

MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION, BHOPAL

Sub: In the matter of reconsideration of order dated 08.05.2015 against petition no. 32 of 2014 in the matter of true up cost of SEZ ,MPAKVN deemed licensee for the period prior to March 2010, in the context of new documents available under RTI.

ORDER

Date of order: 22.04.2016

**M/s Pithampur Audyogik Sangathan ,
231, Saket Nagar
Indore -452018 MP, :**

Petitioner

V/s

1. M.P.A.K.V.N (Indore) Ltd.

Respondent No.1

3/54, Press Complex, Free Press House :
A.B. Road, Indore

2. The Principal Secretary :

Respondent No.2

Energy Dept., GoMP
Vallabh Bhawan, Bhopal

3 The Managing Director, :

Respondent No.3

M.P. Power Management Company Ltd.
Shakti Bhawan, Rampur, Jabalpur – 482 008

Dr. Gautam Kothari appeared on behalf of the petitioner.

Shri Ajay Porwal, Consultant and Ms Bhakti Vyas, Legal Consultant appeared on behalf of the respondent No. 1.

Shri N.K. Upadhyay, EE appeared on behalf of the respondent No. 2.

Shri Manoj Dubey, advisor (Law) & Shri Gagan Diwan , Accounts Officer appeared on behalf of the respondent No. 3.

The subject petition has been filed by the petitioner for determination of the tariff and costs of respondent No.1 for SEZ for FY2005-06 to FY2009-10 by referring to some new evidences obtained through RTI by the petitioner. The petitioner had earlier filed a petition (No. P-32/2014) before MP Electricity Regulatory Commission (hereinafter referred to as “the Commission” or “MPERC”) wherein the petitioner requested the Commission to direct respondent No.1 for submission of true up cost for FY 2005-06 to FY 2009-10 based on audited accounts and as per the relevant regulations of MPERC. Petitioner had further requested to the Commission to determine the retail supply tariffs as per provisions of the Electricity Act, 2003 from FY 2005-06 to FY 2009-10 based on true-up costs. The Commission had held the proceedings in the matter and vide the Order dated 08/05/2015

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disposed of the petition stating that determination of ARR and retail supply tariff for a distribution licensee by the Commission is the pre-requisite for the purpose of carrying out true-up exercise which has not been done. Therefore, the Commission did not find justification for exercising jurisdiction retrospectively for contested period for FY 2005-06 to FY 2009-10 under the circumstances when the Commission had not determined the tariffs for the period under contest.

2. In the recent petition by referring to the correspondence which took place in 2007 between Assistant Development Commissioner, O/o the Development Commissioner, Indore Special Economic Zone, Ministry of Commerce and Industry, Govt. of India and Energy Department, Govt. of Madhya Pradesh obtained by the petitioner through RTI, the petitioner has submitted that there are sufficient documents available to indicate that the fixing of tariff remained the prerogative of the Commission and the powers of MPERC were not exercised/available to the Development Commissioner. Therefore, the matter of true up costs for FY 2005-06 to FY 2009-10 should be reconsidered by the Commission. The Commission considered this petition as the review petition on the Commission's Order dated 08/05/2015 in the matter of petition No. P-32/2014. Since the petitioner has referred to a letter from Energy Department, Govt. of M.P., the Commission considered it appropriate to seek the response from the Energy Department, Govt. of M.P., before admitting the petition for further deliberation.

3. The petitioner in the recent petition has submitted that vide letter No. 70/ISEZ/2006-07/572 dated 22.01.2007 in the matter of "determination of tariff for the electricity supply of Indore SEZ units" Assistant Development Commissioner, O/o the Development Commissioner, Indore Special Economic Zone, Ministry of Commerce and Industry, Govt. of India requested to Principal Secretary, Energy Department, Govt. of M.P. to clarify whether Development Commissioner had authority to fix the tariff for electric supply made to units located in Indore SEZ by respondent no.1 from the power allocated by NTPC. Petitioner has further submitted that in response, Additional Secretary (Energy), Energy Department, Govt. of Madhya Pradesh vide letter No. 2056/1317 dated 21.03.2007 with a detailed analysis of the provisions of Act viz. i) *MP Vidyut Sudhar Adhiniyam, 2000*, ii) *Indore Special Economic Zone (special provision) Act, 2003*, iii) *Electricity Act, 2003*, iv) *Special Economic Zone Act, 2005* and v) *Special Economic Zone Rules, 2006*, stated that it would be appropriate to approach the MPERC for determination of tariffs for electricity supply. The aforementioned opinion received from Energy Department, Govt. of Madhya Pradesh was subsequently forwarded by the Assistant Development Commissioner to the Managing Director, MPAKVN(I)L, Indore vide letter No. 70/ISEZ/2005-06/134 dated 08/05/2007. By referring to a judgment dated 30/10/2014 of the APTEL in the matter of Appeal No. 17 (wrongly indicated by the petitioner as it was Appeal no. 71) of 2013 petitioner has also submitted that the electricity supply business of MPAKVN(I)L as developer of SEZ was under the jurisdiction of the State Commission prior to 03/03/2010 and remained so even after 03/03/2010.

