

**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. 31/2021

Shri Ananda Kumar Mohapatra Petitioner

Vrs

GRIDCO & others Respondents

In the matter of: Application under Section 94(1)(f) read with Regulation 70 of the OERC (Conduct of Business) Regulations, 2004 and Order 47 Rule-1 of the CPC, 1908 seeking review of order dated 26.03.2021 of OERC passed in Case No.72 of 2020 regarding ARR & Bulk Supply Price for FY 2021-22.

For Petitioner: Shri Ananda Mohapatra

Respondents: L. K. Mishra, DGM (Fin.), GRIDCO, Shri Ramesh Chandra Satpathy, Shri R. P. Mahapatra.

Nobody is present on behalf of DoE, GoO, M/s. Visa Steel Limited, M/s. Grinity Power Tech Pvt. Ltd., M/s. Indian Energy Exchange, M/s. Vedanta Limited and OPGC.

ORDER

Date of hearing: 03.08.2021

Date of order: 04.10.2021

The present petition has been filed under Section 94 (1) (f) of the EA, 2003 read with Regulation 70 of OERC (Conduct of Business) Regulations, 2004 and order 47 Rule-1 of Code of Civil Procedure, 1908, seeking review of the ARR and BSP order of GRIDCO for the FY 2021-22 dated 26.03.2021 passed by the Commission in Case No.72 of 2020. The petitioner has undertaken that no appeal has been preferred challenging the aforesaid order dated 26.03.2021 in any higher forum till the date of application.

2. The petitioner has submitted that GRIDCO has multifarious activities and functions. Apart from its prime business of bulk supply of power to DISCOMs, it is engaged in other business like trading/sale of surplus power to others. In the impugned order the Commission has allowed GRIDCO for procurement of only 28791.96 MU during FY

2021-22 towards sale of power to DISCOMs and emergency supply to the CGPs. Hence considering the availability of 35290.03 MU as proposed by GRIDCO in its application there is a surplus energy of 6498.07 MU for trading purposes. In its application GRIDCO has estimated a drawal of 17542.59 MU from central sector on LTA basis and monthly basis against which the Commission has allowed Rs.640.93 crore towards central transmission charges and ERLDC charges without any segregation/apportionment between bulk supply and surplus trading. Since the Commission has approved a drawal of 8425.83 MU from central sector, balance 9116.76 MU (17542.59 – 8425.83) is left for trading by GRIDCO. Hence it was necessary to prorate the total approved transmission and ERLDC charges of Rs.640.93 crore in the ratio of 8425.83 MU : 9116.76 MU which has not been done in the approval of ARR of GRIDCO. As per the above ratio a sum of Rs.307.84 crore should be passed in the ARR and balance sum of Rs.333.09 crore should be left to GRIDCO under the head of other business. Therefore the petitioner has prayed the Commission to review the impugned BSP order and pass only a sum of Rs.307.84 crore in the ARR of GRIDCO by keeping the balance amount of Rs.333.09 crore in the power trading business account of GRIDCO.

3. The petitioner has submitted that the CGPs are continuously injecting inadvertent power to the state grid at no cost and the same is sold by GRIDCO to the State DISCOMs. From the ARR and Transmission Tariff proposal of OPTCL before the Commission for past five years (From FY 2015-16 to 2019-20) a quantum of 7751.12 MU has been injected to the grid from the CGPs, hence the average injection of such inadvertent power is about 1550.22 MU per annum. Considering the average BSP of 287.70 p/u of the previous year, a revenue of Rs.446.00 crore is estimated towards sale of 1550.22 MU which has not been factored in the ARR and BSP of GRIDCO in the impugned order. Hence the petitioner has prayed the Commission to review the impugned order and pass a sum of Rs.446.00 crore under miscellaneous receipt of GRIDCO and revise the ARR & BSP for FY 2021-22.
4. The petitioner has stated that for the FY 2016-17 to FY 2019-20 the Commission had approved the drawal of 5039.45 MU from the IPP of M/s. Vedanta Ltd. towards full state entitlement of power, but in the impugned BSP order for FY 2021-22 the Commission has approved only 3003.48 MU in violation of merit order principle, which facilitates Vedanta to trade the balance power of state quota in the open market

and earn profit at the cost of the state. Therefore, the petitioner has prayed the Commission to review the impugned order and allot at least full state entitlement of 5039.45 MU from M/s. Vedanta Ltd. in the ARR and BSP of GRIDCO for the FY 2021-22.

