

**ODISHA ELECTRICITY REGULATORY COMMISSION
BIDYUT NIYAMAK BHAWAN
PLOT NO.4, CHUNUKOLI, SHAILASHREE VIHAR
BHUBANESWAR - 751 021**

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

Case No. 12/2019

M/s. Shalivahana Green Energy Ltd.	Petitioner
Vrs.		
OREDA & others	Respondents

In the matter of: **An application under Section 94 (1) (f) of the Electricity Act, 2003 read with Regulation 70 of the OERC (Conduct of Business) Regulations, 2004 for review of the order dated 16.02.2019 of the Commission passed in Case No. 46/2018.**

For Petitioner: Mr. R.P. Mahapatra, the authorized representative, Shri Malk Naveen Kumar, Director, M/s. Shalivahana Green Energy Ltd.

For Respondent: Shri Manas Kumar Das, Director (Comm.), GRIDCO Ltd., Ms. Sasmita Patajoshi, AGM (RE), GRIDCO Ltd., Shri S.K. Mohanty, GM, OPTCL and Ms. S. Pattnaik, DoE, GoO.

Nobody is present on behalf of OREDA, OPGC, OHPC, CESU, WESCO Utility, M/s. Baitarani Power Project Pvt. Ltd., M/s. Power Tech Consultant and GEDCOL.

ORDER

Date of hearing: 01.09.2020

Date of order: 01.10.2020

The present application has been filed by M/s. Shalivahana Green Energy Ltd. (the Petitioner) for review of the order of the Commission in Case No. 46/2018 dated 16.02.2019.

2. The factual matrix of the present case is as follows:

The Commission determines generic tariff of different renewable sources after hearing stakeholders for specified control period from time to time. The first control period had a span of three years starting from FY 2010-11 to FY 2012-13. The Commission had determined the generic tariff for the said control period in *Suo Motu* Petition No. 37/2008 order dated 14.09.2010. The 2nd control period also had a span of three years

starting from FY 2013-14 onwards. The Commission had determined the tariff of bio-mass sources for 2nd control period for FY 2013-14 to 2015-16 in its order dated 15.01.2014 in Case No. 80/2013. Thereafter, 3rd control period started which has a tenure starting from FY 2018-19 to FY 2020-21. The Commission has determined tariff of renewable sources including co-generation sources for the 3rd control period in Case No. 46/2018 order dated 16.02.2019.

3. The bio-mass power plant of the present Petitioner was commissioned in the 1st control period (CoD on 19.12.2011) and its tariff is guided by the order dated 14.09.2010 of the Commission in suo motu Petition No. 37/2008. However, on an application of the Petitioner the Commission revised only the fuel cost (variable cost) of the Petitioner's power plant upto FY 2015-16 in Case No. 16/2013 order dated 01.03.2014. The Commission in the said order has stated that the fixed cost, however, as determined in Case No. 37/2008 order dated 14.09.2010 for bio-mass power plant commissioned during the 1st control period would continue to be unchanged for the entire tariff period. Accordingly, the per unit fixed cost has been pegged at Rs.1.95 for the Petitioner's power plant for the entire tariff period as determined in the 1st control period. The tariff period for the bio-mass power plant is 13 years as per 1st control period order. The above has been depicted in the table below:

(In Rs.)					
Year	FY 2013-14	FY 2014-15	FY 2015-16	FY 2016-17	FY 2017-18
Variable Tariff	3.47	3.64	3.83	-	-
Levelling fixed tariff	1.95	1.95	1.95	1.95	1.95
Year-wise tariff	5.42	5.59	5.78	-	-

The Commission while disposing the above petition in Case No. 16/2013 order dated 01.03.2014 had stated that they would review the variable tariff only for the next control period and finalise later based on prevailing fuel price at that time. The Petitioner had therefore, approached the Commission for determination of tariff for FY 2016-17 and the Commission in their order dated 14.09.2017 in Case No. 11/2016 has directed the Petitioner to raise the issue in the tariff determination process for 3rd control period.

4. The Petitioner has now sought the review of the order of the Commission for the 3rd control period starting from FY 2018-19 to FY 2020-21 in Case No. 46/2018 order dated 16.02.2019 because the Commission has not fixed any fuel cost (variable cost) for the Petitioner's power plant for FY 2016-17 to FY 2017-18. As a result, GRIDCO

has been paying to the Petitioner @ 578 paise per unit after FY 2015-16 which is based on the fuel cost for FY 2015-16 fixed by the Commission in absence of any tariff fixed by the Commission for FY 2016-17 and 2017-18. However, the Commission has directed in the order under review that bio-mass fuel price shall be Rs.3226.70/Mt. (average) which would be escalated @5% every year during the control period. The petitioner prays that GRIDCO may be directed to escalate the fuel price @ 5% every year over the price during the 1st year of the control period i.e. FY 2018-19 as per above order and determine the variable tariff. The Petitioner also prays that the Station Heat Rate (SHR) and Gross Calorific Value (GCV) specified for the 3rd control period order should be taken into account for calculation of fuel cost component.

