

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

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

Case No. 28/2023

OPTCL	Petitioner
Vrs.		
M/s. Bharat Electronics Limited & others	Respondents

In the matter of: **Application under Sections 94(1)(f) & 86(1)(K) of the Electricity Act, 2003 read with Regulations, 70 & 76 of the OERC (Conduct of Business) Regulations, 2004 and all the enabling powers in this regard thereby seeking review of order dated 16.01.2023 passed in Case No.36 of 2022 regarding non-payment of Open Access Charges by M/s. Bharat Electronics Limited.**

AND

Case No. 29/2023

OPTCL	Petitioner
Vrs.		
M/s. Bharat Electronics Limited & others	Respondents

In the matter of: **Application under Sections 94(1)(f) & 86(1)(K) of the Electricity Act, 2003 read with Regulations, 70 & 76 of the OERC (Conduct of Business) Regulations, 2004 and all the enabling powers in this regard thereby seeking review of order dated 16.01.2023 passed in Case No.47 of 2022 regarding illegal enforcement/levying charges under OERC (Terms & Conditions of Intra State Open Access) Regulations, 2020 instead OERC (Terms & Conditions of Intra State Open Access) Regulations, 2005 and TCAA dated 07.08.2018 existing between the parties.**

For the Petitioner : Shri P.K. Mohanty, Sr. Advocate along with Shri Subhasish Samantaray, DGM(Elect.), RT&C , OPTCL

For the Respondents: Shri Vikramaditya Singh, Advocate on behalf of M/s. Bharat Electronics Ltd., Shri K.C. Nanda, GM (Fin.), TPWODL, Shri Anirudha Sethy, AGM(Elect.), and Shri B.K.Das, Sr.GM(PP), GRIDCO Ltd.

ORDER

Date of Hearing: 06.06.2023

Date of Order: 06.06.2023

The common Petitioner has filed both these applications under Section 94(1)(f) & 86(1)(k) of the Electricity Act, 2003 read with Regulations 70 & 76 of the OERC (Conduct of Business) Regulations, 2004 seeking for a review of the common order dated 16.01.2023 passed by this Commission in Case No.36 of 2022 and Case No.47 of 2022. The question involved being common, both the applications have been heard together and are being disposed of by this common order.

2. The common Petitioner has made the common prayer in both these applications as follows:

“It is therefore prayed that, the order passed in the Case No.36 of 2022 and Case No.47 of 2022 may be reviewed, taking into considerations to the aforementioned fact and submissions, thereby directing and/or permitting OPTCL to raise the Open Access Charges for the FYs 2020-21, 2021-22 and 2022-23 strictly in terms of the TCAA capacity of 7.5 MW, in vogue, read with OERC (Terms and Conditions of Intra State Open Access) Regulations, 2020 Clause Nos.20(2) & 44(3) thereof, at the rate tariff fixed by the OERC for such periods, deducting the payment if any made by BEL, as against the provisional bills already raised by OPTCL for such periods Or may pass any other order as deemed proper.”

3. The Petitioner-OPTCL in support of his prayer has pleaded as follows:

- a) The Commission at para 7(i) of the impugned order dated 16.01.2023 passed in Case No.36 of 2022 and Case No.47 of 2022 has observed that;

“M/s. BEL has entered into TCAA agreement with OPTCL on 07.08.2018 in accordance with OERC (Terms and Conditions for Open Access) Regulations, 2005. The OERC (Terms and Conditions for Open Access) Regulations, 2020 was notified on 18.11.2020 and the above Regulations, 2005 was repealed. But as per Regulation 44(3) of the new Regulations, 2020, the existing agreement/contract shall be entitled to continue to avail such open access to the transmission and distribution system on the same terms and conditions as stipulated under the existing agreement/contract till its expiry.

We observe from Clause 1(c), Clause 3 and Clause 6 of the said TCAA agreement dated 07.08.2018 that the open access transaction between M/s. BEL and OPTCL shall be governed in accordance with the provisions of OERC(Terms and Conditions for Open Access) Regulations, 2005 as amended from time to time and the conditions as specified by OERC from time to time and also the open access charges would be reviewed from time to time. From the above stipulations in the

agreement/contract, we conclude that though the agreement was executed as per the terms and conditions of OERC (Terms and Conditions for Open Access) Regulations, 2005, after notification of OERC (Terms and Conditions for Open Access) Regulations, 2020, the terms and conditions of open access stipulated under Regulations, 2020, shall be applicable for such open access transactions between M/s. BEL and OPTCL.

