

**ODISHA ELECTRICITY REGULATORY COMMISSION
BIDYUT NIYAMAK BHAWAN
PLOT NO.-4, CHUNOKOLI, SHAILASHREE VIHAR
BHUBANESWAR - 751 021

**Present: Shri G. Mohapatra, Chairperson (Offg.)
Shri S. K. Ray Mohapatra, Member**

Interim Application dated 14.02.2022 arising out of Case No. 02/2022

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| GRIDCO Ltd. | | Petitioner |
| Vrs. | | |
| M/s. Vedanta Ltd. & Others | | Respondent |

In the matter of : An application seeking direction of the Commission to M/s. Vedanta Ltd. to resume full quantum of power supply for the quarter of January to March, 2022 as per Para 30(b) & (f) of the Order dated 05.10.2021 in Case No. 34 of 2018 as an interim relief.

AND

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| GRIDCO Ltd. | | Petitioner |
| Vrs. | | |
| M/s. Vedanta Ltd. & Others | | Respondent |

In the matter of: Application under Sections 142 & 146 of the Electricity Act, 2003 read with Regulations, 2004 for non-compliance of order dated 05.10.2021 of the Commission passed in Case No. 34 of 2018.

For Petitioner: Shri R. K. Mehta, Advocate on behalf of GRIDCO.

For Respondents: Shri Sanjay Sen, Sr. Advocate, Shri Hemanta Singh, Advocate and Shri Lakshya Badwal, advocate on behalf of M/s. Vedanta Limited, the representative of SLDC, Shri K. C. Nanda, DGM (Fin.) of TPWODL, Ms. Niharika Pattnaik on behalf of DoE, GoO and Shri Bijay Das, GM (RT&C), OPTCL.

ORDER

Date of hearing: 19.02.2022

Date of order: 19.02.2022

The Petitioner GRIDCO Limited has filed the present interim application in terms of the direction of the Hon'ble High Court of Orissa in their order dated 09.02.2022 in W.P.(C) No. 3624 of 2022.

2. For the sake of clarity, the said order is quoted below:

- “1. This matter is taken up through Hybrid Arrangement (Virtual/Physical Mode).
2. Heard.
3. The petitioner is stated to have filed a review petition before the Odisha Electricity Regulatory Commission against the order impugned in this writ petition.

4. *Regard being had to the facts and submissions, it would be preposterous at this stage to entertain this writ petition.*
5. *The petitioner, therefore, is directed to pursue the remedy of review before the competent authority. If any application for supply of power by the Opp. Party No.2 to the petitioner is filed before the Odisha Electricity Regulatory Commission, interim order be passed in accordance with law by the said authority within two weeks from the date of filing the interim application.*
6. *With the aforesaid observation, the writ petition is disposed of.*
7. *Urgent certified copy of this Order be granted as per rules.”*

3. In a nutshell, the facts leading to filing of the petition at hand are as under:-

Earlier in Case No. 34/2018 instituted on the petition of Respondent No.1-M/s. Vedanta Limited, the Commission vide order dated 05.10.2021 permitted M/s. Vedanta Ltd. to operate its State Dedicated Unit# II (600 MW) normally as a CGP and operate in IPP mode for supply of power to GRIDCO on requisition basis. In the said order the Commission allowed GRIDCO to exercise its option to avail its entitlement of power under the PPA from the said Unit-II of M/s. Vedanta Ltd. within one month of the order for the quarter from 01.01.2022 to 31.03.2022. However, when M/s. Vedanta did not honour the requisition of GRIDCO to avail power, it approached the Commission under Sections 142 and 146 of the Electricity Act with a prayer to direct M/s. Vedanta to supply power as per the option of GRIDCO. The Commission by its order dated 25.01.2022, in Case No.2/2022 rejected such prayer of the Petitioner GRIDCO on the ground of delay in exercising the option to avail power from M/s. Vedanta. The rejection of the prayer of GRIDCO was challenged before the Hon'ble High Court of Orissa by way of aforesaid Writ petition and Hon'ble High Court by the above mentioned order granted liberty to GRIDCO to file an interim application for supply of power by the Respondent No.1 Vedanta Ltd. to the Petitioner GRIDCO.