5. The petitioner has submitted that as apparent from the impugned order, the Commission is still determining the ARR and BSP of GRIDCO (a trading company) as per the old consolidated Regulations named OERC (Terms and Conditions for Determination of Tariff) Regulations, 2004, whereas the said regulations have been superseded subsequently by OERC Wheeling Tariff and Retail Supply Regulations, 2014, OERC Transmission Tariff Regulations, 2014 and OERC Generation Tariff Regulations, 2014 and 2020, after rectifying the defects in the old regulations. In the old regulation of 2004 there was no clear formula for calculation of BSP for which a 'trial and error' method of calculation of BSP has been adopted by the Commission. Hence there is a need for review of the impugned order. The petitioner has submitted that at Table No.67 of para No.356 of the impugned order, the Commission has deducted the miscellaneous receipt of Rs.44.52 crore from the ARR of Rs.8289.99 crore so as to arrive at the net ARR of Rs.8245.47 crore, but while determining the BSP of 296.29 p/u, the Commission has considered the expected revenue of Rs.8257.57 crore instead of taking the net ARR of Rs.8245.47 crore which is factually incorrect because the expected revenue cannot be arrived at before determination of expected BSP. In the next Table No.68 of para No.364 of the impugned BSP Order the Commission has taken the determined BSP of 296.29 p/u to arrive at the expected revenue of Rs.8257.57 crore. This is an error apparent from the face of the impugned order leaving a surplus gap of Rs.12.10 crore and the contention of the Commission to consider the same in the process of truing up does not sense any meaning because the method of calculation is wrong. Therefore the Petitioner has prayed the Commission to review the above cited para and tables of the impugned order and revise the method of determination of BSP considering the net ARR of Rs.8245.47 crore to arrive at the BSP of 295.85 p/u and bring the revenue gap to zero in the revised BSP order of GRIDCO for the FY 2021-22.
6. The petitioner has submitted that more than 70% of the approved ARR of the DISCOMs constitutes power purchase cost payable to GRIDCO through BSP. Being the prime beneficiary, the four DISCOMs of Odisha should participate in the

proceedings for approval of ARR and BSP of GRIDCO. But in the impugned BSP order passed in Case No.72 of 2020, neither the DISCOMs were the respondents nor the Commission suo motu included the DISCOMs as respondents in the proceeding done for the impugned BSP order. The petitioner has stated that the stake of DISCOMs cannot be ignored by the regulators in any electricity tariff proceedings and therefore he has prayed the Commission to call on the DISCOMs to respond this instant review petition in the interest of justice.

7. The petitioner in its additional submission has raised the following issues:
 - a. The petitioner submitted that the Commission in its generation tariff order of OHPC has approved Rs.42.90 crore on account of income tax paid by OHPC. Accordingly, the same is allowed as pass through of power purchase dues in the BSP order of GRIDCO for FY 2021-22. The Regulation 21 of OERC Generation Tariff Regulation, 2020 specifies that the income tax of the generating company shall be recovered from the beneficiaries which violates the CERC (Terms and Conditions of Tariff) Regulations, 2019 which do not specify recovery of income tax from the beneficiaries but it specifies that the RoE shall be grossed up with the effective tax rate of the respective financial year as per the given formulae there under. As per Section 61(a) of the Electricity Act, 2003 the state commission shall specify the terms and conditions for determination of tariff and in doing so, shall be guided by the principles and methodologies specified by the Central Commission. Therefore, approval of Rs.42.90 crore in the OHPC generation tariff order and pass through of the same in BSP order of GRIDCO is illegal, unlawful and does not uphold the principles of cost based tariff. In view of the contradictory provisions, the Commission may set aside the Regulations, 19 & 21 of OERC Generation Tariff Regulations, 2020 and apply the provisions of CERC Regulations and review the impugned BSP order while allowing Rs.42.90 crore as pass through of power purchase dues towards income tax paid by OHPC.
 - b. The petitioner has submitted that the Commission has allowed Rs.47.42 crore in the OHPC Generation Tariff order for FY 2021-22 towards availability of additional 20% share from Machkund HE Project and the same has been passed through in the BSP order of GRIDCO. The petitioner has submitted that the supplementary agreement executed by OHPC with government of AP/APGENCO on 23.10.2020 for procurement of additional 20% share from Machkund HE