However, as per the OERC (Terms and Conditions for Open Access) Regulations, 2020 the transmission charges shall be payable on the basis of “contracted capacity” in case of long-term and medium-term open access customers. Since the term “contracted capacity” has neither been defined in these Regulations nor in the said TCAA agreement signed between M/s. BEL and OPTCL on 07.08.2018, OPTCL has claimed transmission charges based on the contracted capacity of 7.35 MW for FY 2020-21 and 5 MW for FY 2021-22 based on the maximum scheduled injection for the previous year and 1.814 MW for the FY 2022-23 based on the intimation of M/s. BEL, vide its letter dated 08.10.2021, for projection of ARR and transmission tariff by OPTCL for the FY 2022-23.

OPTCL in its submission has stated that since the term “contract capacity” is not defined in the Regulations, in common parlance, as per the Oxford English Dictionary, the term “Contracted Capacity” in open access Regulations can be interpreted as “Maximum Capacity of power agreed to be transmitted through the electrical network”. We observe that the contracted capacity of 7.35 MW and 5 MW considered by OPTCL for the FY 2020-21 and FY 2021-22 has not been agreed by M/s. BEL, whereas M/s. BEL has intimated OPTCL to consider contracted capacity of 1.814 MW for the FY 2022-23. Therefore, it will be prudent to compute the transmission charges for open access transaction by M/s. BEL considering the 1.814 MW also for the year FY 2020-21 and FY 2021-22. The Commission directs OPTCL to revise the transmission charges bills of M/s. BEL accordingly. The Commission further directs both the parties to finalise the contracted capacity for transmission of power utilising the transmission network of OPTCL for Long Term Access and accordingly make necessary amendment in the TCAA agreement executed between them in view of the uniform applicability of Open Access Regulation irrespective of source of generation.”

- b) From the application of M/s. BEL for availing Long Term Open Access (LTOA) vide its letter dated 27.02.2018, grant of LTOA by OPTCL on 31.03.2018 and Transmission Capacity Access Agreement (TCAA) signed between M/s. OPTCL and M/s. BEL on 07.08.2018, it is apparent that both the parties have agreed upon for transmission of peak load / average load of 7.5 MW from solar plant of M/s. BEL to OFBL, Badmal through open access using OPTCL network. Accordingly, OPTCL

- has made a dedicated provision in its network for evacuation of 7.5 MW power round the clock irrespective of quantum of power injection by M/s. BEL and reserve the corridor for M/s. BEL for transmission of 7.5 MW power.
- c) TCAA is a legal contract between the parties, wherein the mutual agreed contracted capacity has been fixed at 7.5 MW. After Gazette Notification of new OERC Open Access Regulations, 2020 on 18.11.2020, OPTCL has raised the transmission charge bills to M/s. BEL from the month of November, 2020 onwards considering the contracted capacity as 7.35 MW for FY 2020-21 which is the maximum schedule injection observed during FY 2019-20. Similarly for the FY 2021-22, OPTCL considered the contract capacity as 5 MW which is the maximum schedule injection observed during FY 2020-21. M/s. BEL has communicated to consider their contracted capacity as 1.814 MW for the FY 2022-23 and therefore, OPTCL raised the transmission charges bill on M/s. BEL for the month of April, 2022 based on the contracted capacity of 1.814 MW.
- d) M/s. BEL did not agree to accept the billing at 7.35 MW for FY 2020-21 and at 5 MW for FY 2021-22 as raised by OPTCL. In the impugned order it should have been directed for revision of the bills considering contracted capacity as 7.5 MW as agreed by both the parties in the TCAA instead of directing to revise the transmission charges for FY 2020-21 and 2021-22 considering contracted capacity as 1.814 MW, for which the Commission has not given any reason in support of the above direction. The direction of the Commission to revise the transmission charges for FY 2020-21 and 2021-22 of M/s. BEL considering contracted capacity as 1.814 MW instead of 7.5 MW as per the TCAA is an error apparent on the face of the record and contrary to law i.e. against the spirit of the Open Access Regulations, 2020, which requires to be reviewed.
- e) It is a settled position of law that the contract is binding between the parties and the Commission cannot override the contract by exercising its regulatory power under Section 86 of the Electricity Act, 2003, as was followed in judgments given below:
- i. MTNL Case 2000 SCC Online (Delhi) 19 (Para 32)
 - ii. Gujrat Urja (2017) 16 SCC 498 (Para 38, 39, 60, 65-66)
 - iii. Gujrat Urja (2017) 11 SCC 801 (Para 7)

