

**ODISHA ELECTRICITY REGULATORY COMMISSION  
BIDYUT NIYAMAK BHAWAN  
PLOT NO.-4, CHUNUKOLI, 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. 54/2019**

Odisha Power Generation Corporation Ltd.(OPGC Ltd.)      ..... **Petitioner**

**-Versus –**

The Chairman-cum-Managing Director,  
GRIDCO Limited, Janpath, Bhubaneswar & Others.      ..... **Respondents**

**In the matter of:**      **Application under Section 94 (1) (f) of the Electricity Act, 2003 read with Reg.70 of the OERC (Conduct of Business) Regulations, 2004 and OERC (Terms and Conditions for Determination of Generation Tariff) Regulation,2014 along with Order 47 Rule 1 of the Civil Procedure Code, 1908 for review of order dated 16.08.2019 of the Commission passed in Case No. 03 of 2019.**

**For Petitioner:**      Shri Sitesh Mukharjee and Shri Argun Agarwal, Advocates, Shri Ritwik Mishra, GM and Shri Haresh Satpathy, DGM ,OPGC.

**For Respondent:**      Shri Banishree Pradhan, AGM, OPTCL, Shri Prashant Kumar Pradhan, Shri R. P. Mahapatra, Ms. Susmita Mohanty, AGM (Elect.), GRIDCO and Ms. Sonali Pattnaik, DoE, GoO.

**ORDER**

**Date of hearing: 30.06.2020**

**Date of order:21.08.2020**

The present petition has been filed by Odisha Power Generation Corporation Ltd.(OPGC Ltd.) under Section 94 (1) (f) of the Electricity Act, 2003 read with Order 47 Rule 1 of the Civil Procedure Code,1908, Reg.70 of the OERC (Conduct of Business) Regulations,2004 and OERC (Terms and Conditions for Determination of Generation Tariff) Regulation,2014 seeking review of the order dated 16.08.2019 of the Commission passed

in Case No. 03 of 2019 in the matter of approval of capital cost and generation tariff determination for OPGC Units 3 & 4 (2X660 MW).

2. OPGC has submitted that certain errors /mistakes on the face of the record have crept into the impugned order. The Commission, while approving the provisional tariff payable to the Petitioner, in its Impugned Order dated 16.8.2019 has observed as follows at Para.8 (underlined for emphasis).

“8. *The Commission observed that OPGC has filed the present petition for determination of tariff of its expansion project (Unit 3&4) based on the tariff norms of OERC Tariff Regulations, 2014 which was valid till 31.03. 2019. The COD of Unit-3 has been declared by OPGC w.e.f 03.07.2019, but it is yet to be officially intimated to GRIDCO who is the only buyer at present. The Commission is now in the process of formulating new Generation Tariff Regulations, which will be effective w.e.f. 1<sup>st</sup> April, 2019. Final tariff for this expansion project of OPGC shall be determined only after notification of the new Generation Tariff Regulations. Further, the capital cost projected by OPGC has to be audited by OPGC and verified by the Commission through an independent agency. It is expected that the COD of both the units will be declared during the current financial year following the due process. As per the existing PPA approved by the Commission, GRIDCO is agreeable to pay M/s OPGC Rs.2.75 per unit of power procured by them provisionally till final tariff is approved by the Commission. Therefore, we approve the Rs.2.75 per unit as provisional tariff to be paid to OPGC for power procured by GRIDCO from Uni-3 & 4 of the generating station after COD subject to existing PPA. This tariff shall apply for only 50% of the power generated by the Unit-3 & 4 of the petitioner’s power plant for which PPA has been approved by the Commission. After the Generation Tariff Regulation of OERC is notified by the Commission for the control period starting from 2019-20, OPGC shall file fresh petition for determination of final tariff for the control period as per the said Regulation. The provisional transaction between GRIDCO and OPGC shall be settled on the basis of final tariff approved by the Commission. Since, OPGC shall file fresh petition for determination of tariff as per new Regulation the present petition has lost its relevance and therefore there*