5. The Petitioner further submits that Para 11 and 36 of the order dated 16.02.2019 in Case No. 46/2018 may be reviewed.

“11. xxxxxxxxxxxx Taxes, cess and duties shall be reimbursed to the generators at actual as per audit report.” – to be deleted

“36. Taxes and duties: Any tax and duty levied by the Government shall be reimbursed by the beneficiary to the developer as year-end charges. – To be substituted by as follows:

“Tariff determined shall be exclusive of taxes, cess and duties as may be levied by the appropriate Government.

Provided that the taxes and duties levied by the appropriate Government shall be allowed as pass through on actual incurred basis.”

6. The Respondent GRIDCO has stated that the 20 MW bio-mass power project of the Petitioner is guided by the order of the Commission for the 1st control period dated 14.09.2010 in Case No. 37/2008. It is clearly mentioned in that order that the fuel price is variable and will be escalated 5% annually upto the tariff period (13 years from CoD) and the same may be adopted for rest of the tariff period i.e. upto December, 2024. The other technical parameters are freezed considering COD on December, 2011. The Commission may revise the fuel price for FY 2016-17 and 2017-18 on the basis of annual escalation. The pass through of taxes, cess and duty as per actual was not covered in the order dated 14.09.2010 of the 1st control period in Case No. 37/2008. Moreover, the Petitioner has not claimed anything in this regard since the CoD in December, 2011. The Commission while refusing prayer of the Petitioner for determination of tariff for FY 2016-17 in Case No. 11/2016 has stated

that the variable tariff shall be reviewed at the time of determination of tariff for 3rd control period basing on prevailing fuel price at that point of time. But the Petitioner is guided by the order of the Commission in Case No. 37/2008 as per which only the fuel price is variable and will be escalated 5% annually upto the tariff period of the bio-mass project.

7. In its rejoinder M/s. Shalivahana Green Energy Ltd. (SGEL) has stated that it is not correct to state that for the bio-mass power plant commissioned in the 1st control period the SHR and GCV shall remain constant during the entire tariff period. The Commission has revised the GCV of bio-mass fuel from 3522 Kcal/Kg in the 1st control period to 3300 Kcal/Kg during the 2nd control period. The GCV of fuel procured during the 3rd control period cannot have different values from that procured by bio-mass plant commissioned during the earlier control period. The SHR of 3800 Kcal/Kwh was an assumption on which the variable tariff was computed during the 1st control period but was not the actual performance data. The Commission has determined the SHR of 3800 Kcal/Kwh for 1st and 2nd control period whereas for the 3rd control period the SHR has been determined as 4125 Kcal/Kwh from the FY 2018-19 onwards. Therefore, the fuel cost i.e. variable cost should be calculated for the bio-mass plant commissioned during the 1st and 2nd control period assuming the parameters relating to SHR, GCV and fuel price specified in the order for the 3rd control period.
8. In its rejoinder M/s. SGEL has further stated that taxes, cess and duty levied by the Government is not internalised in the tariff and is therefore, allowed as pass through. The provision in the order for the 3rd control period dated 16.02.2019 in Case No. 46/2018 relating to reimbursement based on “Audit Report” or “Year-end Charges” will result in unusual delay and therefore, should be reviewed.
9. Heard the parties at length. The original case was heard by the Chairman and two Members of the Commission. After superannuation of one Member the present review matter was last heard by Chairman and one Member of the Commission on 10.09.2019 and order was reserved. In the meantime one new Member has joined the Commission on 01.06.2020. In several other cases the jurisdiction of the present Commission to hear the review matter which was not originally heard by the new Member was raised. The Petitioner also raised the issue of jurisdiction of the present Commission. Therefore, before going to the merit of the case we are to settle the issue

of jurisdiction of the present commission consisting of the Chairman and two Members. The present new Member was not in the office when the order under review was passed. Mr. A. K Das, a Member then, has demitted office in the mean time and the new Member has joined the Commission in his place. Several arguments and counter arguments have been made in this regard during the hearing pertaining to the propriety of the new Member to hear the review case when he has not heard and disposed of the original case resulting in the order under review. In the matter relating to review of an order passed by the commission two Acts namely the Electricity Act, 2003 and the Orissa Electricity Reform Act, 1995 govern the field. As per Section 185(3) of the Electricity Act, 2003, the provision of the Orissa Electricity Reform Act, 1995 which are not inconsistent with the provisions of the Electricity Act, 2003 shall apply to the State of Odisha. The relevant provisions of the said two Acts are reproduced below.

Section 94 of the Electricity Act, 2003 lays down as follows:

(1) The appropriate Commission shall for the purposes of any inquiry or proceeding under this Act, have the same power as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908) in respect of the following matter namely:.

