

**ODISHA ELECTRICITY REGULATORY COMMISSION
PLOT NO.-4, CHUNOKOLI, SHAILASHREE VIHAR
BHUBANESWAR - 751 021**

**Present: Shri U. N. Behera, Chairperson
 Shri S. K. Parhi, Member
 Shri G. Mohapatra, Member**

Case No. 32/2018

M/s. Vedanta Ltd.

..... Petitioner

Versus

M/s. GRIDCO Limited

..... Respondents

In the matter of: Application under Section 94(1)(f) of the Electricity Act, 2003 read with Regulation 70 of the OERC(Conduct of Business) Regulations, 2004 and other enabling provisions for seeking review of order dated 26.02.2018 of the Commission passed in Case No.38 of 2016.

For Petitioner: Shri Buddy Ranganathan, Advocate and Shri Hemant Singh, Advocate.

For Respondent: Shri S. K. Panda, GM (PP) and Ms. Susmita Mohanty, AGM (Elect.) of GRIDCO Ltd., Shri B. Mehta, CLD, SLDC, Shri Bijay Das, GM, OPTCL and Ms. Niharika Pattnayak, ALO, DoE, GoO

ORDER

Date of hearing: 03.11.2020

Date of order:08.01.2021

The present petition has been filed by M/s. Vedanta Ltd. under Section 94 (1) (f) of the Electricity Act, 2003 read with Regulation 70 (1) of OERC (Conduct of Business) Regulations, 2004 for review of order dated 26.02.2018 of the Commission passed in Case No. 38/2016 for re-determination of tariff in terms of the judgement dated 10.05.2016 in Appeal No. 25 of 2014 passed by the Hon'ble APTEL.

2. The Petitioner submits that M/s. Sterlite Energy Ltd. had executed a consolidated Power Purchase Agreement (PPA) with GRIDCO on 19.12.2012. The said PPA along with tariff for the period 01.01.2011 to 31.03.2014 was also approved by the Commission vide order dated 12.06.2013 passed by the Commission in Case No. 117 of 2009, 31 of 2010 and 56 of 2012. While the aforesaid petitions were pending before the Commission, M/s. Sterlite Energy Limited (hereinafter referred to as "SEL") apprised the Commission on its amalgamation into the present Petitioner company i.e. M/s. Vedanta Limited, however, the approval for the said amalgamation was obtained from the Hon'ble High Court of Madras

after the issuance of the order dated 12.06.2013 in Case Nos. 117 of 2009, 31 of 2010 and 56 of 2012. The petitioner further submitted that since the approval for amalgamation was obtained after the pronouncement of order dated 12.06.2013, the tariff decided by the Commission vide the aforesaid order was required to be re-determined in light of the new debt-equity ratio. Therefore, the Petitioner filed a petition, bearing Case No. 54 of 2013, seeking review of the order dated 12.06.2013, which was disposed of by the Commission vide its order dated 25.09.2013, with an observation that it was beyond the scope of review to take into account the factual development of scheme of amalgamation. Though, the Commission refused to entertain the review petition on issue of changed debt-equity structure, the Petitioner was granted the liberty to approach the Commission once the consolidated accounts were available. Subsequently, the Petitioner approached the Hon'ble APTEL challenging the order dated 12.06.2013, bearing Appeal No. 25 of 2014, wherein the Hon'ble APTEL, vide its judgment dated 10.05.2016 remanded the matter to the Commission to determine the tariff afresh in light of the changed debt equity structure.

