

MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION

BHOPAL

Sub: In the matter of petition filed under Section 9, 42 and 86 of the Electricity Act 2003 in the matter of levy of Additional Surcharge by Respondent MPPKVVCL on wheeling of energy of the Solar Captive Plant of the Petitioner.

Petition No. 35 of 2022

ORDER

(Hearing through Video Conferencing)
(Date of Motion Hearing: 26th July' 2022)
(Date of Order: 1st August' 2022)

Porwal Auto Components Ltd.

(Solar Division) Plot No. 209, Sector-1,
Pithampur, Distt. Dhar (MP) 454775

- **Petitioner**

Vs

The Managing Director,

M.P. Paschim Kshetra Vidyut Vitaran Co. Ltd,
GPH Compound, Pologround, Indore -452003

- **Respondent**

Shri Ajay Porwal appeared on behalf of the petitioner.

The subject petition is filed under Section 9, 42 and 86 of the Electricity Act 2003 in the matter of levy of Additional Surcharge by Respondent MPPKVVCL on wheeling of energy of the Solar Captive Plant of the Petitioner.

2. Having heard the Petitioner, the Commission has observed the following in the subject matter:

- (i) The Petitioner has established two solar PV power captive power plants for use of 100% power as captive use under GOMP Solar policy 2012 and under Section 9 of the Electricity Act, 2003. It has also availed open access under Section 42 (2) of the Electricity Act, 2003 for transmission of power generated from its aforesaid captive power plant at Village Karodia, Tehsil Tarana, Dist Ujjain to its industrial unit at Sector 1 Pithampur. These plants were commissioned on 27/12/2013 and 08/11/2017, respectively.
- (ii) The petitioner has filed this petition against levy of Additional Surcharge on the electricity drawn by its industrial unit at Pithampur from its solar captive plant located at Village Karodia Distt. Ujjain. The petitioner has stated that levy of additional surcharge under Section 42 of the Electricity Act 2003 is in contravention of the provisions of the Act as well as National Electricity Policy.
- (iii) The Petitioner had earlier filed Petition No. 50 of 2019 with following prayers:
 - i. *For order/directions to the Respondent No. 1 not to impose additional surcharge on wheeling of the electricity by the Petitioner from its own generating stations at Village Karodia to its own manufacturing unit at Pithampur for self consumption of 100 % units generated by solar plant as per law; and*

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- ii. *For order/direction to Respondent No. 1 to refund of all amount paid by the Petitioner towards Additional Surcharge till date with interest.*
- (iv) Vide order dated 03/05/2021, this Commission dismissed the aforesaid Petition No. 50 of 2019 and held as follows:
“In view of aforesaid observations and examination of facts and circumstances in the matter and in light of provisions under MPERC (Cogeneration and Generation of Electricity from Renewables Sources of Energy) (Revision I) Regulation, 2010 as amended read with provisions under Section 42 (4) of the Electricity Act 2003, the Commission finds no merit in the contention of petitioner and additional surcharge is therefore, leviable on the petitioner. With the aforesaid observations and findings, the prayer is disallowed and the subject petition is dismissed.”
- (v) Aggrieved by the above stated order, the Petitioner has filed Appeal No. 241 of 2021 before Hon’ble Appellate Tribunal for Electricity challenging the Commission’s order dated 03/05/2021 with the following prayer:
i. *To set aside the impugned order; and*
ii. *To direct the Respondents No. 2 and 3 to refund or adjust the amount collected/recovered under the head of additional surcharge.*
- (vi) Subsequently, the Petitioner has come to know that Hon’ble APEX Court vide order dated 10/12/2021 in **CIVIL APPEAL Nos. 5074-5075 of 2019** in the matter of MSEDCL Vs. JSW held that such captive consumers/captive users, who form a separate class other than the consumers defined under Section 2(15) of the Act, 2003, shall not be subject to pay Additional Surcharge under Section 42(4) of the Electricity Act, 2003.
- (vii) The Petitioner has now filed the subject petition (Petition No. 35 of 2022) with the following prayer:
i. *The Commission may be pleased to admit the present petition;*
ii. *For order/directions to the Respondent No. 1 not to impose additional surcharge on wheeling of the electricity by the Petitioner from its own generating stations at Village Karodia to its own manufacturing unit at Pithampur for self-consumption of 100% units generated by solar plant as per law;*
iii. *For order/direction to Respondent No. 1 to refund Additional Surcharge of Rs. 22,29,539.19 with interest @18% per annum from December 2021 to April 2022 recovered after the order of Hon’ble Apex Court; and*
iv. *For order to adjust additional surcharge of Rs. 25,70,564.93 recovered during the period February 2020 to November 2021.*

