

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

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

**Case No. 49/2022**

OHPC	.....	Petitioner
Vrs.		
GRIDCO Ltd.	.....	Respondent

**In the matter of:**      **Application under Section 94 (1) (f) 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 13.06.2022 of OERC passed in Case No. 78 of 2021 regarding approval of Capital Works of OHPC.**

**For Petitioner:**      Shri Ashis Kumar Mohanty, Director (Operation) and Shri Akshya Kumar Das, AGM (Elect.), OHPC Ltd.,

**Respondent:**      Shri P. K. Das, CGM (PP) and Ms. Murchhana Dhar, DGM (PP), GRIDCO Ltd.

**ORDER**

**Date of hearing: 15.11.2022**

**Date of order: 23.11.2022**

The review petitioner- OHPC has filed the present petition under Section 94 (1) (f) 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 13.06.2022 of OERC passed in Case No. 78 of 2021 in the matter of approval of civil works of OHPC.

2. The Commission in its order dated 13.06.2022 passed in Case No.78 of 2021 had accorded in principle approval to carry out the capital maintenance work of Units-I & II of Chipilima Power House at the negotiated price of Rs.57.36 Crore as proposed by OHPC. Further, the Commission had also accepted in principle the proposal of OHPC to carry out refurbishment of power channel of Chipilima Power House at the estimated cost of Rs.153.55 Crore. Apart from the above two capital works, OHPC, in its petition

in Case No.78 of 2021, had proposed to carry out the following civil works at the total estimated cost of Rs.70.45 Crore.

- i. Construction Quarters at BHEP, Balimela and RHEP, Rengali at an estimated cost of Rs.46.73 Crore.
  - ii. Construction of new water supply system at BHEP, Balimela and extension of water supply system to RHEP colony at Rengali Dam site at an estimated cost of Rs.12.72 Crore.
  - iii. Construction of 40 bedded Training Hostel at BHEP, Balimela at an estimated cost of Rs.5.00 Crore.
  - iv. Construction of Training Hostel at OHPC Training Centre at Bhubaneswar at an estimated cost of Rs.6.00 Crore.
3. The Commission, in the impugned order dated 13.06.2022, though agreed for execution of the above civil works, had suggested to meet the said expenditure from the miscellaneous earnings of OHPC in a segregated manner without being capitalised. In this regard, the observations of the Commission at Para-27 (c) of the impugned order is quoted below:

*“The Commission feels that there is need for construction of quarters along with other basic facilities like drinking water supply system at BHEP & RHEP, which were constructed during the years 1960s & 1980s respectively, to provide better living condition to employees staying in such remote areas. Similarly, proposed construction of training hostel at Balimela and Bhubaneswar is also considered essential for capacity building of employees. Therefore, the Commission agrees for construction of the proposed civil works in respect of construction of quarters & water supply system at BHEP & RHEP, construction of Training Hostel at OHPC Training Centre, Bhubaneswar. However, the Commission observed that the expenditure on the above civil works, if passed on in the ARR of OHPC, will cause hike in OHPC Tariff which consequently exerts burden on the State consumers. In order to avoid such burden on the consumers, the Commission is not inclined to pass on the expenditure of Rs.70.45 Crore proposed by OHPC for the above mentioned civil works as OHPC is in a comfortable position to meet such expenses from its earnings for which huge amount of income tax is being paid by it. Hence, the Commission suggests that OHPC may meet*

*the said expenditure from its miscellaneous earnings in a segregated manner spanning over some years and should not be capitalised.”*

4. Now OHPC has filed the present review petition with the prayer to review the impugned order dated 13.06.2022 and accord in-principle approval for capitalisation of civil works estimated to be Rs.70.45 crore towards construction of quarters, training hostel and water supply system at OHPC generating units in future tariff of OHPC. OHPC has submitted that:

