

THE JHARKHAND STATE ELECTRICITY REGULATORY  
COMMISSION, RANCHI.

**Case No. 26 of 2014.**

M/S. Inland Power Limited ... .. Petitioner

Versus

1. Jharkhand Urja Vikas Nigam Limited having its office at Engineers Bhawan, HEC, Dhurwa, Ranchi through its Chairman-cum-Managing Director.
2. The Chief Engineer (Commercial & Revenue), Jharkhand Urja Vikas Nigam Limited having its office at Engineers Bhawan, HEC, Dhurwa, Ranchi. ... .. Respondents.

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**PRESENT**

Hon'ble Mr. Justice N.N. Tiwari, Chairperson  
Hon'ble Mr. Sunil Verma, Member (Finance)

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Dated: 29th July, 2015.

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For the Petitioner : Mr. N.K. Pasari and Ms. Ranjana Mukherjee,  
Advocate.

For the Respondents: Mr. Navin Kumar, Advocate.

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**ORDER**

1. In this petition, the petitioner has prayed for a direction on the respondents to make payment of the amount withheld by them towards the energy supplied by the petitioner in terms of the contract entered into between the parties as also in terms of the agreed rate of sale/purchase pre-determined between the parties in terms of the tariff rates notified by the Jharkhand State Electricity Regulatory Commission, Ranchi (hereinafter to be referred to as "this Commission"); and for a direction on the respondents to comply with Multi Year Tariff Order dated 27.05.2014 approved by this Commission. The petitioner has also prayed for a direction on the

respondents to forthwith open letter of credit in favour of the petitioner as agreed between them.

2. The petitioner being a generator of the electricity is a generating company within the definition of Section 2 (29) of the Electricity Act, 2003 (for short "the Act"). The petitioner started its business of generation of electricity by installing Thermal Power Plants duly approved by the State Government and since after setting up the Plant, the petitioner has been selling power through feeder of the transmission of the licensee or to the consumers directly, on agreed terms.

3. The petitioner has established Thermal Power Plant in Ramgarh district in the State of Jharkhand on the basis of Memorandum of Understanding with the Government of Jharkhand through its Principle Secretary, Energy Department dated 18.10.2011 with the capacity of 126 MW (2 x 63) Coal based Thermal Power Plant on an investment of Rs. 650/- Crores approximately.

4. The then Jharkhand State Electricity Board vide Agreement dated 23.02.2012 had entered into a Power Purchase Agreement with the petitioner for purchase of energy from 1<sup>st</sup> Unit at contracted capacity out of 25% of 63MW i.e. 15.75 MW, as per the tariff determined by this Commission.

5. Subsequently by agreement dated 22.04.2013, the parties mutually entered into further agreement of purchase and sale of the entire quantum of power to be generated by the petitioner from its 1<sup>st</sup> Unit of 63 MW inclusive of the quantum of power mentioned in the power purchase agreement dated 23.02.2013.

6. In order to sell the energy to be generated by the power plant, an application was filed in this Commission dated 17.07.2013 seeking approval of its generation tariff in terms of the provision of the Act read with the Regulations for determination of tariff for generating licensees.

7. The Commission provisionally approved the tariff for the financial years 2014-15 to 2015-16 for the first Unit determining the capacity charge at Rs. 71.17 Crores and the variable cost charge at Rs. 2.05 per KWH.

8. The petitioner commenced its commercial operation after getting certificate from the Electrical Superintending Engineer. SLDC, Ranchi dated 14.06.2014.

9. The petitioner, thereafter, requested the Chief Engineer (C & R) JUVNL for opening a letter of credit in terms of the power purchase agreement. In the meanwhile, the petitioner also started supplying energy to the respondents in terms of the power purchase agreement.

10. The petitioner, thereafter, served bills to the respondents for the months of May, June and July, 2014 in terms of the rates determined by this Commission i.e. at the rate of Rs. 4.36 per unit.

11. On receiving the said bills, the respondents by its letter dated 26.08.2014 issued by the Chief Engineer (C & R) expressed their inability to procure power on the rates charged by the petitioner in the bills and instructed the petitioner to supply only 15.75 MW power to them, contrary to the terms of the agreement.

12. The petitioner, felt aggrieved and wrote to the Chief Engineer (C & R) requesting to recall the said letter dated 26.08.2014 and to release the

payment of the bills' amounts claimed in accordance with the power purchase agreement and as approved by this Commission.

13. The respondents ignoring the said request wrote letter dated 03.09.2014 stating therein that they would purchase the power at the rate of Rs. 3.71/- per Unit and not at the rate of Rs. 4.36 per Unit charged in the bill.

