

**ORISSA ELECTRICITY REGULATORY COMMISSION
BIDYUT NIYAMAK BHAWAN
UNIT-VIII, BHUBANESWAR - 751 012

Present : Shri B.K. Das, Chairperson
 Shri K.C. Badu, Member
 Shri B.K. Misra, Member

Case No.129/2009

GRIDCO	Petitioner
Vrs.		
NESCO	Respondent

In the matter of: **For review of order dated 31.07.2009 passed in Case No.43 of 2009 of the Commission.**

Case No.130/2009

GRIDCO	Petitioner
Vrs.		
WESCO	Respondent

In the matter of: **For review of order dated 31.07.2009 passed in Case No.44 of 2009 of the Commission.**

On behalf of the petitioner: Shri R. C, Mishra, Sr. G.M(F), GRIDCO (In both the cases)

On behalf of the Respondent: **Shri G.B. Swain, DGM(F), CSO** (In both the cases)

Date of Hearing: 27.11.2009

Date of Order:22.03.2010.

ORDER

Both the cases are taken up today for analogous hearing on question of admission, as they are similar in nature which were arisen out of the order dtd. 31.7.2009 passed by the Commission in Case Nos. 43 & 44 of 2009. The Commission heard the parties first on condonation of delay as prayed by the petitioner for filing the review petitions.

2. Heard. The delay was condoned.
3. Mr. R.C. Mishra, Sr. G.M.(F), GRIDCO stated that the Commission has passed orders in case Nos. 43 & 44 of 2009 with certain observations without considering of material facts on record. Besides, certain material documents which the

petitioner in both the cases could not produce before the Commission prior to the above order was passed and has now submitted in the review petitions for proper appreciation and review of the orders dtd. 31.07.09 in both the cases. In the aforesaid order dtd. 31.07.09 the Commission has observed that there was no legal difficulty on the part of GRIDCO to ensure receipt of full payment by invoking the letter of credit. GRIDCO had done the same after a delay of 24 hours from the permissible date of rebate. The petitioner Gridco did not utilize the authority given to encash the L.C. within the stipulated period of rebate. As per the BSP order dtd. 22.03.07 for FY 2007-08, the payment of rebate is to enforce timely payment to Gridco by DISCOMs and this mechanism does not have any intention to put any licensee to financial loss. Accordingly the Commission has directed Gridco in its order dtd. 31.07.09 in both the cases Nos. 43 & 44 of 2009 which is given below:-

The Commission directs that the loss of rebate of 1% on Rs.46.93 crore which amounts to 46.93 lakh in case of NESCO and on Rs.72.27 crore which amounts to Rs.72.27 lakh in case of WESCO are to be made good by Gridco and directs Gridco to adjust the same from the BST bills of NESCO and WESCO respectively for the month of Sept., 2009 are to be raised in Oct, 2009.

Gridco has submitted the BSP bills to NESCO & WESCO vide letter Nos. SE-BST-56/2005/2329 and SE-BST-56/2005/2300 dtd. 4.5.07 and 03.05.07 of BSP bill Nos. BSP/NESCO/07-08/01 dated 03.05.07 of Rs.55,14,27,718.22 and BSP/WESCO/07-08/03 dtd. 3.5.07 of Rs. 81,30,80,289.50 respectively with copy to the Union Bank of India, Balasore Branch for NESCO and Sambalpur Branch for WESCO at their Main Branch at Bhubaneswar for the month of April, 2007 and requested to release the payment as per the instructions contained in the aforesaid bills which is reproduced below:-

“Please arrange payment of the bills through letter of credit (LC) on presentation/upfront by cash within 48 hours in order to avail rebate of 2% of this invoice by cash/LC”

4. He also stated that as per instruction of the respondents the UBI, Balasore Branch for NESCO had made payment of Rs. 43.37 crore and UBI, Sambalpur Branch had made payment of Rs. 54.15crore to Gridco towards their BSP bill for the month of

April, 2007 including the transmission charges of OPTCL. Both the respondents have written to their Bank that if the payment are made for more than Rs.43.37 crore in case of Nesco & Rs. 54.15 crore in case of WESCO to Gridco towards the BSP bills for month of April,2007, UBI will be solely held responsible for the above transactions. So the Bank acted as per the instruction of the respondents. It is also to be noted that the Bank carried out the advice of the respondents and refrained from remitting the full amount although ESCROW although Bank is obliged to remit the escrowed amounts to Gridco. The L.C. shall be negotiated monthly basis upon submission of monthly invoices by Gridco. The payment of monthly invoice shall be paid through L.C. within 48 hours of its presentation. The L.C. limit sanctioned by Union Bank is linked to SOD facility and all along the respondents used to make payment upfront against their monthly energy bill by availing SOD facility for lack of LC to cover the full amount of the BST bills. Thus, there can not be any reason to presume that Gridco should have negotiated the LC in place to receive the full payment, since the amount of LC did not cover the full bill amount. If the payments are made by a mode other than through LC and within a period of one month of presentation of bills, a rebate of 1% will be allowed as per BST order dtd. 22.3.07. This throws the responsibility on the respondents to follow the mode of payment which ensures 2% full rebate against BST bills i.e., through LC or upfront. Neither the respondents have paid upfront the full amount of their bill nor in LC within 48 hours of the presentation of the bill in full.