Project without any approval of the Commission is violation of 86 (b) of the EA, 2003. Hence the agreement is unlawful and the associated cost of Rs.27.42 crore is subject to rejection in the ARR of OHPC as well as in the BSP order of GRIDCO. Therefore, the Commission may review the impugned BSP order and re-determine the tariff.

- c. The petitioner has further submitted that 5 MW power has been allocated to CSPDCL of Chatisgarh from Hirakud HE Project, Burla as per the agreement executed between the government of Chatisgarh and government of Odisha. The Commission has determined the tariff of 180 p/u for sale of this 5 MW power to Chatisgarh considering saleable design energy of 677.16 MU of HHEP, Burla. But neither the proportionate cost of this 5 MW power is deducted from the power purchase cost of GRIDCO nor the revenue derived from such sale is considered in the determination of ARR of HHEP, Burla for FY 2021-22 for the purpose of sale to GRIDCO. The above mistake in the above impugned BSP order is very much apparent on the face of the record, hence the Commission is to review the BSP order for the FY 2021-22.
- d. The petitioner has submitted that the treatment of non-tariff income of OHPC in the generation tariff is provided in the OERC generation tariff Regulations, 2020, but the same has not been carried properly in the generation tariff order of OHPC resulting in BSP of GRIDCO at higher side. Regulation 26 of OERC Generation Tariff regulations, 2020 specifies the various components of non-tariff income whereas neither OHPC discloses the above components nor the order of the Commission carries any such details. The Commission has considered the non-tariff income of Rs.210.09 crore from the audited accounts of OHPC for FY 2019-20 in which the required details are not available. Non-inclusion of interest on bank deposits in the non-tariff income of OHPC resulted in the generation tariff of OHPC, BSP and RST at higher level. Therefore, the Commission should review the impugned orders.

8. In view of the above, the petitioner has prayed the Commission:

- i) To admit this Review Petition in exercise of the power conferred u/s. 94 (1) (f) of the Act read with regulation 70 of OERC (Conduct of Business) Regulations, 2004.

- ii) To admit the four DISCOMs as respondents in this case proceedings.
 - iii) To pass an Interim Order u/s. 94 (2) and to keep in abeyance the increased BSP in the impugned order till this review petition is disposed off by the Commission.
 - iv) To re-determine the BSP & ARR of GRIDCO by reviewing the impugned order dated 26.03.2021 considering his present petition as per the Order 47, Rule 1 of the Code of Civil Procedure, 1908.
9. The respondent GRIDCO has submitted that Order 47, Rule 1 of Civil Procedure Code, 1908 permits the review of a order if there is an error or mistake apparent on the face of the record, discovery of new and important matter or evidence, which after the exercise of due diligence was not within the knowledge of the petitioner or could not be produced by him at the time when the order was passed or any other sufficient reasons. 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 examination, scrutiny and elucidation either of the fact or legal position. If the error is not self-evident and detection 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. The present review petitioner during hearing of the main petition has already submitted all such information in the original petition and the Commission after prudent check and due diligence has approved the ARR and BSP of GRIDCO for FY 2021-22 in Case No.72 of 2020. The Commission has already considered the submission of the review petitioner while passing the impugned order. The instant review petition is not maintainable in the eyes of law being devoid of any merit and the same does not substitute the ground for review under the provisions of CPC. Since it appears that it is an appeal in disguise, the instant review petition is liable to be dismissed out right.
10. Regarding approval of excess CTU charges on the basis of the ratio of DISCOM sells and sale of surplus power, GRIDCO has submitted that GRIDCO makes trading of surplus power in case the trading price exceeds the variable charges after meeting the state demand at any point of time. Moreover the CTU charges are governed as per the CERC regulations and GRIDCO is contractually obliged to make payment of CTU charges on monthly basis irrespective of the drawal from central generating stations.