3. The Petitioner has further submitted that as per the directions of the Hon'ble APTEL, they have filed the Petition No. 38 of 2016 for re-determination of tariff on account of change in the capital structure of the Petitioner Company after amalgamation. The Commission has disposed off the Petition vide order dated 26.02.2018 (impugned order) with the directions that no interest/ carrying cost shall be payable by GRIDCO on the differential tariff payable for the period 01.01.2011 to 31.03.2014.
4. Aggrieved by the impugned order, the Petitioner filed the present petition seeking review of the impugned order to the extent the impugned order denies the component of interest/ carrying cost accrued in favour Petitioner due to the differential amount on account of this revised charges for the past period i.e. for the tariff period 01.01.2011 to 31.03.2014.
5. The Petitioner submits that the tariff of the Petitioner's power plant has been determined under the provisions of CERC Tariff Regulation, 2009 for the period 2010-2011 to 2013-2014. The petitioner has further submitted that Regulations 6 (5) of the CERC Tariff Regulation, 2009 provides that if the tariff recovered is less than the tariff approved by the Commission, the generating company shall recover the under-recovered amount from the beneficiary along with simple interest at the rate equal to the short-term Prime Lending Rate of State Bank of India as on 1st April of the respective year. The Commission while allowing the differential amount on account of the changed debt-equity structure did not allow the component of interest/ carrying cost which is contrary to the provisions of the

CERC Tariff Regulation, 2009. The relevant provision of the above mentioned CERC Tariff Regulations, 2009 are reproduced below:

6. *Truing up of Capital Expenditure and tariff*

- (5) *Where after the truing up the tariff recovered is less than the tariff approved by the Commission under these regulations the generating company or the transmission licensee, as the case may be, shall recover from the beneficiaries or the transmission customers, as the case may be, the under recovered amount along with simple interest at the rate equal to the short-term Prime Lending Rate of State Bank of India as on 1st April of the respective year."*

The petitioner has submitted that the impugned order has been passed contrary to the above provisions of law, which is an error apparent on record.

6. The Commission has allowed the recovery of differential amount on 26.02.2018, however, such differential amount was due to be recovered by the Petitioner during the tariff period starting from 01.01.2011 to 31.03.2014. Therefore, the Petitioner is entitled for recovery of applicable interest on the differential amount w.e.f. 26.02.2018. Further, the Commission has held that any delay in payment of the bill raised on account of the differential amount shall attract surcharge as per the said Regulation. The petitioner has submitted that the intent of allowing surcharge, in the event of delay in making payment of bill raised on account of the differential amount, is to compensate the Petitioner with the time value of money. Seeking reference to Section 61 (d) of the Electricity Act, 2003 which talks about the recovery of the cost of electricity in reasonable manner, the petitioner has submitted that recovery of the cost of electricity in reasonable manner can only happen when the cost incurred by the generator for generating such electricity is recovered at the right time i.e. (the date on which such cost becomes due to be payable by the beneficiary).

7. The Petitioner further submits that the principle of allowing carrying cost is well settled and the same has also been allowed by the Hon'ble APTEL in several cases. The Hon'ble APTEL in the case of M/s. SLS Power Limited Vs. Andhra Pradesh Electricity Regulatory Commission & Others, being Appeal No. 150, 166, 168, 172, 173 of 2011 and 9, 18, 26 and 38 of 2012, vide its judgment dated 20.12.2012 has held as follows:

"35.5 The principle of carrying cost has been well established in the various judgments of the Tribunal. The carrying cost is the compensation for time value of money or the monies denied at the appropriate time and paid after a lapse of time. Therefore, the developers are entitled to interest on the differential amount due to them as a consequence of re- determination of tariff by the State Commission on the principles laid down in this judgment. We do not accept the contention of the licensees that they should not be penalized with interest. The carrying cost is not a penal charge if the interest rate is fixed according to commercial principles. It is only a compensation for the money denied at the appropriate time."

