

**ODISHA ELECTRICITY REGULATORY COMMISSION
BUDYUT NIYAMAK BHAWAN
PLOT NO.-4, CHUNOKOLI, SHAILASHREE VIHAR
BHUBANESWAR - 751021

**Present: Shri G. Mohapatra, Officiating Chairperson
Shri S. K. Ray Mohapatra, Member**

Case No. 19/2022

M/s. Nava Bharat Ventures Ltd. Petitioner

Vrs.

DoE, GoO & Others Respondents

In the matter of: Application under Section 94(1) of the Electricity Act, 2003 read with Regulation 70(1) of OERC (Conduct of Business) Regulations, 2004 and the provisions of Order 47 Rule-1 of the Civil Procedure Code, 1908 for review of order dated 12.01.2022 of OERC passed in Case No. 44 of 2021 for fixation of tariff (ECR) for procurement of power by GRIDCO from 60 MW Thermal Power Plant (IPP) of the Petitioner at Kharagaprasad, Dhenkanal.

For Petitioner: Shri R. P. Mahapatra, the authorized representative

For Respondents: Ms. Susmita Mohanty, DGM, (PP), GRIDCO & Shri Prasant Kumar Das, CGM (PP), GRIDCO Ltd., the representative of SLDC, the representative of OPTCL, Shri V. Wagle, TPCODL, Shri K. C. Nanda, GM (Fin.), TPWODL, Ms. Malancha Ghose, AGM (RA), TPNODL, Shri Binod Nayak, Asst. GM (Commerce), TPSODL, Ms. Sonali Patnaik, ALO I/c. DoE, GoO

ORDER

Date of Hearing: 21.06.2022

Date of Order: 06 .07.2022

The petitioner, M/s. Nava Bharat Ventures Ltd. (M/s. NBVL), has filed the present application for review of the Commission's order dated 12.01.2022 passed in Case No. 44 of 2021 wherein the Commission have determined the Energy Charge Rate (ECR) for procurement of power by GRIDCO from the 60 MW IPP of the petitioner.

2. The petitioner has submitted that in the impugned order, the Commission has calculated the ECR as 209.11 P/U basing on the submission of GRIDCO, without considering the submission of the petitioner. The following errors are apparent in the above calculation.

- a) The weighted average price of coal has been assumed as Rs.2211.03/MT based on the submission of GRIDCO, whereas the petitioner had determined the average unit cost of coal as Rs.2457.29/MT inclusive of average transportation cost, average uploading cost and the cost of dozing for stacking and feeding of coal and also loss of 0.8 % in transit.
- b) GRIDCO had derived the unit cost of coal at Rs.2211.03/MT based on the following:
- i. Average cost of coal was calculated on the basis of the cost of 30000 MT of Forward E-auction & Linkage auction coal, out of total 85000 MT of coal purchased on 4 occasions.
 - ii. For supply of State share of power, the ECR payable by GRIDCO was determined considering the linkage coal or coal commercially cheaper than the linkage coal both rate and quality i.e. GCV wise.
 - iii. Without grossing up the average landed cost of coal by the normative transit loss of 0.8%.
 - iv. Dozing charges of Rs.58.00/MT for stacking and feeding was not considered stating it as a part of O&M expenses.
- c) As per the petitioner the average cost of coal cannot be limited to only the E-auction and Linkage-auction coal. It has to be based on average of coal received under various purchase modes. Procurement of linkage coal for supply of 12% State share of power is not relevant. The ECR is to be calculated on the basis of the total generation from the plant and the same rate shall be applicable for the 12% State share of power. Since the quantity of coal lost during transit is not available the charges are being paid on the full quantity of coal received at the mine end. Therefore, the effective unit rate of coal is to be calculated taking into account the normative transit loss. Further, GRIDCO has not considered the dozing charges with the wrong impression that such expenditure is part of O&M expenses, which is a component of fixed charges. This is not acceptable to the petitioner as dozing is done by the contractors and does not form a part of installation of the power plant for feeding coal.
- d) In the impugned order, the Respondent-GRIDCO had submitted that in the absence of the actual "As Received" GCV of coal and Third Party sampling

report, consideration of lower limit in range of GCV of coal by the petitioner to derive the weighted average GCV of coal, was not acceptable to GRIDCO. As per GRIDCO, in this case median value of the range of GCV of coal has to be taken. Hence GRIDCO, in its tentative ECR calculation had considered the Average GCV of Coal as the “Weighted average mid GCV of linkage and forward E-auction coal”.

