

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. 04/2011

GRIDCO Petitioner

Vrs.

1. Global Energy Pvt. Ltd. & others
2. Secretary, Ministry of Power, Govt of India
3. Commissioner-cum-Secretary, Department of Energy, Govt. Of Orissa
4. Chairman-cum-Managing Director, OPTCL
5. Shri. Ramesh Chandra Satapathy
6. Shri R.P. Mahapatra Respondents

In the matter of: Application for review of Order of dtd. 18.,09.2010 passed in Case No. 2/2007.

ORDER

Date of Hearing: 07.6.2011

Date of Order: 25.08.2011

1. Shri N. C. Panigrahi, Sr. Advocate, Shri L.N. Mohapatra & Shri S. R. Panigrahi, Advocate on behalf GRIDCO-Petitioner, Shri Sanjay Sen, Advocate & Shri Rajiv Yadav, Advocate- Respondent on behalf of Global Energy Pvt. Ltd., Shri A. K. Mohanty, GM (R&T), OPTCL, Shri S. Pradhan, Dy. Secretary, DoE, GoO, Shri R. P. Mohapatra and Shri R. C. Satapathy are present.
2. This Petition has been filed by GRIDCO u/s 94 of the Electricity Act, 2003 seeking review of the Commission's order dtd. 18.09.2010 passed in case No. 2 of 2007. In the said order Commission granted intra-state trading licence to M/s Global Energy Pvt. Ltd for trading 50 MU of electricity per month (600 MU per annum) inside the state of Orissa. The petitioner, GRIDCO in its review petition has raised following grounds which are necessary to be considered for review of the Commission's order dated 18.09.2010.
 - (a) The Petitioner having been left with considerable revenue gap in its ARRs of successive years to be bridged from trading of power, the remedy to over

come the impact of trading of 600 million units by the Respondent No.1 on that gap has not been specified.

- (b) The meager solace that the revenue gap of Petitioner shall be recognized when need arises leaves the Petitioner to an uncertain and undetermined future which amounts to no consideration of its grievance/objection.
- (c) While fully appreciating the concern of GRIDCO in realizing the gap in ARR and the efforts it needs to make to bridge the gap through UI and trading it, cannot castigate by holding that GRIDCO all along have been taking the benefit of monopoly trading of surplus power. This by itself amounts non-consideration of the objection of GRIDCO since GRIDCO has always been left with huge revenue gap in its ARR and the benefit from trading, if any, has been passed on to consumers by way of truing up.
- (d) The observation that “being the sole buyer in the State, GRIDCO continues to dictate terms, as a result thereof is a disincentive on the part of CGPs and other generators to maximize their generation and supply to the grid” is an assumption not based on proven facts in the pleading of parties. On the face of the fact that Hon’ble Commission has determined the price to be paid to CGPs, the question of any offer of disincentive by GRIDCO does not arise and such observations amount to error apparent on record.
- (e) The observation that GRIDCO has availed power from the captive generations in order to meet the unforeseen power deficit situation in the State during the year 2009-10, GRIDCO is yet to pay power supply bills of most of the Captive Generators since December, 2009 to March, 2010 for about Rs.150 crore is also not based upon proven facts in the pleadings of parties. It is also an error apparent on the face of the record. It violates the principles of natural justice since such question neither arose between parties nor opportunity of hearing on that question was given to GRIDCO.
- (f) The observation that there will be more surplus generation in the State compared to the quantum traded by GRIDCO is based on future contingencies but not on present ground realities of deficit. In a state of visible surplus scenario more traders may come forward with similar applications which ultimately will lead GRIDCO to suffer the revenue gap.