- f) The provisional bills raised against M/s. BEL for the FY 2020-21, 2021-22 and 2022-23 cannot be construed as final bills, pending resolution and settlement of the dispute.
4. The Respondent No.1-M/s. Bharat Electronics Ltd. has resisted the Review Petitions on the grounds stated below:
- a) The present petitions have been purportedly filed against the order dated 16.01.2023 passed by the Commission, wherein the Commission had examined the issues raised by the Petitioner and passed the impugned order. In addition, the Commission had also analysed the issues/comments raised by the Review Petitioner herein and emphatically rejected its prayers. While this being so, the Petitioners have raised issues which are not in the scope of the Review Petitions. For this reason alone, the present petitions are liable to be dismissed at the threshold.
 - b) All the contentions and averments in the present Review Petitions have already been heard in detail and conclusively decided by the Commission in the impugned order dated 16.01.2023 and there is no error apparent on the face of record in the impugned order. Thus, there is no circumstances that warrant the indulgence of the Commission in entertaining the present Review Petitions.
 - c) It is submitted that present Review Petition is to be strictly heard as per the principle enshrined in Order 47 of CPC and the Petitioner has failed to demonstrate that there is any prima-facie error on the face of record. It is well settled principle of law that in exercise of jurisdiction under Order 47 Rule of the Code of Civil Procedure, 1908, an erroneous order /view/ decision cannot be reheard and corrected and review proceedings would have to strictly be confined to the ambit and scope of Order 47 Rule 1 of the CPC, 1908. In this regard, reliance is being placed upon the following judgments.
 - (i) Tungabhadra Industries Ltd. Vrs. Govt. A.P [1964 SC 1372]
 - (ii) State of West Bengal & Ors. Vs. Kamal Sengupta &Anr. [2008 (8) SCC 612]
 - (iii) Parsion Devi Vs. Sumitri Devi [1997 (8) SCC 715]
 - (iv) Haridas Vs. Smt. Usha Rani Banik&Ors. [AIR 2006 SC 1634]

- d) Subsequent to the passing of the impugned order dated 16.01.2023, the Review Petitioner has accepted the directions of the Commission and revised the transmission charge from November, 2020 to January, 2023 with 1.814 MW as contracted capacity. While the matter stood thus, the Petitioner-OPTCL, vide its letter dated 20.03.2023 again shared a draft new TCAA agreement wherein the contracted capacity is indicated as 7.5 MW. This amply demonstrates that the petitioner is raising invoice/bills as per the directions of the Commission and has filed the present review petition as an afterthought. Thereafter the Petitioner-OPTCL recently on 25.05.2023 issued another letter calling upon the Respondent-BEL to pay monthly transmission charges of Rs.1,18,62,286/- which is levied by considering 7.5 MW as contracted capacity. This action of the Petitioner-OPTCL is a blatant violation of the impugned order dated 16.01.2023 passed by this Commission and hence, the Petitioner-OPTCL may be penalised for such violation of the impugned order.
- e) The Respondent-M/s. BEL has set up a 7.5 MW captive solar power plant in the premises of Ordnance Factory, Badmal, Bolangir and entered into the Transmission Capacity Access Agreement (TCAA) dated 07.08.2018 with OPTCL for a period of 25 years as a LTOA customer. The solar power plant working with the Capacity Utilisation Factor (CUF) of 18%, hence the average contracted capacity of a 7.5 MW solar plant would be 1.35 MW which would be the capacity equivalent to a conventional power plant. Moreover, as per Chapter 5(pertaining to open access charges) of OERC Open Access Regulations, 2020, transmission charges will be calculated based on average load projected to be served by the State Transmission Utility in the calendar year, which comes around 1.814 MW for M/s. BEL. Hence, levy of transmission charges by OPTCL at the contracted capacity of 7.35 MW is not at all justified. In this regard the Commission, vide the impugned order dated 16.01.2023, has rightly held that contracted capacity of 7.35 MW and 5 MW considered by OPTCL for the FY 2020-21 and FY 2021-22 has not been agreed to by M/s. BEL and therefore, it will be prudent to calculate the transmission charges for open access transactions by BEL considering 1.814 MW as contracted capacity also for the year 2020-21 and 2021-22.