e) In its reply to the above submission of GRIDCO, the petitioner had not agreed with the contention of GRIDCO due to the reason that even though the coal from a mine has been given a Grade with GCV range, the actual value is many a time lower than the minimum of the Grade on account of the following:

- Apart from coal the coal seams also contain shale and dirt bands with stone etc. For determination of the Grade of coal in a mine, the shale and dirt bands are normally removed and GCV of the coal alone is determined.
- The coal mined from the mines consists of coal, shale and dirt bands, which is supplied to the consumer after crushing. Therefore, the actual GCV of the coal supplied to the customer is 10-15% lower than the declared Grade.
- M/s. NBVL is taking action for third party sampling and accordingly the GCV of the coal supplied shall be determined based on the analysis of the samples.

f) The Commission has not passed any order relating to determination of GCV of coal. However in the illustrated calculation of ECR, the Commission has assumed the GCV of coal as submitted by GRIDCO. The submission of GRIDCO was based on median value of the range of GCV of the grade of coal and that to selected supply and not based on the average of all supplies received by the petitioner.

g) In the impugned order, the petitioner had stated that there is no continuous consumption of fuel oil during the operation of the broilers. But secondary fuel oil is used during the start-up. Therefore, in ECR calculation the petitioner has not considered the cost of secondary fuel oil consumption. However, the petitioner had requested for reimbursement of the actual cost of secondary fuel oil in monthly bills. The petitioner has further submitted that the secondary fuel

oil consumption during a calendar month will be limited to the quantum as provided in the OERC Generation Tariff Regulations, 2020. In the impugned order, the Commission has not considered the above submission of the petitioner which is an error apparent on the face of the record.

- h) In Para-68 of the impugned order, the Commission had directed both GRIDCO and the petitioner to discuss the matter at appropriate level to obtain domestic coal under different policies of the Central/State Government towards State share of power from the subject IPP of the petitioner. Accordingly, the petitioner has already requested the GRIDCO to approach the State Government in this regard. However, the petitioner has submitted that the domestic coal received under different policies under Central/State Government will be considered for determining the ECR for the total generation of power from the 60 MW IPP and at the ECR, GRIDCO will be billed for the 12% State share of power.
- i) In view of the above, the petitioner has prayed the Commission for review of the impugned order dated 12.01.2022 in Case No. 44 of 2021 and to pass orders as stated below:
- The weighted average unit cost of coal shall be calculated on the basis of total quantity of coal purchased under different modes and not limited to any specific purchase.
 - The cost of unloading, dozing for stacking and feeding of coal may be allowed for the determination of the weighted average cost of coal.
 - The loss in transit of 0.8% may be considered to determine the total average unit cost of coal.
 - The weighted average GCV of coal received under different modes of purchase shall be determined based on the test reports of “as received” samples of coal through Third Party Sampling and Testing.
 - The cost of secondary fuel oil shall not form part of the ECR. The cost of secondary fuel oil used during any month for start-up is to be reimbursed, in addition to the amount billed towards the 12% power supplied to GRIDCO based on the ECR, limited to 0.50 ml/kWh on the gross generation for the month.

3. The Respondent-GRIDCO has submitted that;

a) The Electricity Act, 2003 at Section 94(1)(f) confers power on the Commission to review its order which is similar to Section 114 read with Order 47 Rule 1 of the Code of Civil Procedure on the following grounds:

- Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Petitioner and could not be produced by him at the time when the decree or order was passed.
- Some mistake or error apparent on the face of record, and
- For any other sufficient reasons

b) The scope and ambit of review has been well settled by the Apex Court in a cantena of decisions which are as follows:-

In Son Chandrakanta & Another Vrs. Sheikh Habib reported in AIR 1975 SC 1500, the Hon'ble Apex Court dismissed a review application observing as under:

“.....Once an order has been passed.....a review thereof must be subject to the rules of the game and cannot be lightly entertained. A review of a judgment is a serious subject and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility.”

c) Similar view has been stated by the Hon'ble Apex Court in the case of Sajjan Singh and Others Vrs. The State of Rajasthan and Others reported in AIR 1965 SC 845.

d) In Subhash-vrs-State of Maharashtra and Anr. reported in AIR 2002 SC 2537, the Hon'ble Court emphasized that the Court should not be misguided and should not lightly entertain the review application unless there are circumstances falling within the prescribed limits for that as the Courts and Tribunals should not proceed to re-examine the matter as if it was an original application before it for the reason that it cannot be a scope of review.