In the interim application, the Petitioner GRIDCO has made the following prayers:-

- a) *Fix the present application for hearing in the second half of next date of hearing scheduled by Hon'ble Commission on 15.02.2022 in view of the urgency of the matter;*
- b) *Direct Vedanta Ltd. OP No.2 to resume full quantum of power supply for the quarter of January-March, 2022 forthwith as per Para 30(b) and (f) of the OERC order dated 05.10.2021 in Case No.34 of 2018 in terms of the Requisition dated 05.11.2021 of GRIDCO Limited, pending disposal of Case No.06 of 2022;*
- c) *pass such other order(s) or issue direction(s) as may be deemed fit and proper in the bona fide interest of justice;”*

4. The averments of Respondent No.1-M/s. Vedanta Ltd. in its reply may be summarised as follows:-

The Petitioner GRIDCO has not only failed to issue the first requisition notice within the strict timelines of one month, as the said notice was issued only on 05.11.2021, but the Petitioner has also failed to demonstrate and justify if the requisitioning of power from the Respondent No.1 would be cost effective, i.e., in the interest of the end consumers of the State. Accordingly, the Respondent No.1 issued letters dated 10.11.2021, 30.11.2021 and 14.12.2021 to the Petitioner seeking clarification as to whether the Petitioner can justify requisitioning of power as cost effective, in terms of the order dated 05.10.2021. The Respondent No.1 also intimated to the Petitioner that it will not be requisitioning linkage coal as the Petitioner failed to comply with the conditions mentioned in the order dated 05.10.2021. The Petitioner ignored the above letters, and responded only on 30.12.2021 by reiterating its demand of requisitioning power. Subsequently, as a bonafide entity, the Respondent No.1 supplied 50 MW of power to the Petitioner from 01.01.2022 to 03.02.2022, which was supplied from the power generated from the stocked linkage coal by the Respondent No.1. This was also in line with the aforementioned previous orders of this Commission whereby the obligation under the PPA qua the Respondent No.1 was reduced to the power generated from the available linkage coal.

According to the Respondent No.1, the Petitioner filed a petition under section 142 of the Electricity Act, 2003 bearing Case no. 2 of 2022, before the Commission against the Respondent No.1, thereby alleging non-compliance of the order dated 05.10.2021 with further directions requiring the Respondent No.1 to start supplying power in terms of the requisition notice dated 05.11.2021.

The Commission, after a detailed hearing, passed an order dated 25.01.2022 in Case No.2 of 2022, whereby, *inter alia*, it was held that the requisition dated 05.11.2021 has become ineffective, including on account of the fact that the Petitioner did not issue the requisition notice within the period of 30 days as required in the order dated 05.10.2021.

Feeling aggrieved by the said order, the Petitioner filed a review petition against the order dated 25.01.2021, bearing Case No. 06 of 2022 and the said petition is listed for hearing on 19.02.2022. However, by the order of Hon'ble High Court in WP(C) 3624/2022 the Commission has decided to reopen Case No. 2 of 2022 by listing the same for hearing on 19.02.2022, in which the above order dated 25.01.2022 has already been passed, and a review petition filed by the Petitioner against the said order is separately pending for adjudication and is also listed on 19.02.2022. As such, the Commission has listed Case No.

2 of 2022 which is disposed of, along with the above review petition, for hearing on 19.02.2022.

In view of the aforesaid, the impugned order/ notice is in the teeth of all principles of judicial propriety, as well as amounts to virtually deciding/ allowing the review petition filed by the Petitioner against the order dated 25.01.2022. It is a settled principle of law that after passing of an order, a Court becomes *functus officio*, meaning thereby that it cannot thereafter change or modify the order, unless a proceeding is initiated wherein the said order is challenged in a review proceeding, or any other proceeding prescribed under law.

Since the Petitioner has already filed a review petition, being Case No. 06 of 2022, before the Commission for seeking review of the order dated 25.01.2022 passed in Case No. 2 of 2022, any decision qua allowing, disallowing or partly allowing the review petition, could only have been taken after the hearing in the review petition. Accordingly it is prayed by Respondent No.1 to dismiss the interim application at hand as it is not maintainable in the eyes of law.