14. The petitioner reminded the respondents that the bills were raised on the basis of the tariff determined by the Commission, and as agreed upon and accepted by the parties and the respondents cannot resile from the terms of the agreement and work out the amount of the bill @ Rs. 3.71/- per Unit. The Chief Engineer (C & R) of the respondent by letter dated 25.09.2014 informed the petitioner that a Committee is being constituted for evaluation of rate per Unit in view of the dispute regarding the rate.

15. The petitioner has stated that in order to meet out the day to day expenses and the minimum requirement of the plant to keep the same running, they accepted the payment at the rate of Rs. 3.71 per Unit under protest.

16. The petitioner submitted that in view of the terms of the power purchase agreement and the tariff rates determined by the Commission, there is no justification for fixing the rate unilaterally by the respondents or constitute any evaluation committee for that purpose and, that too, without consent of the petitioner.

17. The petitioner further submitted that in terms of Clause 3.2 (iii) of the Power Purchase Agreement, the letter of credit was to be opened in favour of the petitioner by the respondents and as per Clause 4.2 (b), the

respondents have to maintain the letter of credit. The respondents are also bound by the order of rate of tariff passed by this Commission. But despite repeated requests and reminders the agreed terms of the agreement have not been adhered to and the respondents have neither paid the amount of the bills raised in terms of the Power Purchase Agreement and the tariff order of this Commission nor have opened letter of credit till date. The petitioner under that circumstance has ultimately filed this petition praying for the aforesaid relief.

18. The petitioner's claim has been contested by the respondents. In the counter affidavit filed by the respondents, it has been, inter alia, stated that though the Power Purchase Agreement was entered into for purchase of entire power of 1 x63 MW TPP of the petitioner, the average rate of power is more than Rs. 5/- per Unit which is much higher than the average rate of power purchased by JBVNL/JUVNL. The respondents requested the petitioner vide Letter No. 1018 dated 03.09.2014 for revision of bills submitted by the petitioner but the petitioner insisted for payment of the bill on the same rate. Again by Letter No. 1111 dated 25.09.2014, the respondents requested the petitioner for negotiation of rate of purchase of power but the same was also not heeded upon.

19. In order to sort out the said dispute, a Committee was constituted by the respondents by Office Order No. 2261 dated 10.12.2014 which was subsequently revised by Office Order No. 2343 dated 29.12.2014. The meeting of the Committee was held on 12.12.2014 and 17.12.2014 but no representative of the petitioner turned up rather they rushed to the Commission and filed this petition.

20. It has been stated that Clause 8.6 of the Power Purchase Agreement under the heading “disputed bill”, clearly stipulates that in the event of any dispute, the buyer shall pay 75% of the disputed bill amount to the seller and furnish the particulars, such as: item disputed, with full details/date and reasons of dispute; and amount under dispute. All differences or disputes between the parties arising out of or in connection with the agreement have to be mutually discussed and amicably resolved within 90 days. In view of the said terms of the agreement, the respondents took steps to solve the problem mutually but there was no response from the petitioner’s side.

21. The respondents have also prayed for direction of the Commission to the petitioner to cooperate in resolving the said dispute and to sell power at the rate of Rs. 3.71 per Unit or to allow the respondents to procure only 25% of power generated by the petitioner, keeping in view the rate of the average cost of power purchase (i.e. average power purchase of Central generating station, DVC and APNRL) by JBVNL/JUVNL @ 3.71 per Unit during financial year 2014-15. In view thereof, a Committee has been constituted for arriving at an agreed rate.

22. In view of the claim made and the stand taken by the parties, the following Issues arise for consideration:

**Issues:**

- (i) Whether the petitioner is entitled to claim rate of Rs. 4.36 per unit for the energy supplied in terms of the agreement entered into between the parties as also in terms of the tariff determined by this Commission?

- (ii) Whether the respondents are entitled to unilaterally reduce the quantum of power purchase to 25% of the total quantum of MoU if the petitioner does not agree to sell the power at the rate of Rs. 3.71 per unit to the respondents?
- (iii) Whether the respondents are bound to open the letter of credit in favour of the petitioner and to operate and maintain the same?

## **FINDINGS**

### **Issue Nos (i) & (ii)**

23. We heard the parties at length. The following submissions are made by the petitioner:

(i) The petitioner is entitled to raise bills in terms of PPA dated 23.02.2012 read with supplementary PPA dated 22.03.2013 executed between the parties for a period of ten years and also for compliance of the Multi Year Tariff Order dated 27.05.2014 passed by this Commission.

(ii) The respondents are liable to make payment of the bill amount for the power supplied to them from July 2014 till date at the agreed rate and in accordance with the tariff determined by this Commission under the statutory authority after hearing all the concerned parties including the respondent. The tariff order was not challenged by the respondents and the

said order of the Commission dated 27.05.2014 is final and binding on the respondents.

