

**ODISHA ELECTRICITY REGULATORY COMMISSION
SAILASHREE VIHAR,
CHANDRASEKHARPUR,
BHUBANESWAR-751021**

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

Case No. 51/2019

GRIDCO Limited	Petitioner
Vrs.		
M/s. Ferro Alloys Corporation Limited & others	Respondents

In the matter of: **Application under S. 94(1)(f) and S.62(4) of the Electricity Act, 2003 read with Reg.70 of the OERC(Conduct of Business) Regulations, 2004 for review of order dated 29.03.2019 of the Commission passed in Case No.73 of 2018.**

For Petitioner: Shri. K. L. Mishra, DGM (Fin), GRIDCO Ltd.

For Respondent: Shri B. K. Das, GM, OPTCL.
 Shri K. C. Nanda, DGM (Fin), WESCO Utility
 Shri R. P. Mahapatra
 Ms. Sonali Pattnaik, DoE, GoO
 Nobody is present on behalf of Shri R. C. Satapathy, M/s. FACOR Ltd., M/s. OPGC Ltd., TPCODL, SLDC, NESCO Utility, SOUTHCO Utility, Shri Alekh Chandra Mallick and Shri Ananda Kumar Mohapatra.

ORDER

Date of hearing: 30.06.2020

Date of order: 21.08.2020

1. The present petition has been filed by GRIDCO for reviewing the Aggregate Revenue Requirement (ARR) and Bulk Supply Price (BSP) order for FY 2019-20 dated 29.03.2019 under Section 94(1)(f) of the Electricity Act, 2003 read with Regulations 17 of the OERC(Conduct of Business), Regulation, 2004. The said order was made effective from June 01, 2019 due to imposition of model Code of Conduct for general election.

GRIDCO states that against GRIDCO's proposal of Rs.9134.19 crore towards the ARR recoverable through the proposed BSP of 326.77 paise/unit, OERC has approved net ARR of Rs.7702.90 crore at an average BSP of 270.47 paise/unit for FY 2019-20. This reduced BSP of 270.47 paise/unit can only garner ARR of Rs.7529.96 crore leaving revenue gap of Rs.172.94 crore. Therefore, GRIDCO seeks review of the ARR & BSP order on the following grounds:

(a) Realistic assessment of power availability and cost for the State for FY 2019-20.

GRIDCO states that Commission has allowed availability of energy of 34046.81 MU for the State out of which 28731.03 MU has been approved for purchase with transmission loss of 3% at a cost of Rs.7466.64 crore at the rate of 259.88 paise/unit for sale to DISCOM Utility.

(i) Drawal from FSTPS-III and KSHTPS-I and IPP sources

GRIDCO states that the Commission has assumed nil drawal from FSTPS-III and KSHTPS-I during FY 2019-20 which was over optimistic. In fact, GRIDCO has drawn varied amount of power during peak and off peak hours from those stations. In fact, GRIDCO has drawn on an average 1279.56 MU from these stations of NTPC from FY 2014-15 to FY 2018-19. This has led to under estimation of power purchase cost resulting in reduced ARR and BSP. GRIDCO has estimated a drawl of 101.97 MU from FSTPS-III @ approved variable cost of 231 paise/unit for Rs.23.57 crore for the state consumption. Similarly, assumption of the Commission of drawal of 8217.30 MU from IPP has resulted in lower estimation of power purchase cost. Actually GRIDCO has drawn only on an average 2833.75 MU from IPP during FY 2017-18 and FY 2018-19. GRIDCO estimates a drawal of 4267.28 MU of energy from IPP sources during FY 2019-20.

(ii) Energy drawl from OPGC (III & IV Units)

The unit-III of OPGC has declared COD on 03.07.2019 and Unit-IV is under the verge of the COD very soon. GRIDCO is hopeful that it would be possible to procure 4574.98 MU from OPGC III & IV during FY 2019-20 at a project cost of Rs.1263.95 crore. This is in contrast to Commission's approval of 726.93 MU at a cost of Rs.109.53 crore.

(b) Estimated Trading Revenue in FY 2019-20

GRIDCO estimates only 1074.79 MU of power to be traded at the revenue of Rs.429.92 crore which may not be sufficient to bridge the gap. Therefore, GRIDCO would bear Rs.174.95 crore towards additional power purchase after adjusting the trading revenue.

(c) Claimed towards Interest

GRIDCO states that it has claimed Rs.545.15 crore towards interest outgo in ARR and BSP application for FY 2019-20. However, Commission has allowed only Rs.153.97 crore as a pass through interest. Therefore, GRIDCO may be allowed additional Rs.285.13 crore towards interest which includes interest on loan from bank/FIs and interest on SOD.

(d) Claim towards Repayment of Principal

GRIDCO submits that the Commission has not allowed repayment of principal to the tune of Rs.1016.93 crore in the ARR and BSP for FY 2019-20 in line with the stand taken while approving ARR of 2016-17, 2017-18 & 2018-19. Commission has mentioned that the proposed repayment of loan principal amounting to Rs.1016.93 crore during FY 2019-20 may be met from “Power Sector Development Fund” to be created out of the revenue earned from surplus power trading. But it has not materialised.