5. Respondent No. 3 M/s. TPWODL (DISCOM) has stated that from the submission of GRIDCO, it is observed that M/s. Vedanta in the first instance itself has started drawing power under CGP mode without observing the prudence of requirement of GRIDCO. The Commission has given order to run the Unit-II in dual mode as per the requirement of State and this arrangement is having its own importance on long term basis. In the very first instance taking such decision by M/s. Vedanta hastily may not be a prudent decision. In the absence of IPP power, there is a requirement of power due to outage of NTPC stations such as Darlipali, TSTPS Kaniha, OPGC stage-II and hydro stations having low reservoir level. GRIDCO may be sourcing high-cost power from other sources which causes risk of year end adjustment in shape of rise in BSP which ultimately will be a burden on the State consumers. In the BSP order for FY 2021-22 the Commission had approved 3003.48 MU drawal from M/s. Vedanta by GRIDCO out of approved 4847.48 MU drawal from IPPs. M/s. Vedanta should proactively take step to increase the availability of power to the tune of 5009.97 MU for State requirement which will contribute towards reduction of power purchase cost of GRIDCO and eventually will benefit to consumers of the State through reduction in Retail Supply Tariff.
6. The averments as a whole submitted by Respondent No.4-Government of Odisha in Energy Department is concisely stated as follows:

In Case No. 34 of 2018 Respondent No.4 had strongly objected to the conversion of State dedicated Unit-II (600 MW) of Vedanta to CGP and submitted that in view of the

Commission's order dated 27.01.2016 in Case No.21 of 2015, question of annulment of long term PPA dated 19.12.2012 which is valid till 2037 does not arise at all. M/s. Vedanta did not question requisition dated 05.11.2021 of GRIDCO, but supplied 50 MW of power to GRIDCO with effect from 03.01.2022 onwards. Non-supply of power by Vedanta has already burdened the Consumers of the State with additional financial cost of procurement of power to meet State demand. GRIDCO has procured 157 Million Units (MU) of power during January 2022 from Power Exchanges at an average rate of Rs.3.53/Unit (maximum rate of Rs.8.88/Unit). Due to this, additional financial burden on GRIDCO is approximately Rs.15.89 Crore. During January, 2022 (upto 30th January, 2022), GRIDCO has overdrawn around 32.87 MU of power from the National Grid by paying penalty of Rs.11.61 crores due to non-supply of power by M/s. Vedanta. Further, during January, 2022 due to non-supply of Vedanta power, GRIDCO was compelled to use Hydro Power for meeting peak demand beyond stipulated monthly generation in spite of critical Reservoir level on several occasions. It is anticipated that there will be also peak deficit during March, 2022 due to lower Hydro Generation Capacity. The generation from Unit II of M/s. Vedanta was as high as 540 MW during January, 2022 though it had supplied partially from the generated power. During January, 2022, M/s. Vedanta had not booked their monthly entitlement and thus supply of coal was nil for January, 2022 from MCL under long term valid FSA (Fuel Supply Agreement). Therefore, it is evident that, Vedanta had deliberately not lifted linkage coal for supply of State entitlement of power to GRIDCO and such action by M/s. Vedanta is contrary to Para 30(c) of Commission's order dated 05.10.2021 in Case No.34 of 2018. It is a settled position of law that where public interest is involved an interpretation which will sub-serve the public interest has to be preferred as against an interpretation which would be contrary to public interest. M/s. Vedanta has no legal rights/authority to question/examine the prudence of GRIDCO while placing the requisition dated 05.11.2021. The State Government has submitted that M/s. Vedanta Ltd. be directed forthwith to submit Day Ahead Declared Capacity in favour of GRIDCO in terms of Para 30(b) and (f) of the Commission's order dated 05.10.2021 and as per requisition dated 05.11.2021 of GRIDCO and commence supply of power to GRIDCO to meet the State demand in the larger interest of consumers of the State by procuring and utilising linkage/concessional coal available under Unit II (600 MW) under valid long term FSA pending disposal of case No. 6/2022.

