

**ODISHA ELECTRICITY REGULATORY COMMISSION
PLOT NO. 4, CHUNUKOLI, SAILESHREE VIHAR,
CHANDRASEKHARPUR,
BHUBANESWAR-751021**

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

Case No. 55/2022

M/s. Nava Bharat Ventures Limited

..... Petitioner

Vrs.

The CEO, TPCODL and another

.....Respondents

In the matter of: Proceeding on remand by the order dated 05.08.2022 of the Hon'ble High Court of Orissa in W.P.(C) No.16237 of 2016, W.P.(C) No.11158 of 2016 and W.P.(C) No.5201 of 2017.

AND

In the matter of: Case No.43 of 2014 & 44 of 2014 disposed of by OERC vide its common order dated 29.01.2016.

AND

In the matter of: Review Petition in Case No.14 of 2016 & 15 of 2016 disposed of by OERC Vide its Order dated 26.07.2016.

AND

In the matter of: Submission of M/s. Nva Bharat Ventures Ltd.(in Review petition in Case No.14 of 2016 & 15 of 2016) along with calculations as per order dated 05.08.2022 passed in W.P.(C) No.16237 of 2016 by the Hon'ble High Court of Orissa.

AND

In the matter of: An application under Section 142 of the Electricity Act, 2003 for non-compliance of Order dated 28.05.2015 of the GRF, Dhenkanal passed in C.C. Case No.329 of 2014.

For Petitioner: Shri Laxmidhar Pangari, Sr. Advocate on behalf of M/s. NBVL

For Respondent: Shri Puneet Munjal, Regulatory Head, TPCODL, Shri P. K. Das, CGM (PP) and Shri A.K. Samantray, Consultant, GRIDCO Ltd.

ORDER

Date of Hearing: 13.12.2022

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The Petitioner-M/s. Nava Bharat Ventures Limited (M/s. NBVL) has filed the present petition, as per the directions of Hon'ble High Court of Orissa vide their order dated 05.08.2022 passed in W.P.(C) No.16237/2016, with the following prayers:

- i) Re-adjudicate the issue of cross subsidy charge, if at all payable by the petitioner in respect of FY 2010-11, FY 2011-12, FY 2012-13.

- ii) If it is found that petitioner is liable to pay the cross subsidy charges, the same be finally computed/calculated as per the orders/observations/direction of the Commission in various judgements of the Commission.
 - iii) If it is found that petitioner is not liable to pay cross subsidy charges, M/s. TPCODL may be directed to refund the deposit of Rs.25.33 crore made by the petitioner.
 - iv) Directing the OP M/s. TPCODL to refund the retained security deposit and excess amount collected illegally from the petitioner towards demand charges.
2. The background of the matter is that the Commission while disposing of the Case Nos.43 of 2014& 44 of 2014 vide order dated 29.01.2016 had directed as follows:-
- “The Commission directs M/s. NBVL to furnish the required data to CESU/GRIDCO in the prescribed format for computation of its CGP status. After computation of CGP status, if it is found that, the CGP of M/s. NBVL has lost its CGP status, then drawal of power from the CGP to the parent industry shall be treated as a drawal from a generating company. In that case, M/s. NBVL shall pay cross subsidy surcharge to the concerned DISCOM (CESU) at different years.”*
3. Accordingly, the CESU (now TPCODL) had issued a demand notice to the petitioner for payment of Cross-Subsidy Surcharge (CSS). Thereafter, the petitioner filed a writ petition before the Hon’ble High Court of Orissa in W.P.(C) No.11158 of 2016 praying the Court for quashing of the demand notices till CGP status of the petitioner is finally determined.
4. Later, the petitioner, had filed Review petitions against the Commission’s order dated 29.01.2016 passed in Case Nos.43 of 2014& 44 of 2014 on the plea that there is error apparent on the face of the record. These Review petitions were registered as Case Nos.14 of 2016 & 15 of 2016. The Commission vide its common order dated 26.07.2016 had dismissed the said Review petitions filed by the petitioner observing that there is no error apparent on the face of the record, there was no discovery of a new and important fact and there was no other sufficient cause to exercise the jurisdiction of review.
5. Being aggrieved, the petitioner M/s. NBVL had filed another writ petition before the Hon’ble High Court of Orissa in W.P.(C) No.16237 of 2016 challenging the Commission’s order dated 26.07.2016 passed in Case No.14 of 2016 & 15 of 2016 with the prayer for setting aside the said order and to remit the cases to the

Commission with a direction to allow the review on appreciation of all the grounds raised therein.

