

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL**

Sub: In the matter of petition under Section 94 of the Electricity Act, 2003 r/w Regulation 40 of MPERC (Conduct of Business) (Revision-I) Regulations, 2016 and Section 114 r/w Order XLVII Rule 1, Code of Civil Procedure, 1908 seeking review and/or modification and/or clarification of the order dated 27.11.2018 passed by the Commission in Petition No. 37 of 2018.

Petition No. 03/2019

ORDER

(Date of Order: 21st February, 2019)

M/s Shri Durga Khandsari Sugar Mills,
Vill : Mendarana, Tehsil : Pansemal,
District : Barwani (M.P.)

- **Petitioner**

Vs.

The Managing Director,

M.P. Paschim Kshetra Vidyut Vitaran Co. Ltd.,
GPH Compound, Pologround, Indore.

- **Respondent No. 1**

New and Renewable Energy Department,
Government of Madhya Pradesh,
Main Road No. 2, Urja Bhawan,
Near 5 No. Bus Stop, Shivaji Nagar, Bhopal – 462016

- **Respondent No. 2**

Shri Aditya K. Singh, Advocate and Shri Akhilesh Goyal, Representative appeared on behalf of the Petitioner.

Shri Shailendra Jain, Dy. Director appeared on behalf of Respondent No. 1.

None appeared on behalf of Respondent No. 2.

The petitioner Shri Durga Khandsari Sugar Mills has filed the subject petition wherein the petitioner has prayed as under:

- (i) Review, reconsider, modify and/or clarify the impugned order passed in Petition No. 37 of 2018 and direct Respondent No. 1 to not impose additional surcharge on self consumption of the electricity by its co-located bagasse based co-generation stations; and
- (ii) Pass such other order or orders as this Hon'ble Court may deem fit and proper in the interest of justice.

2. Earlier, the petitioner had filed a petition (No. 37/2018) under Section 86(1)(e) and Section 86(1)(a) of the Electricity Act, 2003 read with Regulation 10 of "MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) Regulations, 2010 and Para 18.15, 18.16, 18.18 and 18.20 of MPERC (Terms and Conditions for Intra-State Open Access in

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Madhya Pradesh) Regulations, 2005 wherein among other prayers the petitioner had requested the Commission to direct respondent No. 1 i.e. M.P. Paschim Kshetra Vidyut Vitaran Co. Ltd to not impose cross subsidy on self consumption of the electricity by the petitioner from its own bagasse based cogenerating plant; and declare that all actions being undertaken by respondent No. 1 in regard to imposition of cross subsidy surcharge on the petitioner is void ab initio and further direct to respondent No. 1 for refund of all amount paid by the petitioner for Cross Subsidy Surcharge. The Commission disposed of the said petition (No. 37/2018) vide order dated 27.11.2018 stating that

13. In view of above analysis as per the provisions of the Electricity Act, 2003 and the Electricity rules, 2005, the Commission is of the view that the petitioner has not been able to establish that its co-generation plant can be considered as captive power plant and his consumption as captive consumption, to qualify for exemption under proviso 4 of Section 42(2) of the Electricity Act, 2003. Therefore, all the statutory charges / surcharges as determined by the Commission from time to time shall be leviable on the petitioner by the concerned distribution licensee.

3. Aggrieved by the aforementioned decision of the Commission, the petitioner has filed this review petition under regulation 40 of MPERC (Conduct of Business) (Revision-I) Regulations, 2016. The petitioner has stated in the instant petition that in Petition No. 37/2018 it had prayed before the Commission to declare that the respondent No. 1 cannot impose cross subsidy on self consumption of the electricity by the petitioner from its own generating station by bagasse based cogenerating stations. The Commission rejected the prayer and validated the claim of West Discom to impose cross subsidy. Further, West Discom had also imposed additional surcharge from date of the commissioning of the generating stations of the petitioner, thus misreading /misinterpreting the order of the Commission in Petition No. 37/2018. Therefore, the petitioner filed the instant petition with the prayers as indicated in the paragraph above.

4. The case was listed for motion hearing on 30.01.2019. During the motion hearing, the petitioner restated the contents of the petition. The Commission admitted the petition for further hearing. The petitioner was directed to serve a copy of the petition to the respondents immediately. The respondents are directed to file reply in hard copy by 07.02.2019 with a copy to other parties. The case was listed for next hearing on 12th February, 2019.