7. The factual aspects revealed from the averments of Respondent No.5 OPTCL are precisely stated as follows:

It is the sole discretion of the Commission to scrutinise the justification for requisition of State entitlement from M/s. Vedanta Ltd. Moreover M/s. Vedanta has no right to suggest GRIDCO to withdraw its requisition of power from M/s. Vedanta Ltd. as per order dated 05.10.2021 more so, when it is obligated to supply state share of power to GRIDCO as per direction in para 30 (b) of the order dated 05.10.2021 in Case No. 34/2018. The financial compensation for short/no power supply, as suggested by M/s. Vedanta is not the right solution for GRIDCO/State in power deficit scenario and the issue raised by GRIDCO for non-compliance of order dated 05.10.2021 is a befitting one as M/s Vedanta Limited has violated the order deliberately and wilfully. According to Respondent No.5 M/s. Vedanta Limited has contravened and misinterpreted order dated 05.10.2021 by refusing to accept the requisition of power by GRIDCO and by not furnishing the day ahead declared capacity.

8. Since this interim application involves urgency, explicit in the above referred order of the Hon'ble High Court of Orissa, the same is taken up for hearing. The parties have submitted elaborate written submission and oral submissions through video conferencing.
9. On behalf of the Respondent No. 1 M/s. Vedanta Ltd., vehement objection has been raised against the interim prayer advanced by the Petitioner GRIDCO. They have controverted the maintainability of the prayer of GRIDCO stating inter alia that the Commission after pronouncement of order dated 25.01.2022 in Case No. 02/2022 has become *functus officio* for the purpose of re-appreciation of the dispute. In this context, Learned Counsel for the Respondent No.1 has placed reliance on the decision of Hon'ble Supreme Court in the case of Hari Singh Mann v. Harbhajan Singh Bajwa, reported in (2001) 1 SCC 169 wherein it was held as follows:

“The section is based on an acknowledged principle of law that once a matter is finally disposed of by a Court, the said Court in the absence of a specific statutory provision becomes functus officio and disentitled to entertain a fresh prayer for the same relief, unless the former order of final disposal is set aside by a Court of competent jurisdiction in a manner prescribed by law. The Court becomes functus officio the moment the official order disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or an arithmetical error.”

He also placed reliance on the decision of the Hon'ble Supreme Court in the Case of SBI vs. S. N. Goyal, reported in (2008) 8 SCC 92 wherein it was held as follows:

“26. It is true that once an authority exercising quasi-judicial power takes a final decision, it cannot review its decision unless the relevant statute or rules permit such review. But the question is as to at what stage an authority becomes functus officio in regard to an order made by him.

On going through the aforesaid decisions, it is seen that both the decisions have been made with reference to the special circumstances before the Court. In case of State of Orissa Vrs. Sudhanshu Sekhar Misra reported in 1968 AIR 647: 1968 SCR (2) 154, it was observed by Hon'ble Supreme Court that a decision is to be read in the context of special circumstances, it was made.

The concept of *functus officio* does not have any role for the Commission since the interim application is taken up as per the direction of Hon'ble High Court of Orissa in their order dated 09.02.2022 in W.P.(C) No.3624 of 2022. The direction of the Constitutional Writ Court cannot be brushed aside by any hyper technical approach. The circumstances spelt out by the petitioner GRIDCO and the averments of the State of Odisha represented by their Energy Department in the interim application show that the State had to shed away more than Rs. 27 crores for procuring power in the month of January, 2022. In view of the prayer made by the Petitioner in the interim application, it can be logically concluded that the concept of *functus officio* is no hindrance for taking up the hearing of the prayers advanced by the petitioner in the interim application.

10. It is urged on behalf of the Respondent No. 1 M/s. Vedanta that the present interim application in Case No.02/2022 cannot be logically heard without taking up hearing of the review in Case No. 06/2022 in as much as this Commission after passing of the order dated 25.01.2022 in Case No.02/2022 becomes *functus officio* and that scope of the review application is extremely narrow and is to be exercised only in limited circumstances as provided under the Code of Civil Procedure.