*is no need to keep the present case pending before the Commission. The final tariff shall be determined strictly as per approved PPA of the Commission.*

3. OPGC submitted that the following error is apparent on the face of the record in the impugned order:
  - a) While determining the provisional tariff, the Commission has not followed the Section 61 of the Act and consequent delinking of the provisional tariff from the claimed capital cost in deviation from settled principles of tariff determination.
  - b) The Commission has completely ignored the approach of the Central Electricity Regulatory Commission as required by Section 61(a) of the Act. CERC has consistent approach for allowing 85% of the claimed capital cost while determining provisional tariff.
  - c) The “Commercial Principle” as depicted in Section 61(b) of the Act relates to financial viability of the generator which has been ignored.
  - d) The Commission should take into consideration the issue of tariff shock in future while determining provisional tariff.
4. In view of the aforesaid submissions, the Petitioner requests the Commission to review its order dt.16.08.2019 and allow them a provisional tariff of Rs.3.61 per unit. OPGC further prays that they may be allowed to recover arrears from GRIDCO from the date of COD till the beginning of FY 2020-21 when the Commission revised the provisional tariff to Rs.3.09/kWh from Rs.2.75/kWh in ARR order of GRIDCO through 11 monthly installments.
5. GRIDCO in its reply submitted that the petitioner seeks this review to revise its tariff for the power generated from its Unit-3 and 4 and sold to GRIDCO. The petitioner has prayed for a provisional tariff of Rs.3.61 having Fixed Charge of Rs.2.04/kWh (based on normative generation) and Energy Charge Rate (ECR) of Rs.1.57/kWh. However, while disposing of the Case No. 3 of 2019 which is sought to be reviewed, the Commission had fixed a provisional tariff of Rs.2.75/kWh and further directed the petitioner to file fresh application/petition for determination of final tariff as per new Generation Tariff Regulation.
6. Further, GRIDCO submits that they had calculated the provisional rate of power as Rs.3.09/kWh which includes per Unit fixed charge worked out by considering 85% of

Normative Fixed Charges/kWh derived from Annual Fixed Charges proposed/filed by the Petitioner in this present review case through affidavit dt.31.10.2019 filed on 01.11.2019. They have also submitted this before the Commission during ARR hearing of GRIDCO for FY 2020-21. Accordingly the Commission has approved procurement of 4631.78 MU of power from the OPGC Expansion Project (Unit III and IV) i.e. as per approved PPA dated 04.01.2011 at a provisional rate of Rs.3.09/kWh. At Para 245 of ARR order dtd.22.04.2020 of GRIDCO for FY 2020-21 in Case No. 71 of 2019, the Commission has observed/directed as follows “245. XXXXX *The tariff for this expansion project of OPGC has not yet been determined by the appropriate Commission, though this Commission vide its order dated 16.08.2019 have fixed a provisional tariff @ 275Paise/kWh in respect of this expansion project for procurement of 50% contracted capacity by GRIDCO as per the PPA dated 04.01.2011. Considering the submission of GRIDCO, the Commission observed that the tariff for this expansion of project (Units-III & IV) of OPGC would be more than the provisional tariff of 275 P/U fixed by the Commission in its order dated 16.08.2019. Therefore, the Commission considers the proposal of GRIDCO and approves a provisional tariff of 309 P/U for procurement of power from Units-III & IV expansion projects of OPGC for the purpose of computation of ARR of GRIDCO for the FY 2020-21. GRIDCO shall pay the same to OPGC till tariff is fixed for this expansion project. XXXX*