- (g) The Respondent No. 1 having obtained an inter-state trading license of 'F' category from the CERC, his application for an intra-state trading license had become redundant by virtue of Rule 9 of Electricity Rules, 2005 effected from 08.06.2005 u/s 176 of the Electricity Act, 2003. The Respondent No. 1 having such license from CERC contributes its role to the power market, which leaves no room to realize any further goal of Sec.66 of the Electricity Act, 2003 by the impugned Order.
 - (h) The impugned order suffers from non-consideration of various vital issues raised by the Petitioner in regard to bonafideness conduct and trustworthiness of the petitioner with reference to various civil and criminal proceedings raised/pending against the Petitioner Company and its Promoters, Directors and office bearers. The impugned Order has not analyzed and has not dealt with those contentions nor has reached any conclusion thereon.
 - (i) The Respondent No. 1 filed its documents by Affidavit dtd.15.09.2010 relating to his counter submission recorded in Para-14 of the impugned Order. The Petitioner also filed its response on 19.10.2010 by affidavit dtd. 16.10.2010. But no opportunity of hearing was given to Petitioner on those. This amounts to violation of natural justice.
3. The Counsel for GRIDCO Shri N C Panigrahi submitted that GRIDCO on 19.10.2010 submitted a reply in response to the affidavit of GEL dtd. 15.09.2010. The Commission pronounced the order dtd. 18.09.2010 and therefore, the replies contained in GRIDCO's affidavit dtd. 19.10.2010 have not been taken into consideration by the Commission while pronouncing the said order dtd. 18.09.2010. The Hon'ble Supreme Court in one of its orders have held that if any document is not taken into consideration review can be made. The other points in the GRIDCO's prayer are also sufficient reasons for non-consideration of those points and hence review should be allowed. He further submitted that other respondents and objectors should also be heard and rehearing of the case should be conducted.
4. M/s Global Energy Pvt. Ltd. (Respondent No.1) submitted the following reply on the issue of admission of review application filed by GRIDCO:
- (i) The Commission, vide Order dtd. 18.09.2010, passed in Case No. 02/2007, was pleased to grant an intra-state trading license to GEL for trading up to 50 MUs per month in the State of Orissa. The said order has been passed by the

Commission after duly complying with the statutory procedure laid down in Section 15 of the Electricity Act, 2003. It may be relevant to mention that the Commission was seized of GEL's license application for more than three years, during which all the objections raised by GRIDCO were considered in detailed deliberations undertaken by this Commission.

- (ii) The present application, seeking review of the Order dtd. 18.09.2010, passed by this Commission in Case No. 02/2007, is not maintainable, and ought to be dismissed at the threshold. In this regard, it is submitted that the subject review application has failed to disclose any error apparent to mistake on the face of the record, which would justify a review of the order passed by this Commission.
- (iii) In addition to the aforesaid, it may kindly be noted that GRIDCO had previously filed a review application against order dtd. 06.05.2008, whereby this Commission, after holding that GEL "*is not ineligible to carry on the business of power trading in the State*", directed GEL to give a public notice under Section 15 (5) of the Electricity Act, 2003. This Commission, vide order dtd. 01.10.2009, was pleased to reject the said previous review application, as being devoid of any merit.
- (iv) The grounds for urging review of the order dtd. 18.09.2010 pertain to the perceived adverse impact on the financial position of GRIDCO, post grant of an intra-state trading license to GEL. Similar grounds had been urged by GRIDCO in its previous review application as well, which had been dealt with by this Commission in its Order dtd. 01.10.2009 as follows:

"14.... The Commission, after notice that GRIDCO had been burdened with heavy liabilities from the past, and that through its tariff orders, the Commission has evolved a scheme to give adequate relief to GRIDCO, reached a finding that such factors cannot be sufficient and proper grounds for refusal of an intra-State trading license in the State to an otherwise eligible entity. Given the specific statutory mandate cast upon the Commission to issue trading license to eligible entities and promote market development (including trading)- which mandate admits of no exception – the Commission was of the considered view that GRIDCO's objections stemming from the perceived adverse impact on its revenues could not be accepted, irrespective of the past losses inherited by it. Any perceptible adverse financial impact on GRIDCO arising on account of operations of an intra-State trading licenses may be a relevant factor for consideration while approving GRIDCO's ARR for future years, but the same cannot be urged at this stage to oppose the license application of an otherwise eligible entity."

It is evident that the Commission has adequately considered the issue of perceived adverse financial impact on GRIDCO and, therefore, the same issues can be urged only by way of an appeal before the appropriate forum. Needless to mention, it is settled law that an aggrieved party cannot seek re-appreciation of evidence under the guise of a 'review'.