6. Thereafter, CESU (now TPCODL) had also filed a writ petition in W.P.(C) No.5201 of 2017 challenging the order dated 16.02.2017 passed by this Commission in Case No.49 of 2016, wherein the Commission had observed as follows:

“9. From the submission of CESU we observe that CESU is not aggrieved with the decision of GRF rather wants to adjust the refundable amount with receivable from M/s. NBVL on account of cross subsidy surcharge dispute of which is pending before Hon'ble High Court. On non payment of cross subsidy surcharge by M/s. NBVL in violation of the order of the Commission vide Case Nos. 43 & 44 of 2014 we opine that it is an entirely different issue and hence, independent of the present case in view of the interim order of the Hon'ble High Court dated 15.07.2016. Instead CESU should expedite the case for quicker settlement of the amount receivable as cross subsidy surcharge with Hon'ble High Court of Orissa.

10. In view of the above, we feel that the order of GRF is to be complied with and therefore, CESU is hereby directed to implement the order of the GRF, Dhenkanal in Case No. 329 of GRF 2014 and give effect to the order of refund within three months of issue of this order. Both parties are at liberty to negotiate refund in instalments.”

7. The Hon'ble High Court of Orissa have disposed of the above three writ petitions (W.P.(C) No.11158 of 2016, W.P.(C) No.16237 of 2016 and W.P.(C) No.5201 of 2017) with the following directions: -

“36. In view of the above development and for facilitation of a settlement in OERC, all the writ petitions are disposed of subject to the following directions:

(I) The challenge as we have appreciated against the order dated 16.02.2007 is dismissed but reserving the right of the CESU (now TPCODL) to raise their contention before the OERC.

(II) The challenge as raised in W.P.(C) No.11158 of 2016, filed by the industrial consumer, against issuance of demand notices dated 04.03.2016 (Annexure-5 series) for payment of CSS is to be decided in terms of the order dated 29.01.2016 subject of determination of the CGP status of the petitioner of the writ petition, being, W.P.(C) No.11158 of 2016. This writ petition also stands disposed of, subject to the fresh decision of the OERC.

(III) In the writ petition, being, W.P.(C) No.16237 of 2016, the petitioner (M/s. NBVL) has challenged the order dated 26.07.2016 [read with the clarification], Annexure-8 to the writ petition being W.P.(C) No.16237 of 2016 whereby the review petitions filed by the petitioner, being, Cases No.14 & 15 of 2016 was dismissed. As we have decided to remit the matter back to the OERC for a fresh decision, that order dated 26.07.2016 shall not restrict the consideration of the OERC.

37. *Having regard to the long pendency of these writ petitions, have allowed the prayer for resolution of the disputes through settlement before the OERC. Hence, we remit the issues of energy charges and the CSS to be re-adjudicated by the OERC within a time frame. The industrial consumer, M/s. NBVL is directed to place their calculation with a brief of their submissions before the OERC on or before the next date, as would be posted.*

Similarly, the DISCOM, CESU or its successor TPCODL shall file their calculation with reasons along with a brief of their submission on or before the next date, as determined by us. The next date for appearance before the Orissa Electricity Regulatory Commission (OERC) is on 19th September, 2022.

