

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

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

Case No. 87/2023

M/s. OHPC	Petitioner
- Vrs. -		
DoE, GoO & others	Respondents

In the matter of: Application under Section 94(1)(f) of the Electricity Act, 2003 read with Regulation 70 of the OERC (Conduct of Business) Regulation, 2004 and order 47 Rule-1 of the Civil Procedure Code, 1908 for review of Order dated 08.06.2023 passed by the Commission in Case No. 53 of 2022 and case No.19 of 2023 regarding approval of true-up of ARR and tariff of individual power stations of OHPC from the FY 2016-17 to FY 2020-21.

For Petitioner: Shri Gagan Bihari Maharana, Sr. GM (Finance)

For Respondent: None

ORDER

Date of hearing: 26.09.2023

Date of order: 26.09.2023

1. The present Petition has been filed by the Petitioner Odisha Hydro Power Corporation Limited (OHPC) under Section-94(1)(f) of the Electricity Act, 2003 read with order 47 Rule-1 of the Civil Procedure Code, 1908 read with Regulation 70 of the OERC (Conduct of Business) Regulations, 2004 seeking review of the Order dated 08.06.2023 passed by the Commission in Case No. 53 of 2022 and Case No. 19 of 2023 for approval of True Up of ARR and tariff of individual power stations of OHPC from the FY 2016-17 to FY 2020-21.
2. The matter is taken up hearing on the question of admission as well as on merit.
3. The brief facts in the matter are as follows:

 (A) The Case No. 53 of 2022 was filed by the Review Petitioner for approval of truing up of ARR and Tariff of individual power stations from FY 2016-17 to 2019-20 amounting to Rs.146.61 Crs. The Commission in their order dated 08.06.2023 had rejected the Truing Up proposals of the OHPC-Review Petitioner.

- (B) The Commission in its Order dated 08.06.2023 in Case No. 53/2022 & Case No.19/2023 at Para No. 10 observed as follows:

"However, we draw the attention to a general provision in OERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2020 with regard to truing up which is reproduced below:

"8.(1) The Commission shall carry out truing up exercise at the end of the Tariff Period along with the tariff petition filed for the next tariff period, with respect to the following:

(a) the capital expenditure including additional capital expenditure incurred up to 31.03.2024, as admitted by the Commission after prudence check at the time of truing up.

(b) the capital expenditure including additional capital expenditure incurred up to 31.3.2024, on account of Force Majeure and Change in Law."

The above Regulation relates to approval of any additional capital expenditure which has not been specifically allowed in each year's tariff order. Accordingly, the Petitioner has the liberty to approach the Commission under the above Regulation once the control period of the present Tariff Regulations expires on 31.03.2024.

- (C) The Review Petitioner has reproduced as under the relevant extract of the order in their Petition with justification for review of the order passed by the Commission:

Para-10: *"The Commission has been approving capital addition including additional capitalization in each year's tariff order. In the subsequent year's tariff order, the Commission has been accepting capital addition which has been actually made out of previous year's approval and as reflected in the audited accounts. Therefore, there is no question of variation between the audited accounts and that of capital assets accepted by the Commission for determination of tariff. Moreover depreciation, return on equity and interest on loan component are also allowed on the additional capitalization so accepted by the Commission."*

The Petitioner has stated that the observations of the Commission under above Para 10 that *"The Commission has been approving capital addition including additional capitalization in each year's tariff order. In the subsequent year's tariff order, the Commission has been accepting capital addition which has been actually made out of previous year's approval and as reflected in the audited accounts"* is not stated to be correct in as much as there are variations in project cost as approved by the Commission upto any Financial Year against the project cost as claimed in the truing up petition upto the said Financial Year. The reasons of such variations, as submitted, are due to the followings:-

- The Commission while finalizing the tariff of some financial years, had not approved the additional capitalization as reflected in the audited accounts.

- Further, while determining the tariff of OHPC for a particular Financial Year, the Commission has been considering the additional capitalization as reflected in the audited accounts of two years back, thereby ignoring the additional capitalization incurred (unaudited) upto the date in the year of filling of ARR application and additional capital expenditures projected to be incurred for rest of the period in the said year of filling of ARR application and the concerned year for which ARR is filed.
- (D) Similarly, the Petitioner has submitted the justification for review of the relevant Order of the Commission at Para No. 8 regarding delay in submissions which read as follows: -

“8. The Commission in a similar petition earlier has also dealt with this issue of True up of Annual Revenue Requirement and Tariff of individual power stations of OHPC from the financial year 1996-97 to 2015-16 in Case No. 55/2020 dated 03.11.2021. The observation of the Commission pertaining to filing of true up application under OERC (Terms & Conditions for determination of Generation Tariff) Regulations, 2014 in that order is reproduced below:

89. As per regulation 2.12, the OHPC was required to file its tariff petition along with the true up petition with respect to the capital expenditure including additional capital expenditure incurred up to 31.03.2019 as admitted by the Commission. The OHPC further as per regulation 2.13 may file an application each year for truing up of its generating station of the previous year(s), with respect to the capital expenditure including additional capital expenditure incurred up to the last day of the previous year(s) and determination of revenue gap/surplus for the ensuing year. The OHPC has not complied with the provisions of these regulations. Nevertheless, these regulations only provide for the truing up of the item of capital expenditure including additional capital expenditure.”