- (v) Even though Section 94 (1) (f) of the Electricity Act, 2003 does not specify the grounds on which an aggrieved party may seek review of an order, the power of review must necessarily be exercised in extraordinary circumstances, and to this end, Order 47 Rule 1 of the Code of Civil Procedure, 1908 may provide useful guidance. Order 47 Rule 1 of the Code of Civil Procedure, 1908 is extracted hereunder for ready reference:

"Application for review of judgment –

(1) Any person considering himself aggrieved –

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order. (emphasis supplied)

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellant Court the case on which he applied for the review.

Explanation – The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgement."

It may not be out of place to mention that the Hon'ble Appellant Tribunal for Electricity in *Jayaswal NECO Limited v. Chhattisgarh State Electricity Regulatory Commission* (Appeal No. 186 of 2007), while dealing with the power of review in Paragraph-8 of the judgment, observed that "*generally speaking an order can be reviewed when there is an error apparent on the face of order, as provided for under Order 47 Rule 1 of the Code of Civil Procedure Code.*"

5. The Counsel for M/s Global Energy Pvt. Ltd (Respondent No 1) argued that there is no further scope for pleading afresh for review since all the materials were filed

within the cut off date stipulated by the Commission. GRIDCO has not produced any additional material. It is only reiterating the same arguments it had raised before the pronouncement of Commission's Order dtd.18.09.2010. The present case can't be continued to be open ended and it is unfair to give notice to the other respondents. GRIDCO must specify what materials exactly have been missed out and the new thing should be germane to the case and not extraneous. In order to review the case there has to be sufficient reasons for discovery of new facts and then Commission can consider the new material and decide whether it is fit to be considered for review. In view of all these facts the Counsel for GEL prayed that the review application filled by GRIDCO is devoid of any merit and deserves to be dismissed with cost.

6. Respondent No. 6 Shri R P Mohapatra submitted that the benefit arising out of the trading activity in case of GRIDCO is passed on to the consumers of Orissa. However, in case of GEL it is not known whether any benefit accruing out of trading activity would be passed on to the consumers of Orissa. Govt. of India in a circular in 2005 has barred any inter-state trader to trade as intra-state activity. It is not known how introduction of another trader besides GRIDCO can help the electricity sector in Orissa. GRIDCO at the present has receivable arrears of about Rs.3000 crores. It is not clear as to how much of such arrears should GEL bear. The payment mechanism for trading by GEL has not been addressed and whether some escrow mechanism would be in place.
7. The Commission have analysed the review petition of GRIDCO and also weighed very carefully the submission made by the petitioner GRIDCO and the respondent M/s GEL. Our observations and directions are as follows:
 - (a) GRIDCO in its submission for review have stated that Commission has left considerable revenue gap in the successive ARR's intended to be bridged from trading of power. However the remedy to overcome the impact of trading of 600 million units by GEL on that gap has not been specified. As regards consideration of revenue gap in the ARR of GRIDCO, the Commission have dealt this issue in the para 15 of the Order and how the gap has been bridged over the years by GRIDCO through UI and Expert earning. The Commission in the said Order have discussed about the spirit of Electricity Act, 2003 in order to introduce competition and to boost generation in the state. The Commission, therefore, observed that the revenue gap left in the ARR of the

petitioner has no relation to granting Intra-State Trading License to the respondent.