In this regard, it may be mentioned here that there is a review petition pending with the Commission on the ground inter alia that the requisition of the Petitioner had been made in time and that the Commission committed error in computing the period of one month. Be that as it may, the Commission with the present quorum is unable to take up the Review Petition in question for the impediment laid down under Section 9(4) of the Orissa Electricity Reform Act, 1995 in as much as the post of regular Chairperson is lying vacant and at present, the Commission is functioning with two Members, one acting as Officiating Chairperson. The material aspects for disposal of review petition and the points for consideration for interim application are not exactly similar and mostly divergent. The disposed of Case No. 02/2022 deals with non-compliance of Commission's order by M/s. Vedanta in Case No. 34/2018. M/s. GRIDCO being aggrieved by this order has filed a review application with the Commission bearing Case No. 6/2022. Therefore, Case No. 6/2022 arises out of Case No. 2/2022 and are inter-related. The Case No. 6/2022 does not

stand on its own legs being a review petition. In view of this, the Commission cannot be held functus officio as much as Case No. 2/2022 is concerned in view of pending review application in Case No. 6/2022. M/s. Vedanta Ltd. has also itself submitted that the scope of review is very limited. Therefore, interim application cannot be considered properly there. The interim application should not be saddled with hyper technicalities in view of the urgency in public service. That apart the material aspects for disposal of review petition and points for consideration are not exactly similar and mostly divergent. In such scenario, interim application being urgent in nature is taken up for consideration sans the review matter.

11. Coming to the prayer of the Petitioner GRIDCO, it is seen that the Petitioner has submitted the prayer with forceful averments that there was sudden forced outage of new thermal units during last March-April, 2021. The Petitioner GRIDCO faced sudden power shortage and could not avail / procure the cheap IPP power available within the State from M/s. Vedanta Ltd. In the application, GRIDCO has also highlighted about the availability of power from State Hydro Stations giving details of reservoir level. In the application of GRIDCO, details have been stated regarding reservoir level as on 03.02.2022 of Balimela, Indravati and Machkund Hydro Power Stations. The water level in State hydro power stations has gone down by 10 to 20 feet from the normal level. Both Petitioner GRIDCO and Respondent No.2 SLDC are therefore putting their best efforts to preserve water for meeting power demand of the State during coming severe summer days.
12. From the above averments of the Petitioner GRIDCO, which have not been strongly countered, a prima facie case for interim prayer is well founded with regard to acute shortage of electricity in the State in the coming months.

For the sake of clarity, it can be stated here that the above stated averments of the Petitioner are not afflicted with infirmity of falsehood. Since the petitioner GRIDCO established a prima facie case for the interim application, it is presumable that the Petitioner GRIDCO and the State consumers are likely to suffer greater hardship than the Respondent No. 1 M/s. Vedanta Ltd., if the interim application moved by the GRIDCO, a State Designated Agency, is disallowed.

13. Needless to say, the loss which is likely to occasion to the Petitioner-GRIDCO and the State Consumers in the event of refusal of the interim prayer cannot be compensated by any kind of monetary package.

Though the Petitioner GRIDCO had made similar prayer in its earlier application which was disallowed by this Commission vide order dated 25.01.2022 on the ground of delay of one day in submission of requisition before M/s. Vedanta Limited, there is no legal hurdle for allowing the present interim prayer of the petitioner GRIDCO in view of emergent situation.

14. Hence, the interim application is allowed with the following direction-

M/s. Vedanta Ltd. Respondent No.1 is directed to supply full quantum of power with effect from date of this order i.e. 19.02.2022 forthwith as per para 30(b), (c) and (f) of the OERC order dated 05.10.2021 in Case No. 34 of 2018 till end of 31st March, 2022 by procuring and utilising linkage/concessional coal available under Unit-II (600 MW) under the valid long term FSA pending disposal of Case No. 06 of 2022.

The interim application stands disposed of.

15. Communicate the order to both the sides forthwith through e-mail and other mode of communication.

Sd/-
(S. K. Ray Mohapatra)
Member

Sd/-
(G. Mohapatra)
Chairperson