5. He also further submitted that Gridco have filed the above review petitions for reconsideration of the Commission as there are errors apparent on the face of the records which are given below:
 - (i) Since the payment were usually made by the respondents upfront and the LC in place was not sufficient to cover the full bill amount, it is not correct to hold that there was no legal difficulty on the part of Gridco to ensure receipt of the full payment by invoking letter of credit, which is an error apparent on the face of the record.
 - (ii) As the respondents were not paying the full bill value upfront as was the usual practice with them and alternatively to negotiate for payment through LC. They cannot be allowed to take advantage of both ends by

neither placing the LC to cover the full bill amount nor making payment in full upfront. On the face of this a consideration and weightage in favour of the respondents is totally un-equitable and is an error apparent on the face of the order.

- (iii) It was not possible in part of the Gridco to take up the matter with the Bank for payment of the balance amount of BST bill after part payment made by the respondents on the day end of 7th May, 2007 on the same date as regards payment through LC. The matter taken up with Bank on 08.05.07 and the balance was remitted by Bank to Gridco on the same day. Hence it can not be said that the petitioner did not utilize the authority given to it to encash the LC within the stipulated period of rebate. This is an error on the face of the record.
 - iv) As per direction of the Commission the loss rebate of 1% on Rs.46.93 cr which amounts to Rs.46.93 lakh in case of NESCO and on Rs.72.27 cr which amounts to Rs.72.27 lakh in case of WESCO are to be made good from the BST bills of the respondents for the month of Sept,2009 to be raised in Oct,2009 would be the additional cost and loss to the petitioner while it will result in a financial benefit to the respondents, who have not incurred such amounts as their expences and also not complied with the commercial terms and conditions approved by the Commission.
 - v) The sprit of the BSP Order dated 22.03.2007 to enforce timely payment to Gridco by the respondents are defeated, if the respondents intentionally avoiding the payment by giving wrong advice to the UBI are allowed to get the rebate and it would tantamount to enriching the respondents at the cost of Gridco and would be an un-equitable and wrong precedent.
6. Mr. G.B.Swain, DGM(F),CSO has stated that as Gridco has allowed 1% rebate on the BSP bill amount to the respondents , being aggrieved for lower rebate the respondents had filed their petitions before the Commission . The said petitions were registered as Case Nos.43 &44 of 2009 and were disposed of on 31.07.2009 by the Commission with the following directions :
- The loss of 1 % rebate on Rs.46.93cr which amounts to 46.93 lakh in case of NESCO and on 72.27cr which amounts to 72.27 lakh are to be made good by

Gridco and Gridco should adjust the same from the BST bills of the respondents for the month of Sept, 2009 to be raised in Oct,2009.

Inspite of the specific direction of the Commission Gridco neither adjusted the disallowed rebate amounts of the respondents in the BST bills of Sept,2009 nor sought for time before the Commission , but it has filed the above petitions for review of the aforesaid Order of the Commission passed in Case Nos.43 &44 of 2009.

7. Mr.Swain also stated that the material documents which were not produced earlier are filled in the present review petitions as Annexure- I&II by Gridco were already submitted by the respondents in case Nos. 43 & 44 of 2009 as Annexure-III and the L.C. limit in Annexure-II sanctioned by UBI, which at all are not new documents or facts either. These are the letter of the Bank addressed to Gridco and were received well before the proceedings of the instant case. As Gridco raised that the L.C. limits were not adequate, it is an after thought of Gridco, just to not allow the legitimate rebate of the respondents. If that being the case now Gridco could realized the full amount through LC on next day of the due date i.e., 8.5.2007. Both the documents as well as facts were well known to Gridco. Those facts could not have been brought the facts before the Commission during the proceedings of the matters. He prayed the Commission to dismiss the review petitions of Gridco as there is no error apparent on the face of the record.
8. After hearing the parties, perusal of the case records and having carefully gone through the submissions made by them, the Commission is of the view that the present petitions of GRIDCO for review of the Commission's order dtd.31.07..2009 is not maintainable on the following grounds: -

- a) The Commission's order dtd.31.07..2009 passed in Case Nos.43 & 44 of 2009 has no drawback, mistake or an error apparent on the face of the record, which would attract review of the aforesaid order. In order to have sufficient basis for review of an order, following grounds needs to be satisfied.

- i. There has to be discovery of new or important facts or evidence
- ii. The error has to be apparent and not to be detected by a process of reasoning

- iii. The review petition has a limited purpose and cannot be allowed to be an appeal in disguise.
- b) The grounds of prayer in the review petition have been extensively dealt in the Commission's order in question and review petitions do not satisfy any of the above conditions.
- c) The review petitions are not in conformity with the Hon'ble Supreme Court's order in case of Parison Devi and others Vrs. Sumitri Devi and others. The relevant extract of such judgment is quoted below: -
- i. Under Order 47 Rule 1 CPC a Judgment may be open to review inter-alia if there is a mistake or an error apparent on the face of the record. An error which is not self evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review under Order 47 Rule-1 of CPC, 1908. In exercise of the jurisdiction under Order 47 Rule-1 of CPC, it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has a limited purpose and cannot be allowed to be "an appeal in disguise".
9. After perusal of the case records produced earlier and now produced by GRIDCO. We find that all these material facts were placed before the Commission during the hearing of the Case Nos. 43 and 44 of 2009 as indicated in para-7 above. No new material fact has been brought to the notice of the Commission now nor there is error apparent on the record. In view of this and the guiding principle to exercise the power to review laid down by the Hon'ble Supreme Court as indicated vide para8(c) above, the present review petitions of GRIDCO are not fit for admission and stands dismissed.
10. Accordingly, the cases are disposed of.

Sd/-
(B.K. Misra)
Member

Sd/-
(K.C. Badu)
Member

Sd/-
(B.K. Das)
Chairperson