

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

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

**Case No. 62/2018**

**M/s. Vedanta Ltd.**  
                     **Versus**  
**M/s. GRIDCO Limited**

..... **Petitioner**

..... **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 29.06.2018 of the Commission passed in Case No.95 of 2013.**

**For Petitioner:**        Shri Hemant Singh, Advocate and Shri Ninad Nigam M/s Vedanta Ltd.

**For Respondent:**     Shri L. N. Mohapatra and Ms. Susmita Mohanty, AGM (Elect.) of GRIDCO Ltd., Ms. Banishree Pradhan, OPTCL, and Ms. Sonali Patnaik representative of DoE, GoO. Nobody present on behalf of SLDC.

**ORDER**

**Date of hearing: 30.06.2020**

**Date of order:03.11.2021**

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 29.06.2018 of the Commission passed in Case No. 95/2013 for approval of Multi Year Tariff for supply of Power to GRIDCO for FY 2014-15 to 2018-19.

2. The Petitioner submits that the present Review Petition has been filed owing to the following errors apparent on the face of record of the Impugned Order:

- a) the Commission denied the interest/carrying cost on the differential amount to be payable by GRIDCO on the basis of the revised tariff. (*Para 53 (c) of the Impugned Order*).
- b) the Commission in the Impugned Order (*para 38 of the impugned order*) determined the Interest on Loan Capital erroneously by taking into consideration one month receivables instead of two months.

3. The Petitioner submits that the Commission in its order dated 29.06.2018 passed in Case No. 95 of 2013 on the issue of interest/ carrying cost held as follows:

*“53. 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.*

*(b) XXXXXXXXXXXXXXXX.*

*(c) The differential amount on account of these revised charges for the past period shall be recovered from GRIDCO in six half-yearly instalments without any interest. The first instalment 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.”*

4. In this context, the Petitioner submitted that the Commission vide the impugned order determined the final tariff for the control period 01.04.2014 to 31.03.2019. The said tariff was higher than the earlier provisional tariff as approved by the Commission in GRIDCO ARR orders for respective financial years from FY 2014-15 to 2018-19. However, based on the said differential tariff, which was to be made retrospectively applicable, the Commission did not allow the carrying cost/ interest associated with such differential tariff. As per the Review Petitioner, such, non-allowance of carrying cost/ interest on the differential tariff is an error apparent on face of record. It is submitted that granting carrying cost/ interest on the differential tariff is a regulatory principle based on the principle of time value of money or the monies denied at the appropriate time and paid after a lapse of time.

5. 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."*

6. The Petitioner submitted that in the light of the aforementioned settled regulatory and financial/ commercial principle, the carrying cost/ interest on differential tariff ought to be granted, in terms of Section 61(b) of the Electricity Act, 2003.
7. The Petitioner further submitted that the Respondent/ GRIDCO argued that the delay in determination of final tariff, was attributable to the Review Petition and therefore, the Commission ought to not grant interest/ carrying cost. The aforesaid argument of the Respondent is fundamentally flawed, for the reason that there was no delay on the part of the Petitioner in either initiating proceedings before the Commission or before the Hon'ble Appellate Tribunal. As such, the entire delay was on account of the pending legal proceedings, for which the Review Petitioner ought to be granted with interest cost/ carrying cost. Further, GRIDCO during the hearing held on 30.06.2020 argued that the claim of carrying cost was neither held by the Hon'ble APTEL in the judgement dated 10.05.2016, as payable, nor was pleaded by the Review Petitioner in its tariff petition. The said argument of the Respondent/ GRIDCO is fundamentally flawed. As regards the Hon'ble APTEL, it is submitted that the judgment dated 10.05.2016 in Appeal No. 25 of 2014 was a generic order, which simply remanded the matter before the State Commission for re-determination of tariff. Hence, there was no requirement for the Hon'ble APTEL to have specifically recorded allowing carrying cost/ interest, just like any other tariff parameter. When tariff is determined, then the Commission has to consider all tariff parameters, including carrying cost/ interest, which is a commercial principle, guaranteed under Section 61(b) of the Electricity Act, 2003.
8. The Petitioner further submitted that they hadnot got an opportunity of hearing on the issue of interest and consideration of two months receivables in computation of interest on working capital and neither was this argued or submitted by any of the parties during the course of hearing/ advancing arguments. Therefore, the Impugned Order is apparently not in consonance with the Regulations of the Commission and is thus, contrary to statute and hence, deserves to be reviewed on this ground alone. The present direction disallowing interest is an error apparent on the face of the record.
9. The Petitioner further submitted that in terms of the Interest Act, 1978, interest is to be awarded at the documented rate of interest from the date from which such sum becomes due till the date of institution of proceedings. Further, Section 34 of the Code of Civil Procedure, 1908 ("CPC") stipulates that interest ought to be awarded for the period from the date from which such sum becomes due till the date of institution of proceedings and from the date of