- i) Disallowance by the Commission vide the impugned order for capitalisation of Rs.70.45 crore and suggesting for meeting the above expenditure from the miscellaneous earning is intended to exhaust the whole non-tariff income of OHPC. Non-tariff income has been defined under Regulation 26 of the OERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2020. Only some of the non-tariff income is to be deducted from the Annual Fixed Charges (AFC) as stipulated under Regulation 41 of the said Regulation. Hence the order of the Commission indirectly meant for interference with the non-tariff Income of OHPC other than what is stipulated under the said Regulation 41, which is contrary to the OERC Generation Tariff Regulations, 2020 and hence an error apparent on the face of the record.
- ii) As per the Electricity Act, 2003, the generating station includes any building used for housing the operating staff of a generating station. Further, any asset addition, those are linked to generating station activities and also any additional works/services, which have become necessary for efficient and successful operation of a generating station shall have to pass through in the tariff. There is no such provision in the Generation Tariff Regulations, 2020 for meeting the expenditure of capital nature from the miscellaneous earning. Moreover, the word “miscellaneous earning” and its utilisation have not been defined in the Generation Tariff Regulations, 2020. In absence of any regulatory provision of miscellaneous earning, issuance of directive to meet the expenditure of Rs.70.45 crore from the miscellaneous earning in the impugned order is an error apparent on the face of the record.
- iii) Further there is no regulatory provision for disallowing capitalisation with a plea that such capitalisation would hike the generation tariff. In past years, the average tariff of OHPC generating stations remains around 90 paise/unit. By allowing the

capitalisation of Rs.70.45 crore towards the proposed civil works, the tariff hike of OHPC power stations would be minimal. Moreover, the capitalisation would spread over the years depending upon the completion of the work and hence it may not have burden on the state consumers.

5. The respondent GRIDCO has submitted that:

- i) The approach adopted by the Commission in the impugned order to fund the expenditure of Rs.70.45 crore towards other civil works from the miscellaneous earnings of OHPC appears to be prudent and within the regulatory purview. The plea advanced by the petitioner for filing the present review petition does not qualify any of the grounds specified under Order 47 Rule 1 of the Civil Procedure Code, 1908.
- ii) As per Regulation 50 of the OERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2020, the Commission has the power to remove difficulty under which necessary changes/deviations in the approach followed from the earlier order can be taken without being inconsistency with the provisions of the Act or the provisions of the other Regulations specified by the Commission. Hence the suggestion of the Commission to fund the expenditure of other civil works from the miscellaneous earning of the petitioner is not a violation to any of the applicable Regulations.
- iii) The provisions for treatment of non-tariff income as provided in the OERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2020 are extracted as under:

***“19. Annual Fixed Cost***

*(1) The annual fixed cost (AFC) of a generating station shall consist of the following components:*

- (a) Return on equity;*
- (b) Interest on loan capital;*
- (c) Depreciation;*
- (d) Interest on Working Capital;*
- (e) Operation and maintenance expenses;*
- (f) Income Tax;*
- (g) Less : Non-Tariff Income*

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## **26. Non-Tariff Income**

- (1) *The amount of Non-Tariff Income of the Generating Company as approved by the Commission in accordance with Regulation 41 shall be deducted while determining its Annual Fixed Charge:*

*Provided that the Generating Company shall submit full details of its forecast of Non-Tariff Income to the Commission in such form as may be stipulated by the Commission.*

- (2) *The Non-Tariff Income shall include: (a) Income from rent of land or buildings; (b) Income from sale of scrap; (c) Income from investments; (d) Income from sale of ash/rejected coal; (e) Interest income on advances to suppliers/contractors; (f) Net Income from supply of electricity by the Generating Company to the housing colonies of its operating staff and supply of electricity by the Generating Company for construction works at the generating Station, after adjusting the expenses incurred for supply of such electricity; (g) Income from rental from staff quarters; (h) Income from rental from contractors; (i) Income from hire charges from contractors and others; (j) Income from advertisements; (k) Income from sale of tender documents; (l) Any other Non-Tariff Income.*

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## **41. Sharing of Non-Tariff Income**

*The non-tariff net income in case of generating station from rent of land or buildings, sale of scrap and advertisements shall be shared between the beneficiaries and the generating company, in the ratio 50:50.”*

- iv) As per Regulation 26 all the income of a generator which is not earned from sale of power are covered under non-tariff income. As per Regulation 19 non-tariff income is a part of AFC to be determined by the Commission where such income is deducted from the total revenue requirement calculated for a year. However, as per Regulation 41, 50% of the income from rent of land or buildings, sale of scrap and advertisements shall be retained by the generating company and shall not be used for calculation of AFC or allowed as a pass through to the consumers. In the present context it may be clarified that the term “miscellaneous earning”/other income have the same meaning as non-tariff income. As per OERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2020, a generator is entitled for the profit in terms of RoE, better operational performance, savings due to refinancing of loans, sharing of certain non-tariff income and CDM benefits. All other income is supposed to be passed on to the consumers through reduced tariff.

