. This will increase the depth of the power markets and provide alternative for both generators and licensees/consumers and in long run would lead to reduction in tariff.

- 21. Opening up the power market for multiple players has its own merit. The market forces will bring in competition starting from the generation to retail supply. It will act as an indirect incentive to the generators to ramp up their generation to cash in the open market. GRIDCO and other trading licensees will definitely remain alert to take the advantage of UI, harnessing of surplus power from CGPs, secondary energy from hydro stations and renewable energy sources etc. The competition in generation would give a good price signal to the traders and also to GRIDCO. The resultant benefit of all the transactions will undoubtedly be availed by the common consumer of the State.*

- 22. It is a fact that in anticipation of the profit to be earned by GRIDCO through trading of surplus power, the Commission have all along been leaving a gap in the Annual Revenue Requirement (ARR) of GRIDCO and consequently fixing the BSP rate at a level lower than what it should have been, if the gap should not have been left in the ARR. We fully appreciate the concern of GRIDCO in realizing the gap in the ARR and the efforts it needs to make to bridge the gap through UI and*

trading. At the same time, the Commission cannot afford to loose sight of the mandate of the Electricity Act, 2003 which among other things envisages promoting competition in the electricity sector.

- 23. When some of the IPPs, OPGC & OTPCL start generation and UMPPs come into operation, there would be substantial surplus of power in the State for trading. The proposed trading of power for 120 MU per annum by the applicant M/s ORICON Equipments (P) Ltd. inside the State would not affect the interest of GRIDCO in any manner when the availability of surplus power for trading would be of such a substantial amount. Rather the entry of another trading licensee for trading within the State would ensure better competition in the power sector both for generators as well as for traders. Availability of power through competitive pricing would benefit the distribution companies and ultimately the consumers of the State. Further, the applicant petitioner is to trade power up to 120 MU per annum only inside the state and in that case the sale is to be effected to buyers and consumers within the State. Such Intra-State trading will no way affect the interests of GRIDCO.*
- 24. As regards to the issue of protecting the interest of consumers as mandated in the objective of Electricity Act, 2003, Commission has all along been accepting the gap in ARR of GRIDCO and making provisions for bridging the same in subsequent years. We are of the considered view that any perceptible adverse financial impact on GRIDCO arising on account of operation of an*

Intra-State trading license shall be recognized when need arises, as in the past. The apprehension of State Govt. regarding the export of power outside the State through DISCOMs is unfounded as all of the transaction shall be through the SLDC.....”.

“It is observed from the above table that the net-worth of the company is adequate and the petitioner satisfies the condition of net-worth requirement as specified in condition 28(2) of (Conduct of Business) Regulation, 2004 which is Rs.0.5 crore for trading upto 10 MU per month.

- 26. One of the essential features of the EA 2003 is that the trading of electricity or in other words, the purchase of electricity for resale thereof, is subject to such trading margins as may be fixed by the appropriate Commission. Similarly, the Tariff Policy lays down how a distribution licensee must procure power by a process of transparent bidding and read with Section 63 of Act it is apparent that the regulating powers of the Commission is circumscribed and limited in the matter of determination of tariff where such tariff has been determined through open and transparent bidding.*
- 27. Introducing competition, therefore, in different segments of the electricity industry is one of the key features of the Electricity Act, 2003. Competition will lead to significant benefits to the consumers through reduction in costs and efficiency of operation. It also facilitates price to be determined competitively. Trading no doubt is one*

of the key elements of supply and competition. That power should be procured competitively, is the basic objective and if that be so then it implies that there must necessarily be more than one player or trader in the electricity market and therefore not limited to a single player such as GRIDCO and its monopoly of the market. The general policy in the context should ensure economy in costs, reasonable prices and enough competition to achieve this. The grant of an additional license for trading in electricity will, therefore, not vitiate but promote competition, market development and optimum arms length prices.