the suit to the date of the decree and from the date of the decree to the date of payment. Thus, from the above, it is observed that interest is payable for three distinct periods:

- i) the date from which such sum becomes due till the date of institution of proceedings;
- ii) and from the date of the suit to the date of the decree; and
- iii) From the date of the decree to the date of payment.

10. The petitioner further submitted 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".

11. The Petitioner further submitted that on the issue of Computation of interest in working capital the Commission held as follows:

*"38. The Commission works out the interest on working capital based on the CERC Regulations for the period 01.04.2014 to 09.09.2014 and for the period 10.10.2014 to FY 2019 based on OERC Regulations, 2014 as follows: ....."*

It is submitted that the reliance of the Commission on the aforesaid regulations is completely erroneous on account of the fact that the Power Purchase Agreement (PPA) dated 19.12.2012 was executed during the prevalence of the tariff regulations of the Central Commission issued in the year 2009 [termed as *CERC (Determination of Tariff) Regulations, 2009*]. It is a regulatory principle that the generator has to recover its cost of electricity as guaranteed under Section 61 (d) of the Electricity Act, 2003. Further, Section 61 (b) of the aforesaid Act provides that the generation of electricity has to be conducted on "commercial principles". It is submitted that the principal behind providing interest in working capital, is that for the revenue recovery of the regulated entity a minimum time is provided to the beneficiaries. This means that for meeting daily and running expenses in the aforesaid minimum time, the regulated entity has to arrange working capital from, either external lenders, or through internal accruals. The said capital, which is arranged and utilised by the regulated entity to sustain for the aforesaid minimum time, carries a cost to the same, which is known as interest in working capital. In this context reference be made to the judgment dated 28.05.2009 passed by the Hon'ble Appellate Tribunal for Electricity, in Appeal No. 111 of 2008.

12. The Petitioner submitted that in the above context, the Commission wrongfully applied Regulation 4.24 (IV) of the OERC Tariff Regulations, 2014, for the purpose of computing interest in working capital. It is submitted that when the due date for payment of invoices is 60 days, as per the PPA, then it makes no sense to approve interest in working capital for a period of only one month, instead of the aforesaid 60 days. In the event invoices are cleared by the Respondent after the due date of 60 days and the interest on working capital is allowed for only 30 days, then the Review Petitioner has to incur the interest on working capital for the balance 30 days through its internal resources. This will in turn result in non-recovery of the actual cost of generation, which is in the teeth of the provisions of Section 61 (d) of the Electricity Act, 2003. In the alternative, it is submitted that in the event interest on working capital is to be allowed in terms of the tariff regulations of the Commission, then the Respondent be directed to clear invoices after a period of 30 days and that late payment surcharge would be imposed in the event the payment is delayed beyond the said period.
13. The Petitioner submitted that the scope of review proceeding are very wide, and the same ought to be exercised for the purpose of doing complete justice. In this context, reference be made to the following judgements of the Hon'ble Supreme Court:
- a) *Rajender Singh v. Lt. Governor, Andaman and Nicobar Islands and Ors*, reported in (2005) 13 SCC 289 (please refer to Para 15 and 16);
  - b) *Board of Control for Cricket in India and Anr. v. Netaji Cricket Club & Ors.*, reported in 2005 (4) SCC 741 (please refer to Para 89);
  - c) *S. Nagraj and Ors. v. State of Karnataka and Anr.*, reported in 1993 (Supp.4) SCC 595 (please refer to Para 18 and 19);
  - d) *O.N. Mohindroo v. Distt. Judge, Delhi*, reported in (1971) 3 SCC 5, (please refer to Para 37).
14. The principles which can be categorically culled out from the above judgments are as follows:
- a) Courts should not be precluded from recalling or reviewing their own orders, if it is satisfied that it is necessary to do so for sake of justice;
  - b) Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way;
  - c) All processes of the Court are intended to secure justice and one such process is the power of review, and that whenever there is a manifest wrong done, it is never too late to undo the said wrong;

