

**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. 17/2019

M/s. Baitarani Power Project(P) Ltd.	Petitioner
Vrs.		
Department of Energy, GoO & others	Respondents

In the matter of: An application u/S.94(1) (f) of the Electricity Act, 2003 read with Regulation, 70 of the OERC (Conduct of Business) Regulations, 2004 seeking review of Order dated 16.02.2019 of the Commission passed in Suo Motu Proceeding in Case No.46 of 2018 regarding finalization of tariff of Renewable Energy Sources including Co-generation for the third control period i.e for FY 2018-19 to 2020-21.

For Petitioner: Shri Y.V. Suba Rao, Managing Director of M/s. Baitarani Power Project Pvt. Ltd. and Shri R. P. Mahapatra, the authorized representative.

For Respondents: Shri B.K. Das, GM and Ms. Sasmita Patanjoshi, AGM of GRIDCO Ltd., Shri L. N. Mohapatra, Advocate, OPTCL, Shri Surjit Paul, AGM, Shri Shankar Sethy, AM on behalf of M/s. GEDCOL, Shri K. C.Nanda, DGM (Fin.), WESCO Utility, Shri D.N.Patro, DGM, OHPC and Ms. Sonali Pattnaik, DoE, GoO are present. Nobody is present on behalf of EIC (Electricity)-cum-PCEI, SLDC, OREDA, OPGC, CESU, M/s. Shalivahan Green Energy Ltd., M/s. Power Tech Consultant and the Administrator, WESCO, NESCO & SOUTHCO Utilities.

ORDER

Date of hearing: 30.06.2020

Date of order:21.08.2020

The petitioner M/s Baitarani Power Project (P) Ltd. (BPPPL) has filed the present petition for review of the order dated 16.02.2019 passed by the Commission in Case No.46/2018, based on the provisions in Order 47, Rule 1 of the Civil Procedure Code, 1908 for amendment/additions/deletions in certain paragraphs.

2. The petitioner has submitted that the Commission at para 6 of the impugned order has directed as follows:

“6. Tariff determined based on the principles laid in this order shall be applicable for Renewable Energy power projects commissioned during the control period and shall continue for the entire duration of the Tariff Period. The Tariff Period shall be same as

their useful life and shall be reckoned from the date of commercial operation of the generating stations.”

Further para 12 of the said order provides as follows:

“12. The generic tariff shall be determined on levlised basis for the useful life of the plant, specified in this order. Provided that renewable energy technologies having single part tariff with two components of tariff shall be determined on levlised basis considering the year of commissioning of the project for the fixed cost component while the fuel cost component shall be specified on the year of operation basis. For the purpose of levlised tariff calculation, the discount factor equivalent to post tax weighted average cost of capital shall be considered. Levellisation shall be carried out for the ‘useful life’ of the Renewable Energy project and the tariff shall be specified for the ‘Tariff Period” which shall be same as useful life. The above principles shall also apply for project specific tariff.”

Further Table-1 at para 17 of the said order provides that tariff period for small hydro plants of capacity below 5 MW and the capacity 5 to 25 MW shall be 35 years which is same as the useful life.

“17.Details of RE Technology-wise Useful life/ Tariff period considered for levlised Tariff calculation based on views of respondents is given in the following table:

Table -1

<i>Sl. No.</i>	<i>Technology</i>	<i>Useful Life (Years)</i>	<i>Tariff period (Years)</i>
<i>1</i>	<i>Wind</i>	<i>25</i>	<i>25</i>
<i>2</i>	<i>Small Hydro Plant (SHP)</i>		
	<i>a. Below 5MW</i>	<i>35</i>	<i>35</i>
	<i>b. 5 to 25 MW</i>	<i>35</i>	<i>35</i>
<i>3</i>	<i>Biomass</i>	<i>20</i>	<i>20</i>
<i>4</i>	<i>Non-fossil fuel based Co-generation</i>	<i>20</i>	<i>20</i>
<i>5</i>	<i>Solar PV</i>	<i>25</i>	<i>25</i>
<i>6</i>	<i>Solar Thermal</i>	<i>25</i>	<i>25</i>
<i>7</i>	<i>Municipal Solid Waste</i>	<i>20</i>	<i>20</i>

However, at para 25(e) of the said order, relating to technology specific parameters of small hydro projects has been written as follows:

“25(e) Levellized tariff for SHP Projects

The levlized tariff over the useful life is determined basing on the financial and operating parameters as discussed above and will be applicable for a period of 13 years for the projects of 5 to 25 MW capacity. In case of SHP below 5 MW capacity the tariff will be applicable for 35 years from the date of commercial operation.”