e) In Civil Appeal No.5217/2010, the Apex Court vide their judgment dtd.01.02.2019 between Ashariti Devi THR LRs-Vrs-State of UP and Others reported in AIR 2019 SC 832, the Court reiterating the settled position of law on review held that every error whether factual or legal cannot be subject matter of

review under Order 47 Rule 1 of CPC, though it can be made subject matter of appeal arising out of such order. In order to attract the provisions of Order 47 Rule 1 of the Code, the error/mistake must be apparent on the face of the record. The petitioner must satisfy the Court that the matter or evidence discovered by it at subsequent stage could not be discovered or produced at the initial stage though it had acted with due diligence.

f) A party filing a review on the ground of any other “sufficient reason” must satisfy that the said reason is analogous to the conditions mentioned in Order 47 Rule I CPC. Under the garb of review, a party cannot be permitted to re-open the case and to gain a full-fledged innings for making submission, nor does review lie merely on the ground that it may be possible for the Court to a contrary view to what had been taken earlier. Since the case has been decided after full consideration of the submissions of the parties, the petitioner cannot be permitted to engage the Court again to decide the issue already decided.

g) The petitioner has filed the present petition for review of the order dated 12.01.2022 in respect of following three components of ECR:

- Average Unit cost of coal
- GCV of coal
- Specific Oil Consumption

h) At Para 65 of the order dated 12.01.2022, the Commission has directed as follows:

“65. The energy charge is to be calculated and billed by the generator on month to month basis as per Regulations 27(8), (9) & (10) of the OERC generation Tariff Regulations, 2020. Regulation 27(10) & (11) of the OERC Generation Tariff Regulations, 2020 provides that the Energy Charge Rate (ECR) in Rupees per kWh on ex-power plant.”

i) At Para 66 & 67 of the impugned order dated 12.01.2022, the Commission after prudent check and scrutiny of submissions of the Petitioner and GRIDCO have fixed indicative tariff of Rs.2.09/kWh and have directed as follows:

“66. XXX XXX GRIDCO has to verify the details of coal purchased and consumed as well as GCV of the same. However, as an illustration the Commission has calculated the energy charge rate as under basing on the weighted average price & GCV of both Coal and fuel oil as considered by GRIDCO in its submission.

67. The above computation of ECR is only for the purpose of illustration. The billing of ECR shall be made by M/s. NBVL and submitted to GRIDCO on monthly basis with the details of coal/oil used for generation as per the OERC Generation Tariff Regulation, 2020 and the parameters decided by the Commission in the present order. GRIDCO shall verify GCV and price of coal and oil etc before making actual payment as per Regulations.”

- j) Further the Commission vide its order dated 12.01.2022 has directed as follows:

“68. XXX XXX Further, the Commission is of the view that domestic coal should be utilized for generation of power for State use to avoid tariff burden on the State consumers. Therefore, the Commission directs both GRIDCO and the petitioner to discuss the matter at appropriate level to obtain domestic coal under different policies of the Central/State Govt. towards state share of power from the subject 60 MW IPP of M/s. NBVL.”

Accordingly, the landed price of coal has been considered by the Commission while fixing the indicative ECR.

- k) The submission of GRIDCO was based on the median value of the range of GCV of the Grade of Linkage Auction and Forward E-auction Coal, as NBVL could not place actual “As Received” GCV of coal supported by Third Party Sampling Reports during the proceedings of Case No. 44 of 2021;
- l) The monthly actual ECR shall be worked out based on the formula given in the OERC Tariff Regulations, 2020 as directed at Para 65 of the order. Thus, the contention of the review petitioner regarding specific fuel oil consumption is devoid of merit.
- m) Moreover, the petitioner cannot be treated differently from other thermal generators in respect of consideration of transit loss and computation of ECR respectively.
- n) In the present petition, the petitioner has reiterated the submissions made earlier in Case No.44 of 2021 which have already been taken into cognizance by the Commission while carrying out the exercise of ECR determination under the said case.
- o) In view of the above, the grounds placed by the petitioner for review of the order dated 12.01.2022 cannot be accepted as grounds for review and thus the present application may be dismissed as devoid of merit.