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4. In response respondent No.1 through a written submission filed on 19/01/2016 submitted that the present review petition is not maintainable as in the subject petition petitioner has not able to make out any error apparent on the face of the record and in fact is seeking to re-agitate the issues which have been held against the petitioner in the impugned order dated 08/05/2015 in P-32 of 2014. Further, a review petition shall not be granted on the ground of discovery of new matter or evidence which the petitioner alleges was not within his knowledge, or could not be adduced by him when the order was passed or made, without strict proof of such allegation. Those findings cannot be allowed to be assailed on merits in the name of the aforesaid documents namely; letter from the Department of Energy giving opinion on the clarifications sought by Development Commissioner SEZ Indore.

5. By referring to section 11(2) of Indore Special Economic Zone (Special Provisions) Act, 2003 notified on 28th March 2003, which stipulates that "*The Development Commissioner shall perform functions and exercise powers with regard to matters specified in sub-section (1) in place of Madhya Pradesh Electricity Regulatory Commission constituted under Madhya Pradesh Vidyut Sudhar Adhinyam 2000 (4 of 2001)*" respondent No.1 submitted that prior to the enactment in Electricity Act, 2003 respondent No.1 was governed by Indore SEZ Act, 2003 and accordingly tariff petitions were preferred before the Development Commissioner. By virtue of notification dated 03/03/2010 issued by the Govt. of India under Section 49 of the SEZ Act, the respondent No.1 became a deemed licensee. Prior to this notification there was no express provision for Developer for regulating the distribution of electricity in SEZ. With the classification of the respondent No.1 as a deemed licensee under the Electricity Act, 2003 in terms of the notification dated 03/03/2010 the distribution and retail supply activities of respondent No. 1 came to be regulated by the State Commission under Electricity Act, 2003 pursuant to 03/03/2010.

6. Respondent No.1 further submitted that implementation of the judgment dated 30/10/2014 pronounced by the APTEL referred to by the petitioner as a ground for filing the present review petition has also been stayed by Hon'ble Supreme Court of India.

7. In the submission respondent No.1 denied that proviso inserted in clause (b) of Section 14 of the Electricity Act, 2003 the notification dated 03/03/2010 should have a retrospective application on respondent No.1 as a deemed licensee. The jurisdiction of the State Commission to regulate the tariff of respondent No.1 commenced from 03/03/2010 and thereafter, no retrospective effect of the provision can be read into in the absence of any such specific declaration/direction in the provision itself. The term licensee are intrinsically linked to Section 14 of Electricity Act and the said provision only came to apply upon respondent No. 1 due to the amendment of the said provision by way of the notification dated 03/03/2010. Retrospective application is completely contrary to the framework of the Electricity Act, 2003 itself when even Section 62(4) provides that the tariff may not be amended more than once in the current year. As such retrospective determination of tariff for a period when the Electricity

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Act, 2003 itself and in particular Section 14 did not even apply to respondent No. 1 would be *ultra vires* and the scheme of the Act itself.

8. It is further submitted by respondent No.1 that the clarification received from the Energy Department, Govt. of MP is in the form of an opinion and not an order. Even otherwise Indore SEZ Act, 2003 was amended in 2008 and the provisions enunciated under Section 11 of Indore SEZ Act, 2003 were not amended. Further, by referring to an order passed by Gujarat Electricity Regulatory Commission (GERC) in the case No. 1240 of 2012 wherein GERC rejected the prayer made by the petitioner for True-up of FY 2008-09, FY 2009-10 and FY 2010-11 as the GERC had not approved any ARR for FY 2008-09, FY 2009-10 and FY 2010-11 , respondent No. 1 submitted that as there was no ARR approved by the Commission for FY 2005-2009, there cannot be any True-up for the FY 2005-2009 as rightly held by the Commission in the Order dated 08/05/2015 in Petition No. 32/2014.