But Table-2 of this para 25(e) provides that the tariff period shall be 35 years for the SHEPs both below 5 MW and the capacity of 5 MW to 25 MW. Annexure-2 referred in this paragraph also stipulates the same. The Table-2 of the said order is given below:

Table -2

<i>Particular</i>	<i>Levellized Tariff (Rs./kWh)</i>	<i>Benefit of Accelerated depreciation (Rs./kWh)</i>	<i>Net Levellized Tariff Rs./kWh)</i>	<i>Tariff Period (Years)</i>
<i>SHP projects below 5 MW capacity</i>	6.05	(0.46)	5.59	35
<i>SHP projects of 5 MW above to 25 MW capacity</i>	5.07	(0.42)	4.65	35

3. In view of the above, the petitioner has submitted that the provision of 13 years period for which the levellised tariff will be applicable for the projects for 5 to 25 MW capacity specified in para 25(e) of the said order dated 16.02.2019 is an error apparent on the face of the record. The petitioner has prayed the Commission to provide that the levellised tariff will be applicable for the period of 35 years from the date of commercial operation of the project.

4. The petitioner has further submitted that the following provisions are made in the impugned order relating to reimbursement of taxes, cess and duties by the beneficiary.

Para 11: xxxxxxxxx. Taxes, cess and duties shall be reimbursed to the generators at actual as per audit report.

Para 36: Any tax and duty levied by the Government shall be reimbursed by the beneficiary to the developer as year-end charges.

The petitioner has stated that the RE project developers have to incur the expenditure towards taxes, cess and duties on a monthly/periodic basis and are reimbursed by the beneficiary basing on the audited report as year-end charges which would be unusually delayed. The petitioner has stated that Para 33 of the said order relating to water royalty charges mentions that “Water royalty charges shall not be internalised in tariff. However, the actual amount of water royalty charges as levied by the Govt. of Odisha shall be allowed as pass through component.” Further, Para 24 of CERC Renewable Energy Regulations, 2017 provides that “Tariff determined under these Regulations shall be exclusive of taxes 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”.

5. In view of the above, the petitioner has prayed the Commission that the existing provision of taxes, cess and duties in para 11 may be deleted and para 36 may be substituted by the following:

“36. Taxes and duties:

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 petitioner has further submitted that para 9 of the impugned order dated 16.02.2019 provides as follows:

“9. All RE project shall be guided by the provisions of para 14 of this order regarding interconnection point. The interconnection point and grid connectivity mechanism of RE sources with OPTCL or DISCOMs shall be guided by provisions under OERC (Procurement of Energy from Renewable Sources and its Compliance) Regulations,

2015. The Licensee can also assign the work to the Developer on their behalf for installing power evacuation facilities beyond the inter-connection point. No supervision charges shall be levied by the Licensee on the developer for carrying out the work on his behalf. All necessary assistance shall be provided to the developer by the Licensee."

7. The petitioner has submitted that Regulation 10.3 of OERC (Procurement of Energy from Renewable Sources & its Compliance) Regulations, 2015 regarding "Connectivity with the Grid" provides as follows:
"10.3 The Licensee shall be responsible for development of evacuation infrastructure beyond the inter-connection point while the developer/generating company will have to develop evacuation infrastructure from generating facility upto the inter-connection point at his own expenses."
8. In view of the above, the petitioner has prayed the Commission that para 9 of the impugned order may provide that the licensee can assign the work to the developer on their behalf for installing power evacuation facilities beyond the inter-connection point, on depositing the estimated cost with the developer.
9. The petitioner has further submitted that the Commission in its order dated 15.01.2014 in Case No.80/2013, vide Para 28 had defined inter-connection point as the 11 KV or 33 KV bus of the 33/11 Sub-station of the DISCOM or 33 KV or 132 KV bus of the 132/33 KV or 220/132 KV Sub-station of OPTCL and accordingly the project developers were responsible to construct the dedicated line upto the nearest point of DISCOM or OPTCL network, as the case may be. As a result, the RE projects which were under construction before 3rd Control Period have their own EHT lines constructed by them for availing construction power and for injecting power to the grid after the Units are commissioned.

Therefore, the petitioner has suggested that as the development of the evacuation infrastructure for projects commissioned during the 3rd control period is the responsibility of the licensee, the following provisions may be added to para 9 of the impugned order.

"Provided that, the expenditure incurred by the Developer of the RE Project commissioned during the third control period, towards evacuation infrastructure beyond the inter connection point, including that incurred prior to 2018-19 shall be reimbursed by the licensee. Alternatively, such expenditure may be allowed towards capital cost, in case the developer opts for Project Specific Tariff to be determined by the Commission."