4. The submissions made by the Respondents TPWODL and TPSODL, which are similar in nature, are as follows:

- a) The Commission while disposing the application of the petitioner vide order dated 12.01.2022 in case No.44 of 2021, have approved an indicative tariff of Rs. 2.09/kWh considering the submissions/objections of the both petitioner, GRIDCO and other stake holders.
- b) Now the applicant has filed the review petition with following prayers:
- The weighted average unit cost of coal shall be calculated on the basis of total quantity of coal purchased under different modes and not limited to any specific purchase.
 - The cost of unloading, dozing for stacking and feeding of coal may be allowed for the determination of the weighted average cost of coal.
 - The loss in transit of 0.8% may be considered to determine the total average unit cost of coal.
 - The weighted average GCV of coal received under different modes of purchase shall be determined based on the test reports of “as received” samples of coal through third party sampling and testing.
 - The cost of secondary fuel oil shall not form part of the ECR. The cost of secondary fuel oil used during any month for start-up is to be reimbursed in addition to the amount billed towards the 12% power supplied to GRIDCO based on the Energy Charge Rate, limited to 0.5 ml/kWh on the gross generation for the month.
- c) The instant review application filed by the petitioner is not maintainable in the eyes of law. As per the provisions of Civil Procedure Code, 47, Rule 1, review is permissible if it stratifies the following conditions:
- Discovery of new and important matter or evidence which after exercise of due diligence was not in the knowledge of the applicant and could not be produced by him at the time when the decree or order was passed;
 - Some mistakes or error apparent on the face of record; and
 - For any other sufficient reason

- d) The reason cited by the petitioner is satisfying none of the above pre-conditions for review; rather it seems to be an appeal in disguise. Hence, the instant application is not maintainable and liable to be dismissed.
- e) Further, in the impugned order, the Commission has approved the ECR considering the submissions/ objections of the petitioner, GRIDCO and the other stake holders and it has already attained its finality. At Para 66 of the impugned order dated 12.01.2022, the Commission have observed the following:

“Considering the above provisions of the OERC Generation Tariff Regulations, 2020, the Commission directed that the petitioner-M/s. NBVL would furnish the information/ data to GRIDCO as regards to details of coal and oil with break-up as stated in the Regulations. From the submission of M/s. NBVL it is understood that they are using e-auction/ imported coal for operation of its power station. GRIDCO has to verify the details of coal purchased and consumed as well as GCV of the same. However, as an illustration the Commission has calculated the energy charge rate as under basing on the weighted average price & GCV of both Coal and fuel oil as considered by GRIDCO in its submission.”

- f) From the above, it is very much clear that the price approved by the Commission is an indicative/illustrative only, however basing upon actual after due verification at GRIDCO end, the price would be different. Therefore, the present petition of M/s. NBVL for redetermination of ECR considering new set of submissions is not required.

5. Replying to the submissions of GRIDCO, the petitioner vide its filing on 27.06.2022, has submitted that during the hearing on 21.06.2022, GRIDCO stated that the petitioner is responsible to source coal under the difference schemes of the Government of India. But the petitioner has not done so. Further, the petitioner is not submitting the 3rd party cost analysis report. In its reply, the petitioner has stated that there are certain conditions to be fulfilled to get long term coal linkage as given hereunder:

- a. The generating plant should have a long term PPA with the distribution company, where is the same is possible only through Case-I competitive bidding route. Now-a-days no DISCOM is floating tenders to procure power under long term Case-I bidding. If any DISCOM floats a tender for power procurement under Case-I bidding for a quantity of 1000 MW, as per Case-I tender guidelines, the minimum bid quantity should be 20% of the tender quantity i.e. 200 MW, for which the 60 MW generating plant of the petitioner will not qualify to participate.

- b. The petitioner has a long term PPA with GRIDCO for 12% of the energy sent out, for which Coal India Limited would not allot long term coal linkage.
- c. Now-a-days any coal linkage is possible through only e-auction.
- d. Recently, CEA has finalized the modalities and issued a notification to allot coal under Sakti E-auction Scheme upto one year, against which the petitioner has submitted the application on 05.06.2022.

However, for last few months, the petitioner is procuring low cost coal under special forward e-auction, spot e-auction and Sakti e-auction scheme.