28. *We are thus indisputably of the view that M/s.OPEL's application for a license to trade in electricity upto 10 MUs per month or 120 MUs per annum must be acceded to. Accordingly, the Commission directs that the applicant be issued the license for intra-state trading of power upto 10 MUs per month or 120 MUs per annum within the State of Odisha. A copy of this order be forwarded to GoO, OPTCL/GRIDCO, all DISCOMs, SLDC and a copy be posted on the Commission's website. The grant of the license shall be subject to the applicant complying with all the provisions of the Electricity Act, 2003, the rules framed by the appropriate Government and regulators as specified by the Commission from time to time in all respects. The applicant – M/s.OPEL shall abide by such trading margins as the Commission may determine from time to time under Section 86(1)(j) of the Electricity Act, 2003, for intra-state trading transaction in the State of Odisha. The applicant –*

M/s.OPEL shall not engage in any trading transactions which would be detrimental to the interests of the electricity consumers in the State of Odisha.”

10. The crux of the findings of the State Commission justifying grant of intra-State trading licence to the Respondent no.2 are as under:

- i) The burden of past liabilities on GRIDCO could not be a proper and sufficient ground for refusal of grant of intra-State trading licence. Considering the volume of transaction of GRIDCO, the grant of intra-State trading upto 10MU per month will not destabilize the system in any manner.
- ii) The Commission is bound to act and ensure compliance of the provisions of Section 66 of the Electricity Act for development of market (including trading) in power sector. As the market develops, the generators would participate in competitive power

- market which will in the long run lead to reduction of tariff.
- iii) Introduction of competition is one of the key features of the Electricity Act and competition will lead to significant benefits to the consumers. There must necessarily be more than one trader to promote competition.
 - iv) M/s. Oricon Equipments (P) Ltd. qualifies as an intra-State trader as per the Regulations to trade upto 10 MU per month.
11. One of the main features of the Electricity Act, 2003 is recognition of trading as a distinct activity with the safeguard that the Regulatory Commissions have been authorized to fix ceiling on trading margins, if necessary. The Act also provides for open access to give choice to the consumers to select the source of their power supply.

12. Section 14 of the Electricity Act, 2003 provides that the Appropriate Commission may on application made to it under Section 15 grant a licence to any person for transmission or distribution or undertaking trading in the electricity as an electricity trader. Thus, for intra-State trading the concerned State Commission is authorized to grant trading licence.

13. Section 15 stipulates the procedure for grant of licence.

Section 15(6) provides for:

“(6) Where a person makes an application under subsection (1) of section 14 to act as a licensee, the Appropriate Commission shall, as far as practicable, within ninety days after receipt of such application, -

(a) issue a licence subject to the provisions of this Act and the rules and regulations made thereunder; or

(b) reject the application for reasons to be recorded in writing if such application does not conform to the provisions of this Act or the rules and regulations made thereunder or the provisions of any other law for the time being in force:

Provided that no application shall be rejected unless the applicant has been given an opportunity of being heard.”

14. Thus, the State Commission has to issue a licence subject to the provision of the Act and rules and regulations. The State Commission can reject the application if such application does not conform to the provisions of the Act or the rules and regulations made thereunder or provisions of any other law.
15. Section 52 provides for the State Commission specifying the technical and financial requirement on electricity trader.

“52. Provisions with respect to electricity trader.

- (1) Without prejudice to the provisions contained in clause (c) of section 12, the Appropriate Commission may, specify the technical requirement, capital adequacy requirement and credit worthiness for being an electricity trader.*
- (2) Every electricity trader shall discharge such duties, in relation to supply and trading in electricity, as may be specified by the Appropriate Commission.”*

16. Section 66 provides as under:

“66. Development of market.

The Appropriate Commission shall endeavour to promote the development of a market (including trading) in power in such manner as may be specified and shall be guided by the National Electricity Policy referred to in section 3 in this regard.”

17. Thus, the State Commission has to promote development of market (including trading) in power and in this regard shall be guided by the National Electricity Policy.