38. xxxxxxxx

39. *We further request the OERC to complete the proceeding preferably by eight weeks from the date of filing of the above calculation with reasons and the brief of submission.*

40. *It is needless to mention here that, the OERC may provide a structured opportunity of hearing to the disputants as referred above but while giving such opportunity, the time frame as we have requested to be followed, shall not be allowed to be scattered away. We clearly mention that we have not made any comment on the merit of the orders or the challenges as brought before us by those three writ petitions.*

41. *All these three writ petitions stand disposed of. Pending interlocutory or any other application/s stand disposed of.*

42. *The Registry is directed to send one authenticated copy of this order to the Odisha Electricity Regulatory Commission (OERC) forthwith."*

8. In obedience to the above direction of the Hon'ble High Court of Orissa vide their judgment dated 05.08.2022, the petitioner-NBVL has submitted its calculations on Cross-Subsidy Surcharge with a brief submission on 13.09.2022 before the Commission along with the certified copy of the aforementioned order of the Hon'ble High Court.

Accordingly, the Commission heard the matter on 19.09.2022 and in course of hearing, the representative of TPCODL prayed for two days time to submit the detail calculation as directed by the Hon'ble High Court. Since the Learned Counsel appearing on behalf of M/s.NBVL had no objection to the above prayer of TPCODL, the Commission allowed the prayer of TPCODL and directed to put up the matter on 27.09.2022 for hearing.

During the hearing on 27.09.2022, the Learned Counsel of M/s. NBVL prayed the Commission to allow them two weeks time for filing their rejoinder to the submissions of TPCODL and the representative of TPCODL prayed the Commission to implead GRIDCO Ltd. as one of the Respondents since 90% of the past dues (i.e.

relating to the period of the then CESU) would pass on to GRIDCO as per the provisions of the vesting order dated 26.05.2020. The prayers of both the parties were allowed and the Commission had directed the parties to appear before the Director (Regulatory Affairs) of OERC on 15.10.2022 to have a prehearing discussion on the issues between them and the Director (Regulatory Affairs) of OERC shall summarise the issues and place a note before the Commission, after which the matter shall be listed before the Commission for hearing. Accordingly, the Director (Regulatory Affairs) of OERC put up the issue-wise summarised note before the Commission after a meeting with the parties held on 15.10.2022. As understood, though the representatives of GRIDCO were present in the said meeting, they declined to sign on the joint resolution of the meeting.

9. The Commission heard the matter on 15.11.2022. During the hearing on 15.11.2022, the Counsel of the petitioner prayed the Commission to dispose of the matter based on the aforesaid note submitted by the Director (Regulatory Affairs) or else the Commission may direct all the parties to sit again at OERC in the presence of Director (Regulatory Affairs) to resolve the CSS issues and sign a written memorandum of the amicable settlement of the issues, which shall be placed before the Commission through an affidavit. However, the representative of TPCODL once again prayed the Commission to implead GRIDCO to this proceeding as 90% of the past dues would pass on to GRIDCO as per the vesting order. Accordingly, the Commission vide its interim order dated 15.11.2022 had directed M/s. NBVL, TPCODL and GRIDCO to sit together at OERC on 28.11.2022 in presence of Director (Regulatory Affairs) for mutual settlement of the CSS issues and submit a written note of memorandum after signed by the parties herein through an affidavit. Accordingly, a meeting was held on 28.11.2022 and the petitioner M/s. NBVL and the respondent TPCODL had signed a joint resolution on settlement of the CSS issue which was jointly filed by them before the Commission. The said joint resolution signed by the petitioner-M/s. NBVL and the respondent-M/s. TPCODL is quoted hereunder:

“Joint resolution by NBVL and TPCODL on the issue of CSS payable by NBVL to CESU (now TPCODL) and the refunds to be made by TPCODL to NBVL on the cases linked with CSS mater.