- 6. The petitioner has further submitted that the statement of GRIDCO regarding non-submission of 3rd party analysis report, is not correct. During the course of hearing of the original Petition No. 44/2021, the 3rd party coal analysis report was submitted along with the monthly power supply bills.
- 7. We have considered the submissions of the Review Petitioner & GRIDCO, perused the order dated 12.01.2022 and have scrutinized the record.
- 8. The embargo under Section 9(4) of the Orissa Electricity Reform Act, 1995 in the matter of hearing of the Review Petition by three members of the Commission appears to have been clarified by the Hon'ble APTEL in their order dated 11.03.2022 in Appeal No.38 of 2022 & IA Nos. 256, 257 & 258 of 2022 in the following words:-

“6. During the hearing, it was brought out that there is a vacancy in the office of the Chairperson of the State Commission, though, hopefully it is expected to be filled up in near future. Be that as it may, it is admitted on all sides that on the relevant dates the Commission comprised only of two Members, the Member (Law) being senior having been officiating as Chairperson. Undoubtedly, Section 9(4) of Odisha Electricity Reforms Act, 1995, has prescribed the quorum of all three Members of the Commission sitting in review jurisdiction, but it cannot be ignored that on the relevant date(s) the Commission comprised only of two members. In these circumstances, the doctrine of necessity would allow the Commission to continue discharging its statutory functions rather than abdicating its responsibility.

7. In our considered view, Section 93 of the Electricity Act expressly saves and protects the impugned order from criticism of the kind levelled by the appellant here, the provision reading thus:

Section 93. (Vacancies, etc. not to invalidate proceedings):

No act or proceedings of the Appropriate Commission shall be questioned or shall be invalidated merely on the ground of existence of any vacancy or defect in the constitution of the Appropriate Commission.”

From the above observations of the Hon'ble APTEL, we hold that the Commission at present consisting of two members, of whom one is Officiating as Chairperson is competent to hear the Review Petition.

9. The Commission observed that the petitioner has filed the present petition for review of the order dated 12.01.2022 passed in Case No. 44 of 2021 in respect of weighted average unit cost of coal including cost of dozing and loss in transit, weighted average GCV of coal and cost of secondary fuel oil. The Commission further observed that the petitioner had already raised these issues in the original petition in Case No. 44/2021 and after consideration of the submissions of all the parties, the Commission vide its order dated 12.01.2022 had calculated the ECR as 209.11 P/U for the 60 MW IPP of the petitioner. At Para-67 of the impugned order, the Commission had indicated as follows:

“67. The above computation of ECR is only for the purpose of illustration. The billing of ECR shall be made by M/s. NBVL and submitted to GRIDCO on monthly basis with the details of coal/oil used for generation as per the OERC Generation Tariff Regulation, 2020 and the parameters decided by the Commission in the present order. GRIDCO shall verify GCV and price of coal and oil etc before making actual payment as per Regulations.”

10. From the above observation of the Commission, it is clear that the calculation of ECR as 209.11 P/U in the impugned order is tentative and made for illustration purposes. However, at the time of monthly billing, the petitioner shall compute the ECR as per OERC Generation Tariff Regulations, 2020. The Regulation clearly defines the issues raised by the petitioner in the present review petition. The issues raised by the petitioner in the present review petition are nothing new and have already been addressed by the Commission in the impugned order dated 12.01.2022 in Case No. 44 of 2021. However, the present petition appears more to be an appeal on the issues which had already been raised by the petitioner and been addressed by the Commission in the impugned order.
11. 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. Order 47 Rule 1 of the Civil Procedure Code, 1908 provides that a party considering itself aggrieved by an order may seek review of the order under the following circumstances:

- “(a) Discovery of new and important matter or evidence which was not within knowledge of the Review Petitioner or could not be produced after the exercise of due diligence;*
- (b) Mistake or error apparent on the face of the record; and*
- (c) Any other sufficient reason.”*

12. On examination of the contentions of Review petition, we do not find any error apparent on the face of record, which require modification of our order dated 12.01.2022. We observe that the averments made by the Review Petitioner in the present Review Petition have already been raised by it in Case No.44 of 2021 and the same have already been addressed by us in our order dated 12.01.2022 in Case No.44 of 2021 in paragraph 57 to paragraph 69.

13. In our opinion, the case of the Review Petitioner does not fall under any of the three categories mentioned under Order 47 Rule 1 of Code of Civil Procedure, 1908. The Hon’ble Supreme Court in Lily Thomas & Ors V. Union of India & Ors. [(2000) 6 SCC 224] observed as under:

“56. It follows, therefore, that the power of review can be exercised for correction of a mistake and not to substitute a view. Such powers can be exercised within the limits of the statute dealing with exercise of power. The review cannot be treated as an appeal in disguise. Then mere possibility of two views on the subject is not a ground for review...”

14. In view of above discussions, we are of the view that no ground is made out by the Review Petitioner to review the decision in the impugned order.

15. Accordingly, the case is disposed of.

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

Sd/-
(G. Mohapatra)
Officiating Chairperson