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- (viii) We noticed from the contents of earlier Petition No. 50 of 2019, Appeal No. 241 of 2021, and the instant Petition No. 35 of 2022, that the Petitioner is same, the Petitioner's unit & Solar Captive Plant are the same, Additional Surcharge is levied by the same Respondent (Madhya Pradesh Paschim Kshetra Vidyut Vitaran Company Limited), and the issue raised for consideration is also same i.e., not to impose additional surcharge on wheeling of the electricity by the Petitioner from its own generating stations at Village Karodia to its own manufacturing unit at Pithampur for self consumption of 100 % units generated by solar plant.
- (ix) As part of procedure followed in Appeal No. 241 of 2021, the Commission has filed reply to the aforesaid appeal and the case is now pending adjudication before the Hon'ble APTEL.
- (x) On conjoint reading of all above cases including the instant petition, the Commission has noted that adjudication in the subject petition by this Commission would mean review of Commission's order dated 03/05/2021 passed in Petition No. 50 of 2019 which is challenged in Appeal No. 241 of 2021 and pending adjudication before the Hon'ble APTEL.
- (xi) In this regard, it is pertinent to read Section 114 of the Civil Procedure Code, 1908 for review, which provides asunder:
"114. Review.—Subject as aforesaid, any person considering himself aggrieved—
(a) *by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred.*
(b) *by a decree or order from which no appeal is allowed by this Code, or*
(c) *by a decision on a reference from a Court of Small Causes, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit."*
- (xii) A bare reading of Section 114 makes it clear that this matter cannot be reviewed by the Commission as the Petitioner has exercised its right to file appeal and the Appeal No. 241 of 2021 is pending adjudication before Hon'ble APTEL.
- (xiii) In such a case, wherein the Hon'ble Tribunal is seized of this matter in Appeal No. 241 of 2021, the Commission would like to refer to relevant paragraphs of the following orders passed by Hon'ble High Court and Hon'ble APTEL:
- a. **Kishor Bhikansingh Rajput Versus Preeti Kishor Rajput**, Writ Petition No. 7502 of 2006, decided by Hon'ble Bombay High Court on 07/02/2007-
"Normally, when this Court is ceased of the matter, it is expected of the subordinate courts to stay their hands away. It is difficult to

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understand as to what was an alarming urgency to proceed further and dismiss the petition when the learned Judge of the Family Court was very well aware that the order dated 15th September 2006 was challenged before this Court by the present petitioner. No doubt, that the learned Family Court is right in observing that there was no stay by this Court. But as a matter of propriety and when the learned Judge was very much aware about pendency of the petition before this Court, the learned Judge ought to have stayed his hands away and waited till further orders to be passed by this Court. In that view of the matter, I am inclined to allow the petition."

- b. **Prism Johnson Ltd. & Anr. Versus Madhya Pradesh Electricity Regulatory Commission & Ors.**, DFR No. 16 of 2020 and IA No. 64 of 2020, decided by Hon'ble APTEL on 17/01/2020-

"The very controversy raised in above said O.P. in the proceedings pending before the Respondent Commission on 03.01.2020, Respondent Commission in spite of having knowledge of 17.12.2019 order, as stated above, proceeded to pass the impugned order.

In the light of the issue involved in both O.P. and the appeal being the same (DFR No. 16 of 2020), we direct the Respondent Commission not to proceed with the Petition No. 53 of 2019 till further orders.

Respondent/ DISCOM shall not initiate any coercive steps in pursuance of demand notice in question till further orders."

3. In view of the foregoing observations, the subject petition is not admissible at this stage and hence dismissed and disposed of.

(Gopal Srivastava)
Member (Law)

(Mukul Dhariwal)
Member

(S.P.S. Parihar)
Chairman