- f) The Respondent-M/s. BEL submitted that in view of the above submissions and the law settled by the Hon'ble Supreme Court of India, the present Review Petition filed by OPTCL is bereft of merit and hence not maintainable and is liable to be dismissed.
5. The Petitioner filed the rejoinder against the reply submitted by the Respondent-M/s. Bharat Electronics Ltd. As the averments raised by the Petitioner in its rejoinder have already been stated in the petition, the same are not being reiterated for the sake of brevity.
6. The Respondents-GRIDCO, TPWODL and SLDC have not filed any written replies/submissions.
7. The Commission has carefully considered the submissions made by the learned counsel for the petitioner and the learned counsel for the respondents. In the light of the rival contentions, it needs to be examined as to whether the petitioner has been able to make out a case for review.

At the outset, it is necessary to address to the scope of Review with reference to the settled principles of law.

Section 94(1)(f) of the Electricity Act, 2003 confers power of review of its decisions, directions and orders on the Commission. However, neither the Act nor the Rules framed thereunder indicated any parameters for exercise of this power. In the absence of any indicia, it is not only apt but also permissible to follow the law laid down by the constitutional courts in this regard.

In Sow Chandra Kanta & Another Vs. Sheik Habib (1975 SCC (4) 457) the Hon'ble Supreme Court held that a review of a judgment is a serious step 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.

In Tungabhadra Industries Ltd. Vs. Govt. of A.P. [1964 SC 1372], it was held that review proceedings should strictly be confined within the ambit of Order 47, Rule 1 of the CPC, 1908. The relevant extract of the Judgment is reiterated hereunder:

“7. ...A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error”

In Devender Pal Singh vs. State of NCT of Delhi (2003)2 SCC 501, the Hon'ble Apex Court held that review is not a rehearing of appeal all over again and that scope of interference is very limited to aspects such as miscarriage of justice.

Further, in Lily Thomas &Ors. Vrs. Union of India &Ors. [(2000) 6 SCC 224], the Hon'ble Apex Court held 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 the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not a ground for review....”

In Union of India vs. Sandur Manganese and Iron Ores Limited & others [(2013) 8 SCC 337], the Hon'ble Apex Court held as under:

“23. It has been time and again held that the power of review jurisdiction can be exercised for the correction of a mistake and not to substitute a view.”

In State of West Bengal & Ors. Vs Kamal Sengupta & Anr. [2008 (8) SCC 612], it was held that if an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of record for the purpose of Order 47, Rule 1 of the CPC, 1908. The relevant extract of the Judgment is reiterated hereunder:

“22. The term ‘mistake or error apparent’ by its connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof required long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 47 Rule 1 CPC or Section 22(3)(f) of the Act. To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the Court/Tribunal on a point of fact or law. In any case, while exercising the power of review, the concerned Court/Tribunal cannot sit in appeal over its Judgment/decision.”

In Haridas Vrs. Smt. Usha Rani Banik & Others, reported in AIR 2006 SC 1634, it was held that where the order in question is appealable, the aggrieved party has adequate and efficacious remedy, the Court should not exercise the power to review its order with the greatest circumspection.

In Parsion Devi & Others Vrs. Sumitri Devi & Other [(1997) 8 SCC 715], the Hon'ble Apex Court observed as under:

“9. Under Order 47 Rule 1 of CPC, a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 of CPC, it is not permissible for an erroneous decision to be “reheard and corrected”. A review petition, it must be remembered, has limited purpose and cannot be allowed to be “an appeal in disguise.”