- I. *In the matter of levy of CSS for the entities of CGP and IPP of M/s NBVL and M/s NBVL-IPP respectively, based on Hon’ble OERC’s clarification on applicability of 100% Load Factor (LF) as a principle for levy of Cross subsidy Surcharge (CSS), irrespective of the year in which such a clarification*

was issued by the Hon'ble Commission, and as discussed and mentioned in the MoM dated 15.10.2022, NBVL and TPCODL have agreed as mentioned below:

- II. NBVL CGP is required to pay CSS for FY 2010-11 and FY 2011-12 and the rate of CSS shall be computed considering at 100% load factor.*
- III. NBVL CGP is not required to pay CSS for FY 2012-13 as it had maintained CGP status during the FY 2012-13 considering Section 11 Notifications and Order of OERC.*
- IV. NBVL IPP is required to pay CSS for FY 2010-11, 2011-12 and 2012-13 considering the rate of CSS at 100% Load Factor on the construction power drawn from NBVL CGP during the mentioned period.*
- V. TPCODL agreed to refund the Security deposit amount and excess collected MD charges pertaining to Jan'12, Feb'12 and July'13 respectively to NBVL.*
- VI. Based on the principles as agreed above, on computation of CSS amount, CSS payable by NBVL to TPCODL towards loss of CGP status during the FY 2010-11 & 2011-12 and towards drawal of Construction power for the FY 2010-11 to FY 2012-13 shall be computed.*
- VII. TPCODL shall take steps to refund the security deposit amount and excess demand charges within 4 weeks from the date of Order of the Commission.*

Based on the above principles, the settlement note signed today. After this settlement, no issues survive for the decision of the Commission. This mutual settlement note is signed today i.e. 28.11.2022 before the Director (Regulatory Affairs) / Secretary, OERC, in the office of OERC with a request to the Hon'ble Commission to take this on record and dispose of the matter in case No.55/2022 by appropriate order."

Though the representatives of GRIDCO were present in the said meeting on 28.11.2022, they had not signed on the aforesaid resolution made on the CSS issues.

- 10. The matter was subsequently heard on 06.12.2022. In course of the hearing, on 06.12.2022 the representative of GRIDCO prayed the Commission to direct M/s. NBVL to serve a copy of the said joint resolution to GRIDCO and to allow GRIDCO seven days time for filing their reply on the joint resolution submitted by M/s. NBVL and TPCODL. The Commission had allowed the prayer of GRIDCO and directed them to file its reply on the said joint resolution by 12.12.2022 positively and the matter was accordingly posted on 13.12.2022 for final hearing.
- 11. On 12.12.2022, GRIDCO has filed a written note of submission before this Commission. The submission of GRIDCO in brief is as follows:
 - i) For the FY 2010-11 and FY 2011-12, the CSS rates at different load factors have been determined by the Commission vide its order dated 24.06.2010 passed by the Commission in Case Nos.24, 25, 26 & 27 of 2010.

Accordingly, CESU (now TPCODL) had claimed the CSS amount on M/s. NBVL for the FY 2010-11 and FY 2011-12. The Commission vide its order dated 13.07.2012 in Case Nos.5, 6, 7 & 8 of 2011 and 24, 25, 26 & 27 of 2012 had stipulated that “(a) the wheeling and cross-subsidy surcharge as determined by the Commission for FY 2010-11 shall continue till issuance of this order and (b) the wheeling charge and surcharge as indicated in Table 4 shall be applicable for the year 2012-13 w.e.f. date of issue of this order prospectively and may undergo change from time to time as may be decided by the Commission.”