10. After all its submissions, the petitioner has requested the Commission to give a ruling on the legality of present coram of the Commission having a new Member, who has not heard the original petition.
11. The respondent GRIDCO has submitted that as mentioned in para 25(e) of the order dated 16.02.2019, the levellised tariff over the useful life is determined basing on the financial and operating parameters and will be applicable for a period of 13 years. But as mentioned in Table-1 at para 17 and Table-2 at para 25(e) of the said order, useful life and tariff period for the SHEPs is 35 years and the levellised tariff will be applicable for a period of 35 years. Accordingly, para 25 (e) of the order dated 16.02.2019 may be amended.

12. GRIDCO has further submitted that as mentioned in para 11 of the order dated 16.02.2019 that *“Taxes, cess and duties shall be reimbursed to the generator at actual as per audit report”* may not be deleted but can be amended to the extent that *“Taxes, cess and duties shall be reimbursed to the generators at actual on submission of supporting documents, which will be later confirmed as per the audit report”*.
13. Regarding the issue of sharing of cost of the power evacuation facility beyond the inter-connection point, GRIDCO submitted that the Commission in its interim order dated 10.09.2019 had directed GRIDCO to discuss with OPTCL on transfer of evacuation facility to OPTCL. Accordingly, a meeting was convened by GRIDCO with OPTCL and M/s BPPPL on 23.09.2019. But nothing concrete could emerge from that meeting and the matter was left to the Commission again.
14. In its submission the respondent, EIC (Electricity)-cum-PCEI has submitted that The Implementation Agreement (I.A.) signed with the developer M/s Baitarani Power Project Private Limited mentions the life period of the project as given below:
“WHEREAS both parties to this agreement have agreed that the company shall establish, operate and maintain the project at its own cost for a period of thirty years from the date of commissioning of the project, or such extended period as may be mutually agreed upon between the company and the GOO”.
- Hence, the useful life of the project may be considered as 30 years.
15. Regarding the transmission cost, the respondent EIC (Electricity) has further stated that the cost for transmission line for evacuation of power (Rs.19.00 crore) is included in the project cost which was approved by the STC for issuance of TEC. STC decides the project cost and its derived project specific tariff.
16. The respondent M/s OPTCL has submitted that the petitioner in its application has indicated about only one error apparent in para 25(e) of the impugned order dated 16.02.2019 in which the applicable period of levellised tariff has inadvertently appeared as 13 years instead of 35 years. This typographical error can be corrected by the Commission on its own motion, by an order passed pursuant to section 152 of CPC. Except the above, the other prayers of the petitioner for review of the order on deletion of taxes and duties in para 11, substitution of existing provision in para 36 by another and addition of a new proviso to para 9 of the order as suggested by the petitioner, are not matters to be covered by the scope of review under order 47 rule 1 of CPC and accordingly all such prayers are liable to be rejected. Further, the petitioner in its application has not testified to the effect that it has not filed any appeal against the impugned order before the APTEL and in absence of such sworn testimony the present petition for review is not admissible at all.
17. OPTCL has submitted that the prayer of the petitioner on infrastructure cost is not liable to be considered at all (besides being not qualified for review) on the following grounds.
- (a) The project was conceptualized after the petitioner entered into MOU with the Government and the State Technical Committee permitted for undertaking the project work in the year 2007.
- (b) After system study the OPTCL by its letter dated 04.08.2009 also allowed connectivity of the project with its network in which specific stipulation has been made in clause-1(ii)(d) thereof that the petitioner should establish, operate and

maintain its generating station, sub-station, tie lines and dedicated transmission line upto connection point by its own arrangement in accordance with the provision of Sec.7 and 10(1) of the Electricity Act, 2003. As per Para 13 of the said permission the developer may handover the lines to OPTCL for O&M and pay annual charges to OPTCL.