8. The petitioner submits that Hon'ble APTEL vide its various judgments laid down the principle regarding entitlement of interest/ carrying cost for deferred recoveries wherein the Generator/ Licensee is entitled to carrying cost on his claim of legitimate expenditure if the expenditure is:
- (a) accepted but recovery is deferred, e.g. interest on regulatory assets;
 - (b) claim not approved within a reasonable time; and
 - (c) disallowed by the State Commission but subsequently allowed by the superior authority".
9. In the present case, the changed debt-equity structure on account of the amalgamation was not allowed by the Commission while determining the tariff vide the order dated 12.06.2013. However, the changed debt-equity structure was considered by the Hon'ble APTEL and the same was allowed vide their judgment dated 10.05.2016. Hence, the present case falls under category (c) as mentioned herein above on account of the fact that the changed debt-equity structure disallowed by this Commission was subsequently allowed by the Hon'ble APTEL. Hence, the Petitioner is entitled to claim carrying cost/ interest based on the principles laid down by the Hon'ble APTEL.
10. In view of the above submissions, the Petitioner prays that the Commission may take on record the present submission and allow the recovery of carrying cost/ interest on the differential amount at the short term prime lending rate of SBI as per CERC tariff Regulations, 2009.
11. The Respondent GRIDCO submits that the present application has been filed by the Petitioner M/s. Vedanta Ltd for review of the Commission's order dated 26.02.2018 and they have prayed for the following reliefs: (a) Carrying cost/Interest on the differential amount be permitted at short term prime lending rate of State Bank of India as per CERC (Terms and Conditions of Tariff Regulations) 2009 or such other rate as the Commission may deem fit, to be levied from 01.01.2011 upto the payment date (b) Calculation of Interest on Loan Capital be done as per CERC Regulations, 2009.
12. GRIDCO further submits that the petitioner has contended in their application that the disallowing interest is an error apparent on the face of the record. There was no apparent error in the Commission's order dated 26.02.2018 in Case No. 38 of 2016, as the said case was filed by the Petitioner and admitted by the Commission on consideration of the order dated 10.05.2016 of Hon'ble APTEL in Appeal No. 25 of 2014. The Petitioner has also admitted that they had not prayed for the carrying cost in their application admitted under

Case No. 38 of 2016. The prayer of the Petitioner in Case No. 38 of 2016 filed vide affidavit dated 16.07.2016 was as follows:

Para 9, Page 9:

" That, in view of the above, it is prayed that this Hon'ble Commission considers the consolidated accounts submitted by the Petitioner for the revised debt: equity structure of the Petitioner for determination of tariff with retrospective true-up and allows a revision in fixed charges payable to the Petitioner in light of the findings of the Hon'ble Appellate Tribunal."

13. Thereafter, the petitioner had made submissions vide affidavit dated 20.01.2017, 23.06.2017, 10.07.2017 respectively wherein, the Petitioner had prayed only for determination of the tariff considering revised debt & equity structure. It is pertinent to mention that the Hon'ble APTEL have also not given any such observations in their final judgement dated 10.05.2016 in Appeal No. 25 of 2014 to consider levy of carrying cost on redetermination of tariff with effect from 01.01.2011. The relevant Para of the judgement dated 10.05.2016 is reiterated below:

Para 7(g), Page 34:

"We are of the considered view that pursuant to the amalgamation, the consolidated audited accounts of new company as and when made available before the State Commission, communicating therein the revised debt equity structure of the new entity with all other relevant details, for determination of tariff, would be examined appropriately by the State Commission."

14. It is to be noted here that the Hon'ble Madras High Court pronounced its order on 25.07.2013 granting merger of Sterlite Energy Limited which was a subsidiary of Sterlite Industries Limited along with other subsidiaries with its holding company with effect from 01.01.2011. The Commission carried out hearings of case No. 38 of 2016 on 21.09.2016 (on question of admission and hearing), 06.01.2017, 25.04.2017 and 04.07.2017. The Commission pronounced the final order on 26.02.2018. Thus, the Petitioner had ample opportunity to place on record its contentions regarding carrying cost (if any) through the submissions made vide various affidavits.
15. Further, it is submitted that the Petitioner simultaneously filed Case No. 38 of 2016 before the Commission and also challenged the Hon'ble APTEL judgement dated 10.05.2016 in Civil appeals before Hon'ble Supreme Court of India challenging the APTEL Judgement. The Hon'ble Supreme Court finally disposed off the Civil Appeals in their order dated 10.03.2017 in C.A. No. 30263 and 30264 of 2016. Therefore, the Hon'ble APTEL judgement dated 10.05.2016 in Appeal No. 25 of 2014 attained its finality on 10.03.2017. The Commission had heard the matter in Case No. 38 of 2016 finally on 04.07.2017 along

with multi-year tariff application in Case No. 95 of 2013 (for control period 2014-19) and finally disposed off the application on 26.02.2018. Therefore, the Petitioner's claim for carrying cost with effect from 01.11.2011 till date of payment is untenable and be dismissed.