- ii) In the aforesaid order, the Commission had directed to determine cross-subsidy surcharge considering 100% load factor for the open access customers w.e.f. the date of issue of order i.e. 13.07.2012. In the said order, the Commission has not directed to recover the amount of cross-subsidy surcharge at the cross-subsidy rate corresponding to 100% load factor for the FY 2010-11 & 2011-12.
 - iii) The aforesaid two orders of the Commission i.e. order dated 24.06.2010 and 13.07.2012 had not been challenged in appropriate forum at relevant time and therefore, the said orders are final and binding. Further, no record is available with GRIDCO indicating that M/s. NBVL has ever disputed the bill raised by erstwhile CESU on them towards cross-subsidy surcharges calculated at the rate determined by the Commission corresponding to 20% load factor.
 - iv) GRIDCO agrees to CSS rate approved in the Commission’s order dated 24.06.2010 passed in Case Nos.24, 25, 26 & 27 of 2010 and the order dated 13.07.2012 passed in Case No.5, 6, 7 & 8 of 2011 and 24, 25, 26 & 27 of 2012 as indicated in the above submission and the revised CSS amounting to Rs.47.79 crore as claimed by TPCODL earlier on M/s. NBVL.
12. The case ultimately came up for hearing on 13.12.2022 in presence of the Learned Sr. Advocate Shri L. D. Pangari representing the Petitioner- M/s. NBVL, Shri Puneet Munjal, Regulatory Head (TPCODL), Shri P.K. Das, CGM (PP), GRIDCO and Shri A.K. Samantray, Consultant, GRIDCO.

13. We have heard the parties pursuant to the order dated 05.08.2022 of the Hon'ble High Court of Orissa in WP (C) No.11858 of 2016, WP (C) No.16237 of 2016 and WP (C) No.5201 of 2017.
14. After hearing, we observe that in the meeting held between the parties on 15.10.2022 at OERC in presence of Director (Regulatory Affairs) for resolution of disputes on Cross-Subsidy Surcharge, the representatives of GRIDCO though were present in the said meeting, had declined to sign the joint resolution of the meeting. The Petitioner-M/s. NBVL and the Respondent-M/s. TPCODL have resolved the controversy voluntarily in the meeting held between them on 28.11.2022 at OERC in presence of Director (Regulatory Affairs) and the terms of the settlement have been documented in the shape of a written memorandum dated 28.11.2022, which has been placed before the Commission. The representatives of GRIDCO present in the meeting did not sign in the said settlement note on resolution of CSS issues between petitioner M/s. NBVL and respondent M/s. TPCODL. However, on 12.12.2022, GRIDCO has filed a written note of submission praying that computation of cross subsidy surcharge at 100% load factor should be applicable for FY 2012-13 basing on the order of the Commission in Case Nos. 5, 6, 7 & 8 of 2011 and Case Nos. 24, 25, 26 & 27 of 2012 dated 13.07.2012 and not on cross subsidy surcharge for FY 2010-11 and 2011-12. This submission of GRIDCO has no merit inasmuch as the Commission in its order in Case No. 24-27/2010 dated 24.06.2010 had approved rate of cross subsidy surcharge for FY 2010-11 and 2011-12. Similarly, the Commission in Case Nos. 5, 6, 7 & 8 of 2011 and Case Nos. 24, 25, 26 & 27 of 2012 dated 13.07.2012 in addition to determination set of rate of cross subsidy surcharge for FY 2012-13, clarified the methodology of computation of cross subsidy surcharge for Open Access consumers. The Commission had clarified that while finding out cross subsidy surcharge rate for open access consumers, 100% load factor should be assumed. This clarification was given in response to the doubts raised by some of the Respondents in that case. It has no relationship with the rate of the cross-subsidy surcharge which is re-determined from year to year. GRIDCO has confused between rate of cross subsidy surcharge and methodology of its determination.
15. On perusal of the settlement note signed by the representatives of both the petitioner-M/s. NBVL and respondent-TPCODL, it is found that there has been a stipulation that "no dispute survives". The said settlement appears to be lawful in nature and both the

parties have admitted to have entered into such settlement between them voluntarily putting end to the inter-se dispute including refund of security deposit and refund of excess demand charges by the terms of such settlement. Hence, the Commission accepts the same. Accordingly, the Commission holds that the settlement so recorded shall be binding on both the parties. In terms of the aforesaid settlement, the present proceeding is disposed of.

It is made clear that if GRIDCO is aggrieved with the above settlement made between the petitioner-M/s. NBVL and respondent-TPCODL, it is at liberty to challenge the same before the appropriate forum within the period of limitation.

(S. K. Ray Mohapatra)
Member

(G. Mohapatra)
Officiating Chairperson