

**ODISHA ELECTRICITY REGULATORY COMMISSION
BIDYUT NIYAMAK BHAWAN
SHAILASHREE VIHAR, BHUBANESWAR-751021**

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

Case No. 53/2019

GRIDCO Limited	Petitioner
Vrs.		
OPGC Ltd. & others	Respondents

In the matter of: **Application under S. 94(1)(f) of the Electricity Act, 2003 read with Reg.70 of the OERC(Conduct of Business) Regulations, 2004 for review of order dated 28.03.2019 of the Commission passed in Case No.33 of 2018.**

For Petitioner: Ms. Susmita Mohanty, AGM (Elect.), GRIDCO

For Respondents: Shri Sitesh Mukharjee and Shri Arjun Agarwal, Advocates,
 Shri Ritwik Mishra, GM, Shri Haresh Satpathy, DGM
 & Shri Haresh Satpathy, DGM on behalf of OPGC Limited,
 Shri Prashant Kumar Pradhan, Shri R. P. Mahapatra,
 Ms. Sonali Pattnaik, DoE, GoO .
 Nobody is present on behalf of Shri Ramesh Satpathy, Shri Prashanta
 Kumar Das, Shri Ananda Kumar Mohapatra, Shri G. N. Agarwal and Shri
 Aditya Kumar Mishra.

ORDER

Date of hearing: 30.06.2020

Date of order:10.09.2020

The petitioner GRIDCO Ltd. has filed the present petition under Section 94(1) (f) of the Electricity Act, 2003 seeking review of this Commission's order dt.28.03.2019 passed in case No.33/2018. The petitioner has requested the Commission to condone the delay of 14 days in filing the petition.

2. The case No.33/2018 was filed by OPGC for redetermination of the Generation tariff of Unit-I & II of Ib Thermal Power Station of OPGC Ltd. as per the direction of Hon'ble Supreme Court dt.19.04.2018 passed in CA No.9485 of 2017.
3. GRIDCO states that MCL has notified the grade of coal as G-13 (GCV 3401 Kcal/Kg to 3700 Kcal/Kg) vide its notification dt.07.04.2017. As per the submission of OPGC, they were procuring their linkage coal from Lakhanpur Mine of MCL for use in Unit-I and II of their power plant whose grade varies from G-13 to G-14. Therefore, the lower limit of

G-13 coal (3401-3700 Kcal/Kg) i.e. 3400 Kcal/Kg shall be applicable for working out indicative/base ECR for FY 2016-17 in respect of OPGC. However, the Commission has determined indicative Energy Charge Rate (ECR) basing on GCV of 3100 Kcal/Kg.

4. GRIDCO further submits that from the monthly invoice of coal procured by OPGC from MCL during FY 2016-17, the grade of coal can be ascertained and can be considered for determining the GCV of coal as received in the power station. This actual GCV of coal as received at the power station is to be considered for actual monthly ECR calculation for FY 2016-17. Till date OPGC has not submitted any document regarding the “as received” GCV of coal for FY 2016-17, FY 2017-18 and FY 2018-19. GRIDCO points out that OPGC has raised supplementary energy bill towards the arrear energy charges for FY 2016-17 considering the indicative/base energy charge rate (ECR) of 148.44 paisa/Kwh. This has been done basing on “as fired” GCV and not on “as received” GCV.
5. Respondent OPGC states that the Commission has left the questions relating to methodology and point of measurement of GCV for purposes of energy charge/fuel price variation calculation as per the PPA dt.13.08.1996 between OPGC and GRIDCO in case No.43 of 2017. The decision of the Commission in that case should be awaited. OPGC further states that while GRIDCO purportedly agrees that GCV “delivered to/received at the power station” is to be considered, simultaneously attempts to alter the basic concept of the formula under clause 9 of Schedule II to the PPA by seeking to place the words in the formula relatable to the project site with mine site. This is not permissible. Therefore, the review petition may be dismissed.
6. One of the respondent Mr. R.P. Mahapatra states that the Commission should decide first the jurisdiction of the Commission to hear the review case after inclusion of a new Member, who has not heard the original case. Hon’ble Supreme Court in its judgment in CA No.9485 of 2017 dt.19.04.2018 has set aside the order of the Commission determining the tariff of OPGC basing on the Regulation of the Commission. Hon’ble Court has directed as follows:

“The State Commission may take into account the notification dt.21.06.2008 for the fixed cost, the PPA for the variable costs specified therein and for other costs not reflected in the PPA, statutory regulation may be applied”.

Mr. Mahapatra points out that item-17 and 19 of Schedule II of the PPA provides GCV of coal as 3400 Kcal/Kg and cost of coal as Rs.418/Ton (to be corrected as per Administered Price notification of GoI). Therefore, GCV of coal should be 3400 Kcal/Kg on a normative basis. Basing on the order of Hon’ble Supreme Court, tariff is determined on normative parameters.

7. Another respondent Mr. P.K. Pradhan states that Hon'ble Apex Court has set aside the order of the Commission relating to tariff of OPGC from FY 2016-17 to FY 2018-19 and has directed inter alia to determine variable cost as per the PPA norm. As per PPA, the GCV has been considered as 3400 Kcal/Kg and is to be determined at the generating station end. However, the Commission while determining the ECR has considered GCV as 3100 Kcal/Kg. This is an error. In case the Commission considers GCV of 3400 Kcal/Kg mentioned in the PPA as an illustrative one, then in case of specific oil consumption, it should be considered as 0.47– 0.5 ml/Kwh maximum which is the actual consumption.
8. 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. 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.

9. Now we consider the merit of the review petition. The crux of the review is GCV of coal which is fired in the power station. The Commission is seized of the matter in case No.43/2017 which deals with questions relating to methodology and point of measurement of GCV for purposes of energy charges/fuel price variation calculation. The decision of the Commission in that case shall be equally applicable in this case. The present review petition is an appeal by GRIDCO to modify the indicative GCV in the impugned order. There is no cause which attracts review as per Order 47 Rule 1 of the Civil Procedure Code, which states as follows:

- 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.

10. The present petition appears more to be an appeal than a prayer to review the order and, therefore, does not merit consideration.
11. Accordingly, the case is disposed of.

Sd/-
(G.Mohapatra)
Member

Sd/-
(S. K. Parhi)
Member

Sd/-
(U. N. Behera)
Chairperson