GRIDCO has submitted that the petitioner has made its own contention for bifurcation of the business of GRIDCO which is not applicable to GRIDCO since GRIDCO is empowered in extending uninterrupted quality power to meet the state demand through DISCOMs which could be possible through availing power supply from all state entitled sources. Considering the long term demand of the state, GRIDCO has entered into long term PPAs with central generating stations attracting CTU charges irrespective of the drawal made from these stations. Surplus power is sold in the energy exchanges to recover the unabsorbed fixed costs of the Eastern Region Generating Stations and at times, the trading opportunity goes in favour of GRIDCO in the subdued market. Thus the segregation of CTU charges would not be fair proposition as contended by the petitioner.

11. Regarding non-consideration of revenue on account of infirm power, GRIDCO has submitted that the APTEL has issued directive for non-consideration of the inadvertent power and the same does not deserve any cost. The Commission has followed the directives of the APTEL in the impugned order. Thus, the contention of the petitioner would not be tenable.
12. Regarding short approval of the state entitlement of power from IPPs, GRIDCO has submitted that the lower quantum of power has been allowed by the Commission on the basis of the short supply of power by the IPPs in considering the past trends over the years. Further GRIDCO has taken legal recourses against the defaulting IPPs for non-compliance by the IPPs and for availing state share of power to optimise its procurement costs. Further, GRIDCO has levied penalty on M/s. Vedanta Ltd. for non supply of the requisite quantum of power.
13. Regarding the contention of the petitioner on “trial and error” method of calculation of BSP by the Commission, GRIDCO has submitted that the BSP is determined on the basis of procurement plan of GRIDCO considering the state demand made through DISCOMs, energy availability with its associated uncontrollable costs for the respective generating stations as per the prevailing tariff regulations. Further, the tariff is determined through participation of various stake holders on public notice inviting objections/suggestions.
14. Regarding miscellaneous receipt of Rs.44.52 crore, GRIDCO has submitted that this revenue was projected towards sale of emergency power of 60 MU to long term

customers, i.e. NALCO and IMFA for meeting their back up power as per the MoU signed with them. Further, regarding disclosure of non-tariff income in the ARR, GRIDCO has submitted that it makes bulk supply of power at the approved rate to DISCOMs and at times generates revenue towards the sale of surplus power after meeting the state demand and sale of emergency power to the CGPs on long term basis.

15. GRIDCO has submitted that the review application is not maintainable in the eyes of law being devoid of any merit and the same does not substitute the grounds for review as depicted under Order 47, Rule-1 of CPC, 1908. While determining the ARR and BSP of GRIDCO for FY 2021-22, the Commission has already considered the submissions of the review petitioner and approved the ARR and BSP in the impugned order. Hence re-consideration of the submission advanced in the review petition would require to redetermination. The present review petition appears to be an appeal in disguise, hence is liable to be dismissed out right.
16. On the issues raised by the petitioner in its additional submission, the respondent GRIDCO has submitted the following:
 - a. Regarding approval of Rs.42.90 crore towards reimbursement of income tax paid by OHPC during FY 2019-20, GRIDCO has submitted that as per Regulation 21 of OERC Generation Tariff Regulations, 2020 income tax of the generating company shall be recovered from the beneficiary and this will exclude income tax on other income streams (income from non-generation activities). Accordingly, the Commission has approved pass through of Rs. 42.90 crore towards reimbursement of income tax paid by OHPC after deducting interest income of Rs.118.78 crore from the total profit before tax (PBIT) figure of Rs.246.60 crore.
 - b. Regarding pass through cost of Rs.27.42 crore, GRIDCO has submitted that the above amount is considered towards 20% share of the present depreciated project cost of Machkund HE Project as per the MoM dated 23.10.2020 between Government of AP and Government of Odisha towards onetime cost for availing the state share of power. Odisha has a share of 50% on Machkund Joint HE project. Odisha was demanding for allocation of share in 50:50 basis from this project. As decided by both the Governments, Odisha has to pay Rs. 27.42 Cr. for additional 20% share. The State Government has decided that OHPC has to pay