(iii) The MoU dated 18.10.2011 entered into between the petitioner and the State of Jharkhand provides for the first right of purchase to the distribution licensee for upto 25% of the power supplied by the petitioner to the system which was followed by the PPA dated 23.02.2012 executed by the respondents for purchase of 35 MW power from the 1<sup>st</sup> Unit of the petitioner. The supplementary Power Purchase Agreement dated 22.03.2013 stipulates for purchase of the full quantum of 63MW from the 1st Unit of the petitioner by the respondents.

(iv) As per the MoU and the PPAs, the payment of tariff to the petitioner for sale of power has to be determined by the Commission.

(v) The tariff for the financial years 2014-15 to 2015-16 for 1<sup>st</sup> Unit was determined by this Commission by tariff order dated 27.05.2014. The capacity charges were approved at Rs. 71.1 Crores and the variable cost charge at Rs. 2.05 per KWH.

(vi) The petitioner has been supplying power to the respondents since July, 2014 till date, in terms of the PPA. There is no scope for deviation from the terms of the agreement.

(vii) The stands taken by the respondents for allowing them to procure the entire quantum of 63 MW under PPA contrary to the tariff determined by the Commission are wholly unjustified.

(viii) The respondents cannot deviate from the terms of PPAs and the tariff order dated 27.05.2014.



(ix) The respondents are bound to open and maintain letter of credit as per the agreed terms.

24. In reply, the respondents made the following submissions:

(i) The average cost of the power purchased by the petitioner as determined by this Commission by tariff order dated 27.05.2014 is at Rs. 5/- per unit which is much higher than the average power purchase cost of the licensee which is Rs. 3.71 per Unit.

(ii) In view of the financial crunch being faced by the respondents, they may be allowed to pay the energy purchased of 88% at the rate of Rs. 3.71 Paise per Unit.

(iii) The respondents felt difficulty in procuring the contracted power from the petitioner at the rate determined by tariff order dated 27.05.2014.

25. From the statements appearing in the affidavit and submissions made in course of hearing, it is clear that the respondents have not denied the petitioner's claim on any legal ground. Rather the respondents have expressed their difficulty to pay the bill amounts and to abide by the obligations under the contract between the parties--under onerous circumstances.

26. Learned counsel for the petitioner submitted that the average power purchase of Rs. 3.71 per Unit, referred to by the respondent licensee, is nothing but the "short terms" power purchase cost determined by the Commission for the current financial year and the same has no co-relation or proximity with the "long term" PPA and determination of tariff on project specific basis. The petitioner's claim is based on the PPAs executed by the buyer as also on the terms of the tariff order dated 27.05.2014. On

the basis of the PPAs, the petitioner has been performing his part of obligation while the respondent is whimsically insisting for purchasing power arbitrarily on lesser rate contrary to the rate of tariff determined by this Commission in accordance with the established procedure.

27. Learned counsel further submitted that there is no scope for the respondents to deny payment on the rate determined by the Commission. The respondents cannot unilaterally quote any other rate as per their whims and fancy. Since the terms of the agreement provides for purchase of the entire quantum of power generated by the petitioner from its 1<sup>st</sup> Unit, it is not open for the respondents to unilaterally decide to procure less quantum of power, which, if allowed, would defeat the entire purpose of setting up the plant and would cause serious prejudice to the petitioner who has made huge investment in the said plant.

28. As against the said submissions quoting the terms of the PPA and the statutory determination of tariff by the Commission, the respondents could not make any defence than to take plea of their poor financial condition in making payment on the rate determined by the tariff order.

29. In order to come to a conclusion, it is necessary to take note of legal pronouncements on the subject.

30. In **Continental Construction Co. Ltd. vs. State of Madhya Pradesh [(1988) 3 Supreme Court Cases 82]**, the Hon'ble Supreme Court has held that the Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract rates different from the stipulated rates. It has

been further held that a contract is not frustrated merely because the circumstances in which the contract was made, altered.

31. In the instant case, the expression 'covenants' and the 'Power Purchase Agreement' regarding capacity charge is clearly mentioned in Article 4.3 (i) which stipulates 'capacity charge' as determined by the JSERC from time to time in accordance with JSERC Tariff Regulation. Further Article 8.1.1 provides that the buyer shall pay the seller the monthly tariff payment, on or before due date comprising of tariff for every contracted year, as determined/approved by JSERC.

Further, Article 8.3.1 stipulates for buyer to make payment of the amount under monthly bill within due date through letter of credit or by DD/RTGS/Cheques to the sellers designated account.