16. The background of matters of various Appeals and the Hon'ble APTEL judgement cited by the Petitioner are different from the instant case of the Petitioner and therefore are not tenable under this instant review Petition. Therefore, in view of the aforementioned facts the present review application is liable to be dismissed by the Commission as there is no apparent error in the impinged order.
17. During hearing on 27.04.2019, the representative of petitioner has submitted that the present case is filed for review of the order dated 26.02.2018 of the Commission passed in Case No. 38/2016, which was passed by the three Members of the Commission. As one of the Members had demitted office after completion of his tenure and the said post was vacant, he prayed the Commission to adjourn the hearing of the matter until the new member joined in the Commission. Accordingly, after joining of the new Member the case was heard on 03.11.2020.
18. Heard both the Petitioner and Respondent GRIDCO. The written submission and rejoinder submitted by the Petitioner and Respondents are taken on record.
19. As per Section 94(1) (f) of the Electricity Act, 2003, this Commission has the same power as are vested with the Civil Court under the Code of Civil Procedure, 1908 in respect of reviewing its decisions, directions and orders among others.

As per Order 47 Rule 1 of the Civil Procedure Code, review of an order can be made on the following grounds:

- (a) Error apparent on the face of the record;
- (b) New and important matter or evidence which is relevant for the purpose was discovered which could not be produced after exercise of due diligence or if there appears to be some mistake;
- (c) Any other sufficient reason.

Error contemplated under the rule must be such that is its apparent on the face of the record and not an error which is to be fished out and searched. It must be an error of inadvertence.

20. The Commission, in its Impugned Order dated 26.02.2018 has observed as follows:

“37. In conclusion, the Commission direct as follows:

- (a) *M/s. Vedanta Ltd. will submit the revised bill of fixed charges month-wise based on the approved Annual Fixed Charges and the month-wise Energy Charge as per formula given in this Order.*

XXXXXXXXXX

- (d) *The differential amount on account of these revised charges for the past period shall be recovered from GRIDCO in six half-yearly installments without any interest. The first installment shall be due on 30th day of presenting the bill in final shape in accordance with Regulation 6.6 of OERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2014. Any delay in payment of the bill shall attract surcharge as per the said Regulation."*

21. From the above and also the submission made by the petitioner, it is clear that the dues of GRIDCO starts from the date M/s. Vedanta submits the revised bill of fixed charges. The Commission had rejected the review application of M/s. Vedanta vide order dated 25.09.2013 in Case No. 54 of 2013 since the present Petitioner failed to produce order of Hon'ble High Court of Madras on the amalgamation of subsidiaries before issuance of order by the Commission on 12.06.2013 determining the tariff of the Petitioner for the period from 01.01.2011 to 31.03.2014. The Commission had also granted liberty to the Petitioner to submit its consolidated account when it would be available. Hon'ble APTEL vide its judgment dated 10.05.2016 had also remanded the matter to the Commission to determine the tariff afresh in light of the changed debt equity structure. Accordingly, the Commission has determined the tariff of the relevant period and has directed the petitioner to submit revised bills in its order dated 26.02.2018. Therefore, we do not see any reason for any apparent error creeping into our order. The Petitioner has also not pointed out any of them. The present petition appears more to be an appeal than prayer to review our order and, therefore, does not merit consideration.
22. Accordingly, the case is disposed of.

Sd/-

(G. Mohapatra)
Member

Sd/-

(S. K. Parhi)
Member

Sd/-

(U. N. Behera)
Chairperson