(a) to (e) XXXX

(f) *reviewing its decision, directions and orders*

Section 9(4) of the OER act 1995 says

*(4) The quorum for the meeting of the Commission shall be two, but in the case of a meeting of the Commission to review any previous decision taken by the Commission or for consideration of any issue which could not be decided on account of equality of votes in favour of or against the resolution proposed or where the issue considered at a meeting in which only two members of the Commission were present, the quorum for the meeting shall be all the three
XXXXX*

On a conjoint reading of the provisions of aforesaid two Acts, we find that there is no inconsistency between the two provisions relating to review of an order. When the Electricity Act, 2003 is silent about the quorum of the Commission to hear a review application, the Electricity Reform Act, 1995 is clear and explicit about the same. It clearly says, quorum of the meeting of the commission shall be ordinarily two, but in case of review of an order of the Commission, it should be heard by three members including the Chairperson. In our considered opinion, the decision of the Hon'ble Supreme Court in case of Gullapalli Nageswara Rao and others Vrs. Andhra Pradesh

State Road Transport Corporation and another reported in AIR 1959 (SC) 308:[1959]Supp(1)SCR 319 quoted by Hon'ble APTEL and the Hon'ble APTEL in the case of Torrent Power Ltd vrs. Gujarat Electricity Board disposed of on 30th march 2017 in Appeal No.178 of 2016 and IA No.389 of 2016 cited by the respondent are conceptually different if the same are to be read and understood with reference to the Section 9(4) of the Orissa Electricity Reform Act, 1995.

Therefore, we are of the view that there is no legal bar for the new member to sit with Chairman and other Member to hear the review petition at hand constituting the quorum of three members.

10. Now, coming to the merit of the case, we refer to our order in Case No.16/2013 dt.01.03.2014 while determining tariff of the biomass power plant of the present petitioner for the 2nd control period. For the sake of convenience, we quote our order as follows:

“6. Commission in the meantime have also finalized the Suo-Motu proceedings for finalization of generic tariff of Renewable Energy Sources including cogeneration for the second control period 2013-14 to 2017-18 in Case No. 80/2013 dated 15.01.2014. This order is applicable to the power plants based on renewable sources of energy being commissioned during the second control period. Most of the concerns and submissions of the petitioner regarding revising capital cost, O&M expenses, SHR, GCV, Fuel Cost, Ancillary consumption, Evacuation Expenses, ROI, Interest on working capital and enforcing RPO obligation raised in the present petition have been considered in the order dated 15.01.2014 applicable for the plants commissioned during second control period.

7. However, the Biomass power plant of the present petitioner was commissioned during the first control period and as such the generic tariff determined for biomass power plant, in order No. 80/2013 dt. 15.01.2014 would not be applicable to the present petitioner. Commission in Case No. 37/2008 dt. 14.09.2010 while determining generic tariff for renewable resources for the 1st control period, at para 10 mentioned that tariff determined for RE projects, commissioned during the control period, shall continue to be applicable for the RE projects for the entire duration of tariff period.”

11. In the above order, the Commission determined the year-wise tariff of the petitioner upto FY 2015-16 as mentioned in para 3 above. This has been determined basing on the escalation of fuel cost 5% per annum and keeping levellised fixed tariff at Rs.1.95 for the whole tariff period of 13 years as per our order in Case No. 37/2008 for the first control period in which the power plant had achieved CoD. In consonance with our earlier order and assuming further escalation of fuel cost at 5% per annum, the following tariff is determined for the petitioner. This is determined for the rest of tariff

period of 13 years which ends in FY 2023-24. GRIDCO is to pay the petitioner at this rate for the power procured by them. All the past bills should be revised accordingly.

(In Rs.)

Year	FY 2015- 16	FY 2016- 17	FY 2017- 18	FY 2018- 19	FY 2019- 20	FY 2020- 21	FY 2021- 22	FY 2022- 23	FY 2023- 24
Variable Tariff	3.83	4.02	4.22	4.43	4.65	4.88	5.13	5.38	5.65
Levellised fixed tariff	1.95	1.95	1.95	1.95	1.95	1.95	1.95	1.95	1.95
Year-wise tariff	5.78	5.97	6.17	6.38	6.60	6.83	7.08	7.33	7.60

12. Now, we come to the second point on which the petitioner seeks review of our order regarding passing on of taxes, cess and duties. We have directed that these shall be reimbursed to the generators at actual as per audit report. The prayer of the petitioner on this regard is that it should be reimbursed on actual basis which is exclusive of tariff. The actual payment of taxes and cess can only be known when the audit of the accounts of relevant year is completed. Therefore, we do not find any reasons to review our order in this regard.
13. With the above observation, the case is disposed of.

Sd/-
(G. Mohapatra)
Member

Sd/-
(S.K. Parhi)
Member

Sd/-
(U.N. Behera)
Chairperson