7. GRIDCO further submits that they do not agree with the claim of OPGC for recovery of arrear from them for the period from September, 2019 to March, 2020 in 11 monthly installments considering provisional rate of Rs.3.09/kWh. GRIDCO states that they have already paid for the power supplied during September, 2019 to March, 2020 with a provisional rate of Rs.2.75/kWh fixed by the Commission vide order dated 16.08.2019 in Case No.3 of 2019. GRIDCO has been paying to OPGC @ Rs.3.09/kWh w.e.f. April, 2020. The recovery of old arrears is extraneous to this review petition and therefore may not be entertained. GRIDCO brings to the notice of the Commission their precarious financial condition due to COVID-19 situation and consequential decision of the Commission not to raise BSP. GRIDCO requests the Commission to reject the present review petition as it does not fall under any category under which review can be made.
8. Responding to the Petition, one of the Respondents Mr. R P Mahapatra submitted that the Commission has approved the provisional tariff of Rs.2.75 per unit for power procured by GRIDCO from Unit-3&4 of the generating station after COD subject to existing PPA till

final tariff is approved by the Commission. Further, the Commission in its order dated 29.3.2019 in Case No.73 of 2018 had determined the “Provisional price” of infirm power to be procured from the OPGC expansion project during the FY 2019-20 as 150.68 paise/unit. Therefore, the provisional tariff of the firm power from the Units-3&4 for FY 2019-20 should also be limited to 150.68 paise/unit as determined by the Commission. He further submitted that the Commission may not admit the present review petition filed by OPGC as the petition is in nature of an Appeal rather than Review. Mr. Mahapatra pointed out an order of Hon’ble APTEL in Appeal No.178 of 2016 (M/s Torrent Power Ltd. V. GERC), where Hon’ble APTEL quotes the judgments of Hon’ble Supreme Court which reads as follows:

*Para-35 - “thus, it is clear that the principle that one who hears must decide applies even to quasi judicial proceedings and it is a facet of doctrine of natural justice. X XXX”*

*Para-39 – xxx An application for review is not an appeal or revision to a superior court but a request to the same court to recall or reconsider its decision on the limited grounds prescribed for review. The reason for requiring the same Judges to hear the application for review is simple. Judges who decided the matter could have heard it at length, applied their mind and would know best, the facts and legal position in the context of which the decision was rendered xxx.”*

In view of the observation of Hon’ble APTEL, Mr. Mahapatra questions the validity of a new Member hearing the review petition though he has not heard the original petition. He requests the Commission to decide this matter first and then hear the case on merit.

9. Responding to the Petition, another Respondent Mr. P K Pradhan submitted that the Unit 3 & 4 of OPGC could not make COD by 31.03.2019. GRIDCO has not yet filed the amended PPA before OERC for approval where GRIDCO share of power will be 75% instead of 50%. New OERC Generation Regulations is yet to be notified. Therefore, provisional tariff of Rs.2.75/kWh is justified. There is no apparent error in the order of the Commission. Therefore, OPGC should file fresh petition for determination of tariff for FY 2019-20 as per the Regulation.
10. Responding to the Petition, CGM CESU submitted that the present review petition is not maintainable as there is neither any mistake nor any error apparent on the face of the record nor there is discovery of any new and important matter of evidence, which could have been discovered earlier or which was not within knowledge of the review petitioner.

The document now being sought to be placed on record were very much within the knowledge of the review petitioner. Hence such review petition for redetermination of tariff is not maintainable as the provisional tariff has been approved by the Commission after due consideration.

11. OPGC in its rejoinder submitted that the impugned order was passed on 16.08.2019, granting an unsustainable provisional tariff of Rs. 2.75/kWh. OPGC's Expansion Project declared its Commercial Operation Date ("COD") on 21.08.2019. GRIDCO in its reply on 31.10.2019 has proposed Rs.3.09/kWh as the provisional tariff. In view of this, the review petition may be taken up to avoid Tariff shock to the consumers of the state when the final tariff will be determined. It will also balance the cash flow problem of both GRIDCO and OPGC. Regarding the jurisdiction of the Commission to review its own order the counsel of the petitioner has submitted that after enactment of the Electricity Act, 2003 provisions of OER Act, 1995 not inconsistent with the provisions of the Electricity Act shall apply to the State in which such enactments are applicable. As per Section 94 of the Electricity Act the Commission has the same powers as are vested in a Civil Court under Code of Civil Procedure in respect of reviewing its decision. He states that the Commission with two Members can review an order of the Commission in view of the provisions in the Electricity Act, 2003.
12. 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.