the said amount and accordingly, the Commission has allowed the same in the ARR of OHPC for the FY 2021-22 and the same has to be reimbursed by GRIDCO to OHPC as per the BSP order for FY 2021-22.

- c. Regarding the issue of non-consideration of revenue earned from sale of 5 MW power from HHEP, Burla to CSPDCL, GRIDCO has submitted that the Commission at Para-21 of the Case No. 58/2019 has stipulated as follows:

“We observe that at Para-123 of the impugned order, the Commission has determined the tariff for supply of 5 MW power to CSEB (presently CSPDCL) from HHEP, Burla and recognized the supply of power to CSEB. But the concern of OHPC is that the quantum of 16.644 MU energy towards 5 MW share of CSEB from HHEP, Burla is to be deducted from saleable design energy in order to determine ECR of HHEP in respect of sale of power to GRIDCO. We observe that in the Tariff Orders of past years as well as of the FY 2019-20, the ECR of HHEP, Burla is being determined based on the saleable design energy of HHEP without deducting the allocation to CSEB, because the revenue earned by OHPC from sale of power to CSEB is not being deducted from the ARR of HHEP, Burla. This revenue is being retained by OHPC. Therefore, same principle has been adopted in the impugned order while determining the ECR of HHEP, Burla for the FY 2019-20. In view of the above, the Issue No.1 raised by OHPC in the present petition does not come under review of the impugned order as there is no apparent error in the order”.

Further, in OHPC tariff order for FY 2021-22, the Commission has decided the total amount payable by GRIDCO to OHPC and the said finding is placed in the impugned BSP order. There is no case of apparent error in the BSP order itself. Co-relating any other order and getting aggrieved with any decision, is the matter of appeal, not a review case.

- d. Regarding non-tariff income of OHPC, GRIDCO has submitted that the Commission at Para-203 (Table-46) of the OHPC ARR & Tariff order for FY 2021-22, has approved total cost of Rs. 526.68 Cr. and considered the ARR of OHPC at Rs. 501.68 Cr. after deduction of Rs. 25 Cr. towards non-tariff income.

17. Heard the parties and their written submissions are taken on record. The Commission observed that as per Section 94 (1) (f) of the Electricity Act, 2003, this Commission has the same power as 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.

- 18. The Commission observed that most of the issues raised by the petitioner in the present review petition was raised by him during the hearing of the Case No. 72/2020 and some new issues raised by the petitioner in the instant review petition have also been considered by the Commission while passing the impugned order dated 26.03.2021 passed in Case No. 72/2020. Further, the issues raised by the petitioner in its additional submission are related to OHPC and the Commission has duly considered and clarified those issues in OHPC ARR and Generation tariff order dated 26.03.2021 passed in Case No. 70/2020. GRIDCO being the sole beneficiary of OHPC power stations, the reimbursable amount passed in the OHPC ARR and Generation tariff order is to be reimbursed by GRIDCO which have been reflected in the impugned order. Hence, those issues are not the matters for review in the present review petition.
- 19. In view of the above, we do not see any reason for any apparent error creeping into our order and also the Petitioner has not submitted any new and important matter or evidence with sufficient reasons which is relevant for the purpose. The present petition appears more to be an appeal than prayer to review our order and, therefore, does not merit consideration.
- 20. Accordingly, the case is disposed of.

Sd/-
(G. Mohapatra)
Member

Sd/-
(S. K. Parhi)
Member

Sd/-
(U. N. Behera)
Chairperson