The Petitioner has stated that as per the Regulation 2.12 of the OERC Generation Tariff Regulations, 2014, the Commission shall carry out truing up exercise along with the tariff petition filed for the next tariff period, with respect to the capital expenditure including the additional capital expenditure incurred upto 31.03.2019, as admitted by the Commission after prudence check at the time of truing up. Thus, truing up exercise upto 31.03.2019 is supposed to be considered at the time of filling of tariff petition i.e. by the end of November, 2019. Truing up for FY 2014-15 & 2015-16 are covered under the OERC Generation Tariff Regulations, 2014. The applicability of the OERC Generation Tariff Regulations, 2014 was extended upto 31.03.2020 vide Notification No. OERC/RA/ AMEND. REG. -14/2013/233 dated 04.02.2020. Thus, the due date for truing up exercise upto 31.03.2020 was deemed to be extended to the end of November, 2020.

According to OHPC, since Truing up of accounts for FY 2014-15 & 2015-16 is covered under the OERC Generation Tariff Regulations, 2014 and OHPC had filed the truing up petition from FY 1996-97 to FY 2015-16 on 16.09.2020 i.e before the due date, there was no delay in filing Truing Up Petitions respect of FY 2014-15 & FY 2015-16 (*which are included in the truing up petition from FY 1996-97 to FY 2015-16*).

- (E) The Petitioner has submitted the justification for review of the relevant extract of the Order of the Commission at Para No. 9 regarding delay in submission which are as follows: -

“9. The same principle of timing of filing of true up application is also followed in OERC (Terms & Conditions for Determination of Generation Tariff) Regulations, 2020. As per Regulation 8 (1) (c) of the OERC (Terms & Conditions for Determination of Generation Tariff) Regulations, 2020, OHPC may file an application each year for truing up expenses of its hydro generating stations of the previous year(s) with respect to capital expenditure including additional capital expenditure incurred up to last day of the previous year(s) and revenue gap /surplus for the ensuing year within the time limit as specified by the Commission. The present petition has been filed for truing up expenses for the period from FY 2016-17 to 2021-22 after filing of the tariff application for the respective year and issue of order in that respect which is contrary to the provision of the Generation Tariff Regulations, 2014 and also the Generation Tariff Regulation, 2020.”

Justifying its review the Petitioner has stated that the Commission did not consider the fact that the petition for truing up for FY 2016-17 & onwards could not have been possible due to non-finalisation of power station-wise gross fixed assets of the Petitioner as on 31.03.2016 since this matter was pending before the Commission in Case No. 11/2022. The order against aforesaid truing up petition upto FY 2015-16 in Case No. 11/2022 was issued on 08.08.2022. Thus, disallowance citing delay in submission is an error apparent on the face of record which also requires to be reviewed by the Commission.

4. For the aforesaid reasons, the petitioner prays the Commission to allow the Review Petition under Section 94 (1) (f) of the Electricity Act, 2003 read with Regulation 70 (1) of the OERC (Conduct of Business) Regulations, 2004 and the provisions of Order-47 Rule-1 of CPC, 1908.
5. On examination of the aforementioned submissions made by the Review Petitioner, we find that all the above points raised in the Review Petition have already been discussed in our order dated 08.06.2023 in Case No.53 of 2022 & Case No.19 of 2023 for FY 2021-22. The Commission has been approving capital addition including additional

capitalization in each year's tariff order. In the subsequent year's tariff order, the Commission has been accepting capital addition which has been actually made out of the previous year's approval as reflected in the audited accounts. The audited accounts which is filed with the Commission during tariff proceeding during the month of November every year relates to closing account of the previous financial year. Therefore, there is no question of variation between the audited accounts and that of capital assets accepted by the Commission for determination of tariff when the order is issued in the month of March for ensuing financial year. Similarly, pendency of any consolidated application for true up for past several years before the Commission for which the Petitioner is itself responsible does not debar the Petitioner to file separate true up application for each subsequent year for which audited account is available. Hence, we do not find any apparent error in our order dated 08.06.2023 relating to them. After hearing the Review Petitioner and on perusal of the case records, we refer the provisions made under order 47 Rule-1 of the Code of Civil Procedure, 1908 "Application for review of judgment" where review is possible:

1. *Any person considering himself aggrieved-*
 - a. *by a decree or order from which an appeal is allowed, but from no appeal has been preferred,*
 - b. *by a decree or order from which no appeal is allowed, or*
 - c. *by a decision on a reference from a Court of Small Causes and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.*
2. *A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.*

Explanation:-*The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgement.*

6. The petitioner through his pleadings or through his submissions could not make out the discovery of any new or any important matter or evidence which, after the exercise of due diligence was not within their knowledge or could not be produced by them at the time when the order was made, or that on account of some mistake or error apparent on

the face of the record or for any other sufficient reason, desires to obtain a review of the order passed. We also do not find any sufficient ground to review the order under challenge. Thus, the review application is found not maintainable.

7. The application to review the order passed in Case No. 53 of 2022 is dismissed, at the stage of admission as it has no merit for consideration.

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

Sd/-
(G. Mohapatra)
MEMBER

Sd/-
(S. C. Mahapatra)
CHAIRPERSON