18. Article 5.7.1 of the National Electricity Policy provides for:

“5.7.1 To promote market development, a part of new generating capacities, say 15% may be sold outside long-term PPAs. As the power markets develop, it would be feasible to finance projects with competitive generation costs outside the longterm power purchase agreement framework. In the coming years, a significant portion of the installed capacity of new generating stations could participate in competitive power markets. This will increase the depth of the

power markets and provide alternatives for both generators and licensees/consumers and in long run would lead to reduction in tariff.”

19. Thus, the provision of the Electricity Act and National Electricity Policy provides for promotion of development of power markets including trading.

20. The State Commission has specified Regulations regarding qualification of the electricity trader. The State Commission after considering the net worth of the Respondent no.1 granted intra-State trading licence to the Respondent no. 1 to trade upto 10 MU per month. The Appellant has not raised any issue regarding the qualification of the Respondent no.1 but has objected to grant of licence as it would affect its interests. The Appellant also wants the State Commission to maintain exclusive power trading rights of the Appellant in Orissa for the time being to recoup its past revenue gap. We feel that the contention of the

Appellant is in contravention to the provisions of the Electricity Act and the National Electricity Policy.

21. Just because the State Commission has not been allowing adequate bulk supply tariff to be charged from the distribution licensees to recover the costs of the Appellant, it could not be a reason for denial of trading licence to the Respondent no.1. The Appellant has to seek legal remedy for recovery of its costs from the Distribution Licensees.

22. The Appellant has contended that the grant of trading licence to a private company is against the consumer interest. We are not convinced by the contention of the Appellant. Firstly grant of intra-State licence to the Respondent no.1 as per the provisions of the Electricity Act and the rules and regulations made thereof, with the intent to promote competition cannot be against the interest of the consumers. Secondly, the trading licence

to the Respondent no. 1 has been granted for intra-State trading. Thus, the Respondent no.1 is expected to purchase power from the generators within the State and sell to consumers in Orissa through open access, thus providing a choice to the consumers. Thirdly, the supply by the Respondent no. 1 to the consumers within Orissa will result in corresponding reduction in quantum of power supply by the Appellant to the distribution licensee and will not have any impact on the intra-State trading of surplus power by the Appellant.

23. The Learned Counsel for the Appellant has argued that the Respondent no.1 is likely to supply power to HT/EHT consumers whose tariff is attractive which will affect the revenue of the Distribution Licensees which in turn will affect the payment by the Distribution Licensees to the Appellant. We are not able to accept this argument of the Appellant. Firstly, the Distribution

Licenseses have not filed any Appeal against the impugned order. Secondly, the HT/EHT consumers are also consumers and they could not be deprived of their right to take power from an alternate source by seeking open access conferred on them under the Electricity Act. Thirdly, the HT/EHT consumers while availing power through open access have to pay surcharge and wheeling charges as determined by the State Commission to the distribution licensees which will be utilized by the distribution licensees for meeting the requirement of current level of cross subsidy within the area of the distribution licensees as per Section 42(2) of the Electricity Act, 2003.

24. In view of above we do not find any illegality or infirmity in the impugned order of the State Commission granting trading licensee to the Respondent no.1

25. Summary of our findings:

- i) The provisions of the Electricity Act and National Electricity Policy provides for promotion of development of power market (including trading).**
- ii) The intra-State trading licence to the Respondent no.1 has been granted by the State Commission after considering the qualification requirements as per its Regulations. The Appellant has also not raised any objections regarding the technical and financial qualification of the Respondent no.1 to undertake intra-State trading of electricity upto 120 MU per annum.**
- iii) The contention of the Appellant to maintain its monopoly in the intra-State trading is in contravention to the provisions of the Electricity Act, 2003 and the rules and regulations framed thereof. The trading licence to the Respondent no.1**

cannot be denied on the ground of poor financial position of the Appellant.

(iv) We do not agree with the contention of the Appellant that the grant of intra-State trading licence to the Respondent no. 1 is against the interests of the consumers.

26. In view of above the Appeal is dismissed as devoid of any merits. No order as to costs.

27. Pronounced in the open court on this 23rd day of April, 2014.

(Justice Surendra Kumar)
Judicial Member

(Rakesh Nath)
Technical Member

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