- d) If the Court finds that the order was passed under a mistake and it would not have exercised the jurisdiction but for the erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice then it cannot on any principle be precluded from rectifying the error;
- e) The philosophy behind exercise of power of review is the anxiety to avoid injustice;
- f) Rectification of an order, through review, stems from the fundamental principle that justice is above all;

15. In view of the above, the Petitioner prayed before the Commission to grant the following reliefs:

- i) consider two months receivables for computation of Interest on working capital as provided for in the PPA dated 19.12.2012.
- ii) the differential amount be declared as receivables and would be part of the working capital in terms of Regulation 18(1)(a) of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 for the period 01.04.2014 to 09.10.2014 and Regulation 4.26 of the Odisha Electricity Regulatory Commission (Terms and Conditions for Determination of Generation Tariff) Regulations, 2014 for the balance tariff period;
- iii) OERC direction in order dated 29.06.2018 in para no 53\_ (c) be modified and the word "without interest" be replaced with word "applicable interest".
- iv) as prescribed in Regulation 18(3) of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009, the rate of interest thereon shall be on normative basis and based on Regulations of CERC and OERC for respective period.

2. 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 29.06.2018 in Case No. 95 of 2013 and they have prayed for the following reliefs: (a) allowing of Carrying cost/Interest on the differential amount on account of revision of tariff for the control period 2014-19 (b) Computation of interest on working capital considering two months receivables as per CERC Regulations, 2014. The present case pertains to the tariff for control period 2014-19 and tariff order was passed on 29.06.2018 after passing of final order in Case No.38 of 2016 on dated 26.02.2018 pertaining to the period 2010-14. GRIDCO in its submission prayed the Commission to dismiss the Review Petition of the Petitioner in view of the following grounds:

- a) The present review petition of the Petitioner does not qualify under any of the grounds of Code of Civil Procedure 1908.
- b) The Petitioner did not avail ample opportunity during the hearings held on 07.04.2015, 06.01.2017, 25.04.2017, 04.07.2017 respectively to raise the issue.
- c) The Petitioner had itself filed the amended tariff application on 12.12.2014 where in it had referred to OERC Tariff Regulation, 2014. Further, it was delayed the determination of tariff by the Commission because of other various applications filed by the Petitioner such as to convert its thermal Units from IPP to CGP (Case No.21 of 2015). On disposal of the said case, it filed another Case No.38 of 2016 for consideration of changed debt: equity structure on account of change in the capital structure of the Petitioner Company after amalgamation w.e.f 01.11.2011.
- d) Determination of tariff for control period 2014-19 was very much dependent on petition filed by the Petitioner as Case No.38 of 2016 for the period 2010-14, which was finally disposed off on 26.02.2018 by the Commission.