9. Respondent No. 2 and 3 through the written submission filed on 19/01/2016 stated that in the facts and circumstances, when the tariff has not been determined for the prior period, i.e. 2005-06 to 2009-10, the Commission may take a view, as may be deemed just and proper, to the effect that, whether a true up exercise would be possible for the said period.

10. The contentions raised and the replies filed in the subject petition for review of the Commission's order dated 08/05/2015 have been scrupulously scrutinized for establishing the maintainability of the subject petition. The review sought by the petitioner is based on certain correspondence took place in year 2007 between Assistant Development Commissioner, O/o the Development Commissioner, Indore Special Economic Zone, Ministry of Commerce and Industry, Govt. of India and Energy Department, Govt. of Madhya Pradesh obtained by the petitioner through RTI. Here, the Energy Department, Govt. of MP was asked by MPAKVN(IL) for providing a clarification that whether Development Commissioner has the authority to fix the tariff for electric supply made to units located in Indore SEZ from the quota allocated by NTPC. In response the Energy Department, Govt. of Madhya Pradesh with detailed deliberations on relevant Acts and Rules notified in the matter replied that it would be appropriate to approach MPERC for determination of tariffs for electricity supply. The Commission has noted that opinion given by the Energy Department, Govt. of Madhya Pradesh was loud and clear. The Commission has further observed that respondent No.1 had not pursued the matter further with the Commission and rather preferred to confine the issue with itself. The respondent No.1 should have approached to the Commission for seeking directions in the matter. Instead, respondent No.1 had approached to the Commission only for grant of open access and also for the distribution license in SEZ area. The Commission has noted that in a separate matter of petition No. 36/2009 which has incidentally been referred to by respondent No. 1 in its submission, it approached to the Commission for directions to West Discom regarding applicability of "Bulk Supply Tariff HV-7" for additional power requirement for SEZ proposed sourced from West Discom. Among other directions in the Petition No. 36/2009

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vide order dated 30/10/2009 the Commission had stated as under:

“(v) The SEZ Indore shall submit the application for license for the distribution of supply within the SEZ, alongwith all the details including supportive documents and tariff all other requirements related thereto, to the Commission by 30th Nov., 2009.

“(vi) The Commission expects that the SEZ, indore shall be able to submit its ARR/tariff proposals subsequent to issue of license, by 15th Jan., 2010.

11. The Commission has noted that respondent No.1 had approached to the Commission in the tariff related matters only after establishment of jurisdiction of the Commission upon it as deemed distribution licensee through the notification dated 03/03/2010 issued by Government of India. Respondent No. 1 had subsequently filed a petition (No. 55 of 2010) wherein among other prayers it requested the Commission to allow to claim same tariff from SEZ units at which it would procure power from West Discom till its ARR and retail tariff was determined by the Commission. Vide order dated 30/08/2010, the Commission had allowed the same to respondent No.1.

12. In view of the facts and circumstances discussed hereinabove it is amply clear that prior to notification of 03/03/2010 the Commission had not determined ARR or retail supply tariffs for SEZ Pithampur as respondent No.1 had neither filed any petition before the Commission nor referred the matter to the Commission in this regard. The Commission had already stated in the Order dated 08/05/2015 in the matter of petition No. 32/2014 that the Commission did not find any justification for exercising its jurisdiction upon respondent No.1 retrospectively for the period from FY 2005-06 to FY 2009-10 when the Commission had not determined the tariffs for the aforesaid period since the determination of ARR and retail supply tariff for a distribution licensee by the Commission is the pre-requisite for the purpose of carrying out true-up exercise by the Commission. The Commission has pondered over the matter and has considerate opinion that such exercise should be taken up by the Commission with effect from the period for which the Commission had determined the tariffs otherwise it not only affects the consumer and utility but also would be a deviation from Regulations.

13. In this situation the Commission once again does not find any justification for accepting the petitioner's arguments for exercising the jurisdiction upon the respondent No.1 with retrospective effect i.e. for the period from FY 2005-06 to FY 2009-10 when the tariffs for retail supply of electricity in the SEZ area for the contested period had not been determined by this Commission. The petition, therefore, stands disposed of.

**Sd/-
(Alok Gupta)
Member**

**Sd/-
(A. B. Bajpai)
Member**

**Sd/-
(Dr. Dev Raj Birdi)
Chairman**