32. It is admitted position that by virtue of the agreement dated 23.02.2012, the then Jharkhand State Electricity Board, (the predecessor concerned), agreed for purchasing energy from 1<sup>st</sup> Unit of the petitioner named as Inland Gola Thermal Power Project located at Inland Nagar, Block Gola, Ramgarh at contracted capacity out of 25% of 63MW i.e. 15.75 MW. The Board was desirous to purchase 12% of 63MW i.e. 7.56 MW on the long term basis which the petitioner agreed to sell at variable cost and as per the tariff determined by this Commission. By a supplementary Power Purchase Agreement dated 22.04.2013, the respondents agreed to purchase the entire quantum of power to be generated by the petitioner from its 1<sup>st</sup> Unit of 63 MW inclusive of the quantum mentioned in the Power Purchase Agreement dated 23.02.2012. The Commission in its tariff order determined the tariff for 88% of the total capacity i.e. variable cost, subject to fuel price adjustment as per the terms

of Tariff Regulation 2010 and fixed charges as approved by this Commission vide order dated 27.05.2014 approving the capacity charge at Rs. 71.17 Crores and variable cost charged at Rs. 2.05 per KWH for the financial year 2014-15 to 2015-16.

33. The petitioner's claimed that the bill was raised at the rate determined by the Commission which came to be Rs. 4.36 Paise per Unit. Instead of making payment of the amount raised on the said basis, the respondent Company unilaterally fixed the rate for purchase @ Rs. 3.71 Paise per Unit.

34. Section 56 of the Contract Act read with the decisions of the **Supreme Court in Travancore Devaswom Board vs. Thanath International [(2004) 13 Supreme Court Cases 44]** does not permit any party to frustrate the contract on the ground that the performance of the contract become more onerous. Once agreements are executed and signed, the same is binding and enforceable in law.

35. In view of the law laid down by the Hon'ble Supreme Court, the respondents have no scope for quoting its own rate contrary to the provision of PPA as also contrary to the tariff order issued by the Commission.

36. The respondents, thus, cannot deny payment contrary to the agreed terms and in violation of the tariff order passed by this Commission.

37. In view of the clear term of contract for purchasing entire quantum of power purchased by the petitioner, the respondents cannot unilaterally deviate from the said terms and reduce the amount of power purchase at 25% of the total quantum of MoU in case the petitioner does not agree to

sell power at the rate of Rs. 3.71 Paise per Unit, as desired by the respondents.

38. In view of the above discussions, the issues nos. (i) and (ii) are decided in favour of the petitioner and it is held that the petitioner is entitled to get payment of the Unit sold to the respondents at the rate of Rs. 4.36 Paise per Unit of the energy supplied to the respondents in terms of PPAs and the order of tariff passed by this Commission.

39. **Issue No. (iii):** This issue is co-related with Issue Nos. (i) and (ii). Article 3 of the PPA stipulates 'condition precedent' and Article 3.2 (iii) clearly provides that the buyer shall provide to the seller an unconditional, revolving and irrevocable letter of credit in accordance with Article 8.4 of this Agreement. Article 4.2 (b) provides for opening and maintaining the letter of credit by the buyer. Article 8.4 which deals with the payment mechanism clearly stipulates in Article 8.4.1.1 that the buyer shall provide to the seller for payment of its monthly bill, a monthly unconditional, revolving and irrevocable stand-by letter of credit ("Letter of Credit"), opened and maintained by the buyer, which may be drawn by the seller in accordance with Article 8.4.1.5.

40. It is an admitted position that till date, the respondent has not provided any letter of credit, as mutually agreed between the parties in terms of Power Purchase Agreement. The respondents have, thus, failed to fulfill their contractual obligation which is binding on them.

41. It is, therefore, held that the respondents are bound to open and maintain the letter of credit as per the provision of Articles 3.2(iii), 4.2 (b) read with Article 8.4.1 of the Power Purchase Agreement. This issue is, accordingly, decided in favour of the petitioner.

**Summary of the Findings:**

- (I) The petitioner is entitled to get payment of the Units sold to the respondents at the rate of Rs. Rs. 4.36 Paise per Unit of the energy supplied to the respondents in terms of the agreement entered into between the parties and rate of tariff determined by this Commission.
- (II) The respondents cannot unilaterally reduce the amount of power purchase of 25% of the total quantum of MoU if the petitioner does not agree to sell the power at the rate of Rs. 3.71 Paise per Unit.
- (III) The respondents are bound to open letter of credit in favour of the petitioner and operate and maintain the same.

**DIRECTION**

42. The respondents are, accordingly, directed to make payment of the pending bill at the rate of Rs. 4.36 Paise per Unit of the energy to the petitioner till date within two months, failing which, the amount shall carry the interest at the rate of 6% per annum

43. The respondents are further directed to open letter of credit in favour of the petitioner and operate and maintain the same in terms of PPA.

44. This petition is, accordingly, allowed in the above terms with cost of Rs. 50,000/0 (Rupees fifty thousand).

Sd/-  
(Sunil Verma)  
Member (F)

Sd/-  
(N.N.Tiwari, J.)  
Chairperson