13. Now we proceed to consider the merit of the case. The Commission, while approving the provisional tariff payable to the Petitioner, in its Impugned Order dated 16.8.2019 has observed as follows at Para.8 :

8. XXXXXXXX. *The Commission is now in the process of formulating new Generation Tariff Regulations, which will be effective w.e.f. 1<sup>st</sup> April, 2019. Final tariff for this expansion project of OPGC shall be determined only after notification of the new Generation Tariff Regulations. Further, the capital cost projected by OPGC has to be audited by OPGC and verified by the Commission through an independent agency. It is expected that the COD of both the units will be declared during the current financial year following the due process. As per the existing PPA approved by the Commission, GRIDCO is agreeable to pay M/s OPGC Rs.2.75 per unit of power procured by them provisionally till final tariff is approved by the Commission. Therefore, we approve the Rs.2.75 per unit as provisional tariff to be paid to OPGC for power procured by GRIDCO from Uni-3 & 4 of the generating station after COD subject to existing PPA. This tariff shall apply for only 50% of the power generated by the Unit-3 & 4 of the petitioner's power plant for which PPA has been approved by the Commission. After the Generation Tariff Regulation of OERC is notified by the Commission for the control period starting from 2019-20, OPGC shall file fresh petition for determination of final tariff for the control period as per the said Regulation. The provisional transaction between GRIDCO and OPGC shall be settled on the basis of final tariff approved by the Commission. Since, OPGC shall file fresh petitioner for determination of tariff as per new Regulation the present petition has lost its relevance and therefore there is no need to keep the present case pending before the Commission. The final tariff shall be determined strictly as per approved PPA of the Commission.*

14. Subsequently, the Commission in its order dated 22.04.2020 in Case No. 71(ARR of GRIDCO for FY 2020-20) at Para 245 have observed as follows:

*"245. XXXXX The tariff for this expansion project of OPGC has not yet been determined by the appropriate Commission, though this Commission vide its order dated 16.08.2019 have fixed a provisional tariff @ 275Paise/kWh in respect of this expansion project for procurement of 50% contracted capacity by GRIDCO as per the PPA dated 04.01.2011. Considering the submission of GRIDCO, the Commission observed that the tariff for this expansion of project (Units-III & IV) of OPGC would be more than the provisional tariff of 275 P/U fixed by the Commission in its order dated 16.08.2019. Therefore, the Commission considers the proposal of GRIDCO and approves a provisional tariff of 309 P/U for procurement of power from Units-III & IV expansion projects of OPGC for the*



*purpose of computation of ARR of GRIDCO for the FY 2020-21. GRIDCO shall pay the same to OPGC till tariff is fixed for this expansion project. XXXX*

15. In view of the above order, the cause of action for review no longer exists. The Commission has already modified the provisional tariff from Rs.2.75/Unit to Rs. 3.09/Unit for FY 2020-21 based on the submission of GRIDCO and the submission from various quarters. Accordingly, GRIDCO has paid provisionally for the power purchased from Unit-3 & 4 of OPGC @ Rs.2.75/unit for FY 2019-20 and @ Rs.3.09/Unit for FY 2020-21. Since the tariff is provisional the claim of the petitioner to pay them arrear on installment basis does not hold good because the new tariff @Rs.3.09 paise/ unit is also provisional. Once the final tariff is determined by the Commission, GRIDCO shall settle the past and future bills as per the tariff so fixed by the Commission.
16. 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.

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.

17. But no such error has been pointed out by the Petitioner seeking the review of our judgment. The present petition appears more to be an appeal than a prayer to review the order and, therefore, does not merit consideration.
18. Therefore, there is no need to review the order of the Commission. Once the Generation tariff Regulation is notified, OPGC may file the tariff petition for determination of the final Tariff for its Unit-3 & 4.
19. Accordingly, the case is disposed of.

Sd/-

Sd/-

Sd/-

**(G.Mohapatra)**  
**Member**

**(S. K. Parhi)**  
**Member**

**(U. N. Behera)**  
**Chairperson**