3. The Commission had clearly mentioned at Para 17 of the impugned order that it has considered CERC Tariff Regulation, 2014 for the period from 1st April, 2014 to 9.10.2014 and OERC Tariff Regulation, 2014 from 10.10.2014 till 31st March, 2019 for determination of tariff for the control period 2014-19. Accordingly, the Commission had determined the tariff considering two months receivables as per CERC Regulations upto 09.10.2014 and one month receivables from 10.10.2014 onwards as per OERC Tariff Regulation, 2014. Further, in the existing agreement dated 19.12.2012, there is no provision to consider two months receivables for computation of Interest on Working Capital. It is settled law that the provisions of a subsisting agreement/contract are superseded by the respective provisions of regulations in effect by the appropriate Commission. The relevant provision of the PPA dated 19.12.2012 regarding Capacity Charges is reproduced below:

*“2.2(A)(i): Capacity (Fixed) Charges: The Capacity Charges shall be determined by OERC as per the terms and conditions of tariff issued from time to time XXX XXX.”*

*“6.0 Tariff:*

*6.1 The tariff for sale of power by SEL to GRIDCO shall be determined by the Appropriate Commission XXXX XXXXX.”*

4. Further, GRIDCO submits that the Petitioner had filed another application under Case No.38 of 2016 for consideration of revised debt:equity structure w.e.f 01.11.2011 (under the Tariff period 2011-14) and unless said application is disposed off, it could not have been

possible to dispose of Case No.95 of 2013 in the matter of determination of the tariff for the control period 2014-19. The Petitioner itself had delayed the proceedings in Case No.95 of 2013 due to filing of Case No.21 of 2015 for conversion of IPP Units to CGP Units. 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 29.06.2018. Therefore, the Petitioner's claim for carrying cost is untenable and be dismissed. Therefore the Respondent GRIDCO ought not to be burdened with unwarranted carrying cost.

5. GRIDCO further submitted that the Petitioner has also admitted at Para 6 of their application that they had not prayed for the carrying cost in their application admitted under Case No.95 of 2013. In this regard, the Respondent GRIDCO in their submission dated 05.07.2019 have filed the judgement dated 23.09.2008 of Hon'ble Supreme Court of India in Civil Appeal No. 5798-5799 of 2008 wherein it has been observed that,

*“It is well settled that in the absence of pleading, evidence, if any produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it.”*

6. Therefore, in absence of any such pleadings for payment of carrying cost by GRIDCO in the proceedings of Case No. 95 of 2013 before the Commission, the Petitioner ought not raise such issue afresh through this Review petition.
7. 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.
8. Heard both the Petitioner and Respondent GRIDCO. The written submission and rejoinder submitted by the Petitioner and Respondents are taken on record.



9. 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.

10. The Commission, in its Impugned Order dated 29.06.2018 has observed as follows:

*“ 53. 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.*
- (b) The tariff of M/s. Vedanta Ltd. – IPP, so determined in this Order is valid from 01.04.2014 to 31.03.2019.*
- (c) The differential amount on account of these revised charges for the past period shall be recovered from GRIDCO in six half-yearly instalments without any interest. The first instalment shall be due on 30<sup>th</sup> 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.”*

11. 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 also rejected the review application of M/s. Vedanta regarding allowing of carrying cost for the tariff period 2011-14 vide order dated 08.01.2021 in Case No. 32 of 2018 and observed at Para 21 of the said order as follows:

*“ 21. XXXXX. 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.*

12. The determination of tariff for the control period FY 2010-2014 and FY 2014-19 are interlinked. The Case No. 38 of 2016 pertaining to determination of tariff for the period 2010-14 was finally disposed off by the Commission vide order dated 26.02.2018. The Impugned Order dated 29.06.2018 is dependent upon the outcome of the order on the 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.
13. Accordingly, the case is disposed of.

Sd/-  
**(G. Mohapatra)**  
**Member**

Sd/-  
**(S. K. Parhi)**  
**Member**

Sd/-  
**(U. N. Behera)**  
**Chairperson**