(e) Allow Revenue Deficit of Rs.172.94 crore due to gap in ARR

The Commission has approved net ARR of Rs.7702.90 crore in favour of GRIDCO for FY 2019-20 whereas allowed Rs.7529.96 crore to be recovered through BSP allowing a gap of Rs.172.94 crore. This may be allowed to be recouped.

(f) Some minor typographical error

GRIDCO submits that some minor typographical error has crept into the order though they have no impact on the ARR and BSP as approved by the Commission.

2. In summary GRIDCO prays the Commission to allow Rs.1650 crore as a pass through which has not been allowed in the original order.
3. The respondent CESU said that review of an order is permissible under Order 47, Rule 1 of Code of Civil Proceeding, 1998. The review petition permits rectification of any error appeared on the face of the record and not to substitute views. The term mistake or error apparent by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If the error is not self evident

and detention thereof requires long debate and reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 47, Rule 1 of CPC. CESU further submitted that the review petitioner has already submitted all such information in the original petition and the Commission after prudent check and due diligence approved the BSP of GRIDCO with detailed well reasoned findings in case No.73 of 2018. Therefore, review petition is not maintainable.

4. Another respondent WESCO Utility stated that the present review application is not maintainable in the eyes of law as being devoid of merit and not substantiating the grounds for review as depicted under the provisions of Section 152 of CPC. While determining the ARR of GRIDCO, Commission has already considered the submission of GRIDCO and approved BSP for FY 2019-20. Hence, reconsideration of proposed submission of GRIDCO would require redetermination of RST of four Distribution Utilities. In view of the above, the review petition should be dismissed outright.
5. The respondent Mr. R.P. Mahapatra has stated that the petitioner has filed the review petition under “Any other sufficient reasons”. All the prayers on which review is sought have been extensively dealt with by the Commission in their order in case No.73 of 2018. The small typographical error which has no bearing on the order may be corrected only. Therefore, the review petition should be rejected. Mr. R.P. Mahapatra has further submitted that the Commission may decide whether a new Member can hear the review petition when he has not heard the original petition.
6. In its rejoinder, GRIDCO states that “an apparent error” or a “mistake” or “otherwise” depends on the subjective analysis and may not be the same always when considered from the perspective of the petitioner and the respondents. GRIDCO is going through a stage of critical finances and has brought before the Commission certain information supported by related data so that Commission can take suitable and prudent regulatory measures. Reconsideration of the ARR and BSP order of GRIDCO does not necessarily require redetermination of Retail Supply Tariff. GRIDCO will have deficit of around Rs.1679.69 cr. (including interest of Rs.29.69 cr. on SOD). Since it may not be possible on the part of GRIDCO to recoup such a large deficit it has approached the Commission to review the ARR and BSP order for FY 2019-20.
7. Heard the parties at length. Prior to delving into the merit of the case, it is felt imperative by us to take a decision on the point of jurisdiction of the present commission consisting of the chairman and two members so far as review of the order

passed by the Commission earlier. The present new member was not in the office when the order under review was passed. 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 provisions 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 Orissa Electricity Reform Act, 1995 postulate about the quorum. 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. Accordingly, there is no legal bar as per the provision of

section 9(4) of the Orissa Electricity Reform Act, 1995 that a three Member Commission inclusive of Chairman cannot hear review petition/application of an order of the Commission passed earlier by two Members including the Chairperson. So 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 judgement dated 30.03.2017 passed by the Hon'ble APTEL in the case of Torrent Power Ltd vrs. Gujarat Electricity Board 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.

In view of the matter, it is conclusively held that the Commission consisting of three Members inclusive of Chairperson is competent to hear the review petition at hand.

8. Now we will consider the merit of the case. The determination of ARR of GRIDCO is based on the estimation of the Commission of the power purchase requirement of GRIDCO for the ensuing year. The Commission makes this estimation depending upon the submission of the petitioner, reply by the respondents and Commission's own opinion. This is done one year in advance and accordingly there is a provision for truing up of uncontrollable costs like power purchase after prudence check. If GRIDCO feels that there is such a requirement, they may approach the Commission. Similarly earning from trading, payment of interest etc. are component of truing up of exercise. Therefore, does not come under the scope of review. While passing the impugned order the Commission has given extensive justification for arriving at a conclusion. Several respondents has also pointed it out.
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. From the submission of GRIDCO, it is clearly felt that except some typographical errors nothing merits review. It is an appeal in disguise. We have already discussed remedy available to GRIDCO in this regard.

11. Accordingly the review petition except correction of some typographical errors is rejected.

Sd/-
(G. Mohapatra)
Member

Sd/-
(S.K. Parhi)
Member

Sd/-
(U.N. Behera)
Chairperson