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5. During the hearing held on 12.02.2019, the petitioner argued at length in favour of its contentions. Respondent No. 1 filed its reply. The petitioner requested the Commission to allow it to file the written submission. The petitioner vide its petition and the written submission dated 15.02.2019 broadly stated as below:

- i. Post pronouncement of the order, West Discom started imposing additional surcharge from the commissioning date of the plant of the petitioner. The Petitioner was compelled to approach this Hon'ble Commission for declaration that the order of the Hon'ble Commission was limited to the prayer sought i.e. prayer against imposition of cross subsidy.
Hon'ble Commission did not discuss provisions of additional surcharge and merely relied on provisions concerned cross subsidy and merely decided applicability of the cross subsidy surcharge on bagasse based cogenerating unit. It appears that the Discom has mistakenly relied on the order of the Hon'ble Commission to justify the imposition of additional surcharge.
- ii. Principles concerning imposition of additional surcharge on open access customers is no more res integra and various judicial forum and quasi-judicial authority in unequivocal terms clearly held that additional surcharge can only be imposed on wheeling and wheeling happens only when some entity is using distribution system of distribution licensee for conveyance of the electricity by payment of certain charges. In the instant case, conveyance of electricity is being done vide its own system of the Petitioner. It is undisputed fact that Petitioner is using its own system for supplying power from its own system.
- iii. Hon'ble Appellate Tribunal for Electricity in Appeal No. 84 of 2015 in the matter of GUVNL Vs. GERC and Anr. while dismissing appeal of GUVNL for imposition of additional surcharge (even if there was no wheeling) observed as follows:

26. *The Appellants stated that connectivity to the Intra-State Network is not a pre requisite for levy of Additional Surcharge. In this regard reliance has been placed by Appellants on the decision of the Hon'ble Supreme Court in the case of Sesa Sterlite Ltd. Vs. Orissa Electricity Regulatory Commission (2014) 8 SCC 444. In the said judgment, we observed that the*

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decision of the Hon'ble Supreme Court had referred to cross-subsidy surcharge and its rational and there is no reference of Additional Surcharge.

28. *Wheeling is defined in Section 2(76) and it reads thus: "(76) "wheeling" means the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under section 62."*

In the present case, no part of distribution system and associated facilities of the Appellants is sought to be used by the Respondent No. 2 for transmission of power through CTU, from injecting point to the Respondent No. 2's plant. Therefore, as per definition under Section 2(76) of the Electricity Act, 2003, Respondent No. 2 is not able to pay wheeling charges on Additional Surcharge for the open access. In terms of Section 42 of the Electricity Act, 2003, the payment of Additional Surcharge on the charges of wheeling would not arise at all.

iv. Further, Section 42(4) reads as follows:

4) *Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an **additional surcharge on the charges of wheeling** , as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.*

v. Conjoint reading of Section 42 and Judgment cited in the instant petition clearly reflect that the additional surcharge can only be imposed on the charges on wheeling. Therefore, it is humbly submitted that if there is no wheeling there is no question of additional surcharge.

vi. In the instant case, the Petitioner is using its own system to supply electricity from its own generating station and not using distribution system of the Respondent No. 1.

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Hon'ble Appellate Tribunal further in Appeal No. 183 of 2016 in the matter of Star Wire (India) Vidyut Private Limited Vs. HERC and anr. defined wheeling as under:

13. *We have already quoted definition of the term 'wheeling' incorporated in the said Act. It is clear from this definition that 'wheeling' means the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under Section 62.*

- vii. The clarification which the Petitioner is seeking through this petition is significant as West Discom have acted in clear violation of settled legal principles by misinterpreting Impugned Order. They have acted against their contractual and statutory obligations by issuing bill for additional surcharge by complete misreading of the order of the Hon'ble Commission.
- viii. The petitioner humbly submits that the Respondent No. 1 has been abusing their dominant position by thrusting upon the petitioner, an increased financial burden in the form of imposition of additional surcharge. It is of great concern to the petitioner that in the absence of this clarification, the Respondent DISCOM's will continue to charge the additional surcharge.
- ix. There is sufficient reason to review/ clarify the judgment of this Hon'ble Court as West Discom is misinterpreting the Impugned Order.
- x. It would be equitable and in the interest of justice that the Impugned Order under review in this petition, is modified/ clarified in as much as otherwise grave prejudice shall be caused to the review petitioner herein.
- xi. West Discom in its reply stated that it has relied on the judgment of the Hon'ble Commission in the matter under petition No. 38/2018 for imposition of additional surcharge. It is erroneous interpretation of the Order in Petition No. 38/2018. Bare reading of the Order suggests that issue concerning additional surcharge has nowhere been discussed in Petition No. 38/2018 and in Petition No. 37/2018.
- xii. West Discom has mistakenly relied on order in Petition No. 38/2018 for imposition of the additional surcharge and it is important to mention that petitioner in Petition No. 38/2018 has also filed clarification petition for seeking

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clarification on additional surcharge and it is listed as Petition No. 02/2019. Therefore, even if we assume but not concede that West Discom has relied on Petition No. 38/2018, order in Petition No. 38/2018 does not deal with additional surcharge.