8. Keeping in view the limited scope of interference in review jurisdiction as per the authoritative pronouncements indicated above, we shall now consider the submissions of the learned counsel for the petitioner. The main contention raised by the Learned Counsel for the Petitioner which may be relevant to the present move is as under:

The direction of the Commission to revise the transmission charges for the Financial Years 2020-21 and 2021-22 considering the contract capacity of 1.814 MW instead of 7.5 MW as per TCAA, without giving any reason whatsoever, is an error apparent on the face of the record and contrary to law.

9. We have considered the above contentions of the Review Petitioner and perused the order dated 16.01.2023 which is impugned before us in the present review petitions. The Commission vide the said order observed as follows:-

“7(i) xxx xxx xxx xxx

However, as per the OERC (Terms and Conditions for Open Access) Regulations, 2020 the transmission charges shall be payable on the basis of “contracted capacity” in case of long-term and medium-term open access customers. Since the term “contracted capacity” has neither been defined in these Regulations nor in the said TCAA agreement signed between M/s. BEL and OPTCL on 07.08.2018, OPTCL has claimed transmission charges based on the contracted capacity of 7.35 MW for FY 2020-21 and 5 MW for FY 2021-22 based on the maximum scheduled injection for the previous year and 1.814 MW for the FY 2022-23 based on the intimation of M/s. BEL, vide its letter dated 08.10.2021, for projection of ARR and transmission tariff by OPTCL for the FY 2022-23.

OPTCL in its submission has stated that since the term “contract capacity” is not defined in the Regulations, in common parlance, as per the Oxford English Dictionary, the term “Contracted Capacity” in open access Regulations can be interpreted as “Maximum Capacity of power agreed to be transmitted through the electrical network”. We observe that the contracted capacity of 7.35 MW and 5 MW considered by OPTCL for the FY 2020-21 and FY 2021-22 has not been agreed by M/s. BEL, whereas M/s. BEL has intimated OPTCL to consider contracted capacity of 1.814 MW for the FY 2022-23. Therefore, it will be prudent to compute the transmission charges for open access transaction by M/s. BEL considering the 1.814 MW also for the year FY 2020-21 and FY 2021-22. The Commission directs OPTCL to revise the transmission charges bills of M/s. BEL accordingly. The Commission further directs both the parties to finalise the contracted capacity for transmission of power utilising the transmission network of OPTCL for Long Term Access and accordingly make necessary amendment in the TCAA agreement executed between them in view of the uniform applicability of Open Access Regulation irrespective of source of generation.”

Thus, the Review Petitioner is merely trying to re-agitate the very same issue which has already been adjudicated by this Commission. Such a move is not permissible being not within the purview of the review jurisdiction.

10. Be it stated here that though in its application for Long Term Open Access, M/s. BEL had indicated power transfer of 7.5 MW at 33 kV level from its solar captive power plant to 132/33 kV Saintala GSS, the transmission capacity is not mentioned in the TCAA entered into between the Respondent-M/s. BEL and the Petitioner-OPTCL on 7th August, 2018. As per the TCAA, M/s. BEL will avail Long Term Open Access through transmission system of OPTCL for injection of 7.5 MW Solar Power from its Power Plant located at OFBL, Badmal.
11. Further, the Review Petitioner-OPTCL in its submission has indicated to have reserved the corridor for evacuation of 7.5 MW power round the clock irrespective of quantum of power injection by M/s. BEL. But in the TCAA, it is mentioned that in accordance with the system studies carried out by OPTCL, dedicated transmission system and system strengthening scheme to facilitate Long Term Open Access is not applicable as the 33 kV transmission line from the solar captive power plant is connected to the existing OPTCL 132 kV grid at Saintala GSS located in the premises of the Ordnance Factory, Badmal.
12. From the foregoing discussions, it is found that neither the Petitioner has produced any new and important matter nor evidence which was not there to be dealt with/considered by the Commission while passing the impugned order dated 16.01.2023 in Case No.36 of 2022 and in Case No.47 of 2022, nor is there any mistake or error apparent on the face of the record calling for review of the said order. Therefore, the Commission is of the view that Review Petitions deserve to be rejected.
13. In the result, both the applications are rejected.

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

Sd/-
(G. Mohapatra)
Member

Sd/-
(S.C. Mahapatra)
Chairperson