- v) The petitioner has earned substantial non-tariff income in past years as given below:

<b>Year</b>	<b>Non-Tariff Income</b>
FY 2020-21	Rs.144.75 crore
FY 2019-20	Rs.210.09 crore
FY 2018-19	Rs.172.08 crore
FY 2017-18	Rs.161.75 crore

- vi) The non-tariff/other income available with the petitioner is sufficient to fund the required expenditure of proposed civil works estimated at Rs.70.45 crore in a phased manner, which otherwise would have been passed on to the consumers through AFC. This will help the petitioner in paying less tax which is otherwise borne by the consumers of the State. The Commission may treat the assets created out of investment of such non-tariff income as consumer contribution which shall not be eligible for depreciation.

6. The petitioner OHPC in its rejoinder has submitted that:

- i) The provisions envisaged in OERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2020 is applicable to all generators. The Commission cannot apply removal of difficulties in isolation to OHPC only for utilising the miscellaneous fund towards capital investment for civil works. If applied, it should be applicable to all the utilities of power sector.
- ii) The figures of non-tariff income as submitted by GRIDCO are inclusive of Reimbursement of Income Tax, Dam share from DoWR in respect of UIHEP which needs to be deducted in order to ascertain the actual non-tariff income. Further major portion of the above Non-Tariff income shall be accounted towards the interest earning on RoE and depreciation fund which shall be taken out and merged in the above fund, for capital investment in the RM & U project, new projects, capital maintenance etc. Once the bank interest is considered under RoE and depreciation fund, the balance fund is very marginal to meet the required capital expenditure. Nevertheless such marginal fund may not be considered as earning out of tariff determination by the Commission.

7. Heard the Petitioner and the Respondent at length through virtual mode. We observe that:

- i) The Commission vide its order dated 13.06.2022 passed in Case No.78 of 2021 have agreed for construction of quarters and drinking water supply system at Balimela & Rengali power stations of OHPC along with construction of training hostel at Balimela and Bhubaneswar, as proposed by OHPC at an estimated cost of Rs.70.45 Crore. However, keeping in view the hike in OHPC tariff on account of such expenditure, the Commission have suggested OHPC to meet the said expenditure from its miscellaneous earnings in a segregated manner spanning over some years without capitalisation of the same in order to avoid tariff burden on the State consumers.
  - ii) The income of a generating company from its core business is mainly from the Return on Equity (RoE), which is a component of its tariff. The income from various other sources is non-tariff income which has been elaborated in Regulation 26 of OERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2020. As per the Regulation 41, the non-tariff net income only from rent of land or buildings, sale of scrap and advertisements shall be shared between the beneficiaries and the generating company, in the ratio 50:50. There should not be any confusion that the “miscellaneous income” mentioned in the impugned order dated 13.06.2022 is the non-tariff income as defined in the OERC Generation Tariff Regulations, 2020. From the submissions of the petitioner it is clearly understood that it has drawn the same conclusion as stated above.
  - iii) The Commission is aware of the fact that the OHPC is having a huge amount of non-tariff income and accordingly a huge amount of tax is being paid by it. Even if the amount towards reimbursement of income tax from GRIDCO and the share of Dam maintenance cost under O&M from the Department of Water Resources, is deducted from the total non-tariff income, there still remains a substantial amount in this account. Being a State generating company, OHPC should not accumulate such income. Therefore, the Commission in the impugned order dated 13.06.2022 have suggested OHPC to meet the proposed expenditure of Rs.70.45 Crore from its miscellaneous income / non-tariff income towards proposed construction of quarters and drinking water supply system at Balimela & Rengali power stations of OHPC and construction of training hostel at Balimela and Bhubaneswar.
8. We further observe that as per Section 94(1) (f) of the Electricity Act, 2003, this Commission has the same powers 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.”*

9. On examination of the submissions made by the parties, we do not find any error apparent on the face of record, which require modification of the impugned order dated 13.06.2022. We observe that the averments made by the Review Petitioner in the present Review Petition is an appeal in disguise. In our opinion, the present review petition 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...”*

10. In view of above observation and discussions, we are of the view that no ground is made out by the Review Petitioner to review the decision in the impugned order.
11. Accordingly, the Review application stands dismissed as found unsustainable in the eye of law.

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

Sd/-  
**(G. Mohapatra)**  
**Officiating Chairperson**