6. Respondent No. 1 vide its submission dated 11.02.2019 requested that the petition filed by the petitioner is devoid of merit; therefore same may be dismissed. The respondent No. 1 largely submitted as below:

- i. The petitioner has filed present petition challenging the legality and validity of levy and billing of additional surcharge by the answering respondent
- ii. The petitioner primarily contended that :
 - a. In the petition No. 37 of 2018, it has prayed before Hon'ble Commission to declare that the respondent No 1 cannot impose cross subsidy surcharge (CSS) on self consumption of the electricity by the Petitioner from its own bagasse based generating station.
 - b. Order of the Hon'ble Commission was limited to the prayer sought i.e prayer against imposition of cross subsidy. Hon'ble Commission did not discuss provisions of additional surcharge and merely relied on the provisions concerning cross subsidy and merely decided applicability of the cross subsidy surcharge on bagasse based cogeneration.
 - c. Post pronouncement of judgment in the petition no. 37 of 2018 West Discom has started imposition of additional surcharge by misreading/misinterpreting order of the Hon'ble Commission in petition No. 37 of 2018.
- iii. From the perusal of averment made in the petition along with relief claimed, it is apparent that the relief sought by the petitioner is limited to the review, reconsideration, modification and/or clarification of the impugned order passed in petition No. 37 of 2018.
- iv. It is correct that prayer of the present petitioner in the petition No. 37 of 2018 was limited to the levy of CSS. However in the case of petition No. 38 of 2018 another similarly placed consumer M/s Narmada Sugar Pvt Ltd has challenged the billing of the 'CSS' as well as 'AS' by Madhya Pradesh Poorva Khetra Vidyut Vitaran Co. Ltd. Relevant extract of the order of Hon'ble Commission dated 29/11/2018 in the petition No 38 of 2018, which dealt with the prayer of the petitioner reproduced as under:

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“2.....The petitioners have broadly prayed to the Commission to:

i. Admit the Present Petition;

ii. In the interim, direct Respondent No. 1 to restore HV 7.1 connection of the Petitioner and issue directions restraining Respondent No. 1 from taking any coercive action till disposal of this Petition;

iii. Direct Respondent No. 1 to not impose cross subsidy and additional surcharge on self consumption of the electricity by the Petitioner from its own generating station by bagasse based cogenerating stations;

iv. Declare that all actions being undertaken by the Respondent No. 1 in regard to imposition of cross subsidy surcharge and additional surcharge on the Petitioner is void ab initio and further direct to Respondent No. 1 for refund of all amount paid by the Petitioner for Cross Subsidy Surcharge and Additional Surcharge; and

v. Pass any such other or further order(s) as the Commission may in the facts and circumstances of the present case, may deem fit and proper.”

- v. From the perusal of the aforesaid prayer it is clear that M/s Narmada Sugar has challenged the levy of ‘CSS’ as well as ‘AS’. After consideration of submission of both the party & relying upon the various judicial pronouncements, Hon’ble Commission has disposed the petition without granting any relief. The relevant part of the order is as under:

“15. In view of above analysis as per the provisions of the Electricity Act, 2003 and the Electricity rules, 2005, the Commission is of the view that the petitioner has not been able to establish that its co-generation plant can be considered as captive power plant and his consumption as captive consumption, to qualify for exemption under proviso 4 of Section 42(2) of the Electricity Act, 2003. Therefore, all the statutory charges / surcharges as determined by the Commission from time to time shall be leviable on the petitioner by the concerned distribution licensee.

- vi. Once the Hon’ble Commission has disposed of the petition no 38/2018, without granting any relief to the petitioner, it shall be deemed that matter of levy of ‘CSS’ as well as ‘AS’ is decided against the petitioner M/s Narmada Sugar.

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vii. After pronouncement of the Judgment after considering all the statutory provision and judicial pronouncement, in the matter of a similarly placed consumer, it is clear that additional surcharge is applicable on the consumption done by the present petitioner from its bagasse based co-generation plant. It is well-settled that a judicial decision on any point of law does not make a new law, it only discover or find the correct position of law. The law has always been the same. Therefore, the decision of the Hon'ble Commission in the matter of M/s Narmada Sugar would have effect of clarifying the legal position which was earlier not correctly understood. Therefore West Discom is correct while raising the bills of additional surcharge to the petitioner.

7. Having heard the petitioner and respondent no. 1 and gone through their submission, the Commission has opined that the impugned Order issued by the Commission in the matter of Petition No. 37/2018 is aptly clear. The petitioner in its petition No. 37/2018 had raised the issue of cross subsidy surcharge only and accordingly the Commission had passed the judgment on the limited issue of cross subsidy surcharge. In the instant review petition, the petitioner requested for review, reconsideration, modification of the Order dated 27.11.2018 passed in Petition No. 37/2018 and/or to clarify the impugned order dated 27.11.2018. As the said Order is very clear and was passed on the limited issue of cross subsidy surcharge, no additional issue can be entertained through this review petition.

8. For dealing the review petitions, the Commission observed that as per powers of Civil Court for review of its decision/ judgment under Section 114 of CPC, the grounds on which review can be sought are given in Order 47 Rule 1 of CPC, which are enumerated below :

- (a) 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 order was passed or;
- (b) on account of some mistake or error apparent on the face of the record or;
- (c) any other sufficient reason.

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9. In view of the above facts & circumstances and limitations of the review, the Petition No. 03/2019 stands disposed of. However, the petitioner is free to file a separate petition on the issue of levy of additional surcharge by the West Discom on the basis of the order of the Commission in another Petition no. 38/2018.

Ordered accordingly.

sd/-
(Mukul Dhariwal)
Member

sd/-
(Dr. Dev Raj Birdi)
Chairman