- (c) By order dated 15.01.2014 passed in Case No.80 of 2013, the Commission on the issue of “interconnection point” in Para 28 of the order also held that the Project Developer may construct the dedicated line upto the nearest point of DISCOM or OPTCL network as the case may be and such line would be treated as deemed transmission line or deemed distribution line.
 - (d) The petitioner also entered into an implementation agreement with the Government on 14.03.2014 and accordingly by letter dated 28.04.2014 of the EIC (Electricity)-cum-PECI, Odisha the petitioner was allowed to complete the project within 36 month from the date of that agreement. The project was thus liable to have been completed in all respect by 2017.
 - (e) The OERC (Procurement of Energy from Renewable Sources and the Compliance) Regulations, 2015 has come into force on its publication in Odisha Gazette on 10.09.2015. It has no retrospective application. Its scope and application is for the Distribution Licensee or any other person procuring on its behalf and the consumers who consume electricity from generators of conventional energy, captive plant having capacity of 1 MW and above from its own source and procured through open access.
 - (f) The clause 2(m) of the above Regulations defines the interconnecting point for the purpose of metering of energy and does not speak of anything on cost of evacuation infrastructure.
 - (g) The Regulations, 2015 notified in Odisha Gazette on 10.09.2015 on procurement of energy from Renewable sources at Clause-10.3 thereof requires the developer to develop evacuation infrastructure from its generating facility upto the interconnection point at its own cost and expenses.
 - (h) The proceeding (in Case No.46/2018) dt.16.02.2019 was meant for plants set up in the state of Odisha in the control period starting from FY 2017-18 and ending in FY 2019-20. The petitioner’s plant set up prior to the third control period 2017-18 to 2019-20 cannot be allowed to take advantage of the order dated 16.02.2019.
 - (i) The transmission cost to be taken into generation tariff is a separate issue and it affects the beneficiaries as per allocation.
 - (j) The OPTCL transmission tariff is determined on the basis of drawls of DISCOMs only. The generation injected into the system is not a criteria for determination of transmission tariff.
18. Heard the parties at length. 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. Andra 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.

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 it is 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 the impugned order in para-17 Table-1 has stipulated that the tariff period for small hydro projects shall be 35 years. The Commission has also in para 12 of the order stated that the “tariff period” shall be same as “useful life”. However in para 25(e), it is inadvertently stated that the levelled tariff over the useful life is determined basing on the financial and operating parameter and will be applicable for a period of **13 years** for the projects of 5 to 25 MW capacity. In contrast, in the Table-2 of the same para, tariff period is correctly mentioned as **35 years**. Therefore, the applicable tariff period for levelled tariff shall be corrected as **35 years** instead of **13 years**.

We direct the Director (RA) of the Commission to correct the above typographical error.

21. The petitioner has sought review of the impugned order seeking deletion/modification of Para-11 and Para-36 on the issue of reimbursement of taxes, cess and duty. We examined the matter and found that there is no error on this account and it is a suggestion of the petitioner. Therefore, it does not fall under the scope of review.
22. Regarding reimbursement of cost of evacuation infrastructure, we find that as per para-28 of the Commission’s order dt.15.01.2014 in Case No.80 of 2013 (Finalization of Generic Tariff of the RE Sources for the 2nd Control Period i.e. from 2013-14 to 2017-18), the inter-connection point for all renewable generations of 5 MW and upto 25 MW projects should be at 33 kV of either at 33/11 kV substation of DISCOM or 132/33 kV substation of OPTCL network whichever is nearer. According to PPA between GRIDCO and M/s BPPPL dt.18.12.2015, the inter-connection point is the nearest 132/33 kV OPTCL grid substation. Therefore, the project developer is to construct power evacuation facility upto the inter-connection point which is 132/33 kV Anandpur grid-substation of OPTCL. It is found from the submission of EIC (Electricity) that the cost of construction of such evacuation infrastructure has already been factored in the project cost. From the submission of OPTCL, it is found that they have allowed connectivity of the project of M/s BPPPL with their network with the condition that M/s BPPPL shall establish, operate and maintain its generating station, substation, tie-lines and dedicated transmission line upto the inter-connection point by its own arrangement and cost, after deposit of the required supervision charges to OPTCL. Therefore, the present claim of the petitioner to reimburse the cost of evacuation infrastructure is an afterthought. This is an attempt to go out of the contract/commitment to avail a missed benefit in the guise of seeking review of the order for 3rd Control Period. The control period order for fixation of generic tariff is unique for that period. It gives the developer of a project an idea about the viability of his project. Considering this he enters into different contracts for such development. It has no relationship with orders of subsequent control period. It is some sort of individual grievance which is attempted to be redressed through review of a generic order. Therefore, this does not fall under any category of review which is specified in Order 47 Rule 1 of the Civil Procedure Code.
23. The Commission has only determined the generic tariff of the SHEPs for specific control period. But the petitioner is at liberty for approaching the Commission for project specific tariff if they desire so.

24. With the above observations, the review petition is partially allowed to the extent mentioned in Para 20 above.

Accordingly the case is disposed of.

Sd/-
(G. Mohapatra)
Member

Sd/-
(S.K. Parhi)
Member

Sd/-
(U.N. Behera)
Chairperson