- (b) GRIDCO in the review petition has stated that, the Commission has not considered the objection of GRIDCO, by observing that GRIDCO all along have been taking the benefit of monopoly trading of surplus power. GRIDCO has also stated that the benefit from trading has been passed on to the consumers by way of trueing up. The Commission in this regard in Para 20 has observed that conferring monopoly of trading to GRIDCO can not go on for perpetuity and other players cannot be kept out of this. This would amount to negating the spirit of competition which is one of the hallmarks of the objectives of the Electricity Act, 2003.
- (c) GRIDCO in its petition has stated that the Commission's observation that GRIDCO being the sole buyer continues to dictate terms as a result there is disincentive on part of CGPs and other generators to maximize their generation and supply to the Grid to meet the power deficit situation in the State as well as for trading of surplus or bottled up power, is an error apparent on record. GRIDCO's such contention is not convincing as to how a mere observation of the Commission can amount to be an error apparent on the face of record.
- (d) GRIDCO has stated that Commission's observation regarding non-payment of power supply bills to captive generators since December, 2009 to March, 2010 for about Rs.150 crore is not based upon proven facts and apparent error on the face of the record. The Commission in this regard observes that it is a fact that GRIDCO has defaulted in such payment in spite of various orders of the Commission and various CGPs have filed cases against GRIDCO before the Commission for the non payment. The GRIDCO's petition that this is error apparent is not based on facts.
- (e) GRIDCO in its petition has stated that more traders may come forward with similar applications which ultimately will lead GRIDCO to suffer the revenue gap. This statement is a mere apprehension and not a sufficient ground for review.
- (f) GRIDCO has stated that in view of GEL possessing another Inter-State license from CERC, its application for an Intra-State Trading Licensee is redundant

by virtue of Rule 9 of Electricity Rules, 2005 and under section 176 of the Electricity Act, 2003. The Commission in this regard has elaborated the issue at Para 27 in its Order dtd. 18.09.2010 towards granting of Intra-State Trading License in spite of the fact that respondent possesses Inter-State Trading License from CERC. This statement is just a repetition of earlier contention raised by the GRIDCO which the Commission has considered in the said Order. Therefore, there is no error apparent on the face of record and hence no case for review on this ground.

- (g) GRIDCO has contended that the Commission has not considered regarding bonafideness, conduct and trust worthiness of the respondent with reference to various civil and criminal proceedings against the petitioner company and its promoters, Directors and office bearers. Such contention of GRIDCO is ill conceived as the Commission considered these facts in the said order and at para 25 observed that *“We are of the firm opinion that any criminal, civil and tax proceeding pending against the petitioner or its sister concern has no relevance to the granting of license to the petitioner under Section 14 of Electricity Act, 2003 read with Regulations 27 and 28 of OERC (Conduct of Business) Regulations, 2004 is concerned.”* There is therefore no apparent error or mistake in this regard and hence no case for review on this ground.
- (h) GRIDCO in its review petition has submitted that in the said order dated 18.09.2010, Commission has considered the affidavit of GEL dated 15.09.2010 without giving opportunity of hearing to GRIDCO on the said affidavit. GRIDCO filed a reply affidavit on 19.10.2010 which was not considered in the said order of the Commission.

Commission has gone into the details of the reply affidavit filed by GRIDCO on 19.10.2010 which was submitted much after passing of the order on 18.09.2010. This affidavit pertains to GRIDCO's view on the involvement of the applicant in various civil and criminal proceedings and net-worth certificate. The issues highlighted by the GRIDCO in its affidavit dtd. 19.10.2010 are as follows:

- i) CBI proceeding against Shri Harry Dhaul and Smt. Laxmi Dhaul – the promoters as still in docs awaiting trail for serious offences.

- ii) Arbitration with Tripura Electricity Department- GEL has defaulted in making payment of Rs.13374140/- to Tripura State Electricity Corporation Ltd.
- iii) Arbitration with Karnataka Power Transmission Corporation Ltd. – The entire arbitration proceeding with KPTCL was questionable and exposes GEL’s anti-public position.
- iv) Debt Recovery Tribunal (DRT) proceeding against Belgundi Cements Pvt. Ltd. – The documents show the financial liability incurred by sister concern M/s Belgundi Cement Ltd. shows a serious reflection and imposes a question mark on the health of its parent company.
- v) Net-worth Certificate – The net-worth of the GEL should be analysed with reference to all trading licenses either acquired or going to be acquired by GEL from other States to come at a comprehensive position.

8. The main grievance of the GRIDCO is that the documents furnished by respondent GEL on 15.09.2010 through affidavit after the hearing was concluded on 04.08.2010 was considered by the Commission in the back of the petitioner GRIDCO whereas affidavit filed by it on 19.10.2010 was not considered by the Commission as the order was passed on 18.09.2010. The petitioner in its affidavit dtd. 16.10.2010 filed on 19.10.2010 in para 4 has clearly stated that the respondent GEL filed the documents on 15.09.2010 before the order was passed on 18.09.2010 in response to the Commissioner’s earlier letter dtd. 19.03.2009 which was issued before hearing was concluded on 04.08.2010. Thus this was known to the GRIDCO when hearing was concluded on 04.08.2010 and GRIDCO had been raising these issues on matters of CBI inquiry, Tax Proceedings, Net-worth etc. at different stages including the review application filed on 21.07.2009 against the order dtd. 06.05.2008 (in Case No. 02/2007). The Commission had considered these aspects while disposing of the said review application as on 01.10.2009.

The Commission has also considered these issues adequately and dealt them in its said order dtd. 18.09.2010 at para 25. The relevant extract of the said para is quoted below:

“25. xxxxxxxxxx

In view of the position regarding various criminal, civil and tax proceeding etc. explained in para 14, we are of the firm opinion that

any criminal, civil and tax proceeding pending against the petitioner or its sister concern has no relevance to the granting of a license to the petitioner under Section 14 of Electricity Act, 2003 read with Regulations 27 and 28 of OERC (Conduction Business) Regulations 2004 is concerned.”

9. As regards the net-worth certificate and creditworthiness of the company the Commission analyzed their audited accounts ending on 31.03.2005 to 31.03.2009 and then considered the same as per Regulation 28 (2) of OERC (Conduct of Business) Regulation, 2004. This has been adequately dealt in Para 26 of the Commission’s Order dtd. 18.09.2010 the extract which is given below:

“26. xxxxxx

To satisfy the condition, the audited Balance Sheet for the year ending 31.03.2005 to 31.03.2008 and provisional balance sheet as on 31.03.2009 of the petitioner were scrutinized. The following table reveals the networth and capital adequacy of GEL.

| Position as on (Rs. in Cr) | | | | | |
|-----------------------------------|-------------------|-------------------|-------------------|-------------------|-------------------|
| Particulars | 31.03.2009 | 31.03.2008 | 31.03.2007 | 31.03.2006 | 31.03.2005 |
| <i>Networth</i> | <i>62.03</i> | <i>37.98</i> | <i>27.14</i> | <i>21.62</i> | <i>14.86</i> |
| <i>Total loan</i> | <i>11.01</i> | <i>8.18</i> | <i>4.31</i> | <i>1.23</i> | <i>1.35</i> |
| <i>Debt /net-worth</i> | <i>0.18</i> | <i>0.22</i> | <i>0.16</i> | <i>0.057</i> | <i>0.091</i> |

It is observed that the net-worth of the company is much higher compared to the debt of GEL. Also the petitioner satisfies the condition of net-worth requirement as specified in condition 28(2) of (Conduct of Business) Regulation, 2004. The capital adequacy as seen from the above table is also satisfactory since the debt / networth ratio is less than unity. Hence the Commission is satisfied with creditworthiness of the petitioner as a prospective Intra-State trading licensee.”

10. The Commission in this regard finds that there is no material presented by GRIDCO in the counter affidavit dtd. 19.10.2010 which tantamount to omission or discovery of any other facts which were not considered by the Commission earlier. Hence, non-consideration of the issues raised by GRIDCO is not backed by any additional evidence.
11. In view of the above analysis of the review petition of the GRIDCO, the Commission finds that there is no omission of fact or discovery of new fact and there is also no error apparent found on the face of the record, in the said order of the Commission. The review petition of GRIDCO is mere repetition of objections earlier reiterated before the Commission.
12. After hearing the parties, perusal of the case records and having carefully gone through the submissions made by them as analyzed in the preceding paragraphs, we

are of the view that the present petition of GRIDCO for review of this Commission's order dtd.18.09.2010 is not maintainable on the following grounds: -

- a) The Commission's order dtd.18.09.2010 passed in Case Nos.2/2007 does not suffer from any mistake which is an error apparent on the face of the record and 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.
13. Further, 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 judgement is quoted below: -

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"

14. In view of the position elaborated from para 7 to 13, the present review is dismissed.

Sd/-
(B K Misra)
Member

Sd/-
(K.C. Badu)
Member

Sd/-
(B. K. Das)
Chairperson