

**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 29.11.2018 passed by the Commission in Petition No. 38 of 2018.

Petition No. 02/2019

ORDER

(Date of order: 27th March, 2019)

M/s. Narmada Sugar Private Limited,
Vill : Pondar, Sali Chouka,
District : Narsinghpur (M.P.)

- **Petitioner**

Vs

M.P. Poorv Kshetra Vidyut Vitaran Co. Ltd.,
Block No. 7, Shakti Bhawan, Rampur, Jabalpur – 482008

- **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 appeared on behalf of the petitioner.

Shri Prakash Upadhyay, Advocate and Shri Deepak Chandela, DGM of the Company appeared on behalf of the respondent No.1.

None appeared on behalf of the respondent No.2.

2. The petitioner, M/s Narmada Sugar Pvt. Ltd. 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. 38 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 direct Respondent No. 1 to refund all such amount which has been collected by it under heading of additional surcharge; and

(ii) Pass such other order or orders as this Hon'ble Court may deem fit and proper in the interest of justice.

3. Earlier, the petitioner had filed a petition (No. 38/2018) under Section 86(1)(e), and Section 86(1)(a) 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 Madhya Pradesh) Regulations, 2005 wherein

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among other prayers the petitioner had requested the Commission to direct respondent no. 1 i.e. M.P. Poorv Kshetra Vidyut Vitaran Co. Ltd not to 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; and 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. The Commission disposed of the said petition (No. 38/2018) stating that

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.

4. 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. In the instant petition, the petitioner has submitted that in Petition No. 38/2018 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 petitioner has further submitted that the Commission mistakenly committed an apparent error of the record by ignoring main prayer of the petitioner and the Commission did not discuss provisions of additional surcharge and merely relied on provisions concerning cross subsidy. The petitioner has stated that however, it appears that this mistake is not intentional. Therefore, the petitioner filed the instant review petition only for clarification relating to imposition of additional surcharge on bagasse based co-generating station and it is a limited petition.

5. 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.

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The respondents were 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.

6. During the hearing held on 12.02.2019, the respondent no. 1 requested the Commission to adjourn the hearing and allow fifteen days' time for filing the reply. The Commission considered the request and allowed the respondent no. 1 time up to 26.02.2019 as the last opportunity to file the reply, with a copy to other party. The case was listed for next hearing on 05th March, 2019. Respondent No. 1 filed its reply vide letter dated 26.02.2019.

7. During the hearing held on 05.03.2019, the petitioner argued at length in favor of its submission in the petition justifying the review of the Commission's order in the petition No. 38/2018 dated 29.11.2018. The petitioner also filed a written submission. The petitioner in the petition and the written submission broadly stated as below:

- i. The petitioner in the petition No. 38/2018 prayed before Hon'ble Commission to declare that the respondent No.1. cannot 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.
- ii. Hon'ble Commission in the aforesaid order held that the petitioner is not eligible for exemption provided in the 4th proviso to Section 42(2) i.e. exemption of cross subsidy surcharge. Further, additional surcharge is levied and governed by provision of Section 42(4) and Section 42(2) has no application in case of levy of additional surcharge. Therefore, any reference to Section 42(2) in the order mean that Hon'ble Commission in its order only dealt with the applicability of cross subsidy surcharge. Order of the Commission is silent on the applicability or otherwise of additional surcharge.
- iii. It is undisputed fact that Section 42(4) of the Act deals with additional surcharge and it defines additional surcharge as a surcharge on wheeling. Wheeling has been defined in Section 2(76) of the Act as an operation whereby the infrastructure of transmission licensee or distribution licensee, as the case may be, is used by another person for conveyance of the electricity. It is undisputed and not even denied by the respondent that the petitioner is neither using distribution system and associated facilities of

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distribution licensee, therefore question of surcharge on wheeling does not arise at all, if there is no wheeling only.

- iv. However, Hon'ble Commission unintentionally committed error by not clarifying position of law in cases of imposition of additional surcharge on self-consumption of the electricity by the petitioner from its own generating station by bagasse based cogenerating stations. Hon'ble Commission mistakenly committed an apparent error on the record by ignoring main prayer of the petitioner. Hon'ble Commission did not discuss provisions of additional surcharge and merely relied on previous concerning cross subsidy. However, it appears that this mistake is not intentional.
- v. 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 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

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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.

- vi. 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.*
- vii. 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. As in the case in hand no part of the distribution system is used and no wheeling charges billed to the petitioner hence following the rulings of Hon'ble Appellate Tribunal for Electricity in Appeal No. 84 of 2015 in the matter of GUVNL Vs. GERC and Anr. and in case of Kalyani Steels Limited Appeal No. 28 of 2005, no additional surcharge is applicable in the present case.
- viii. 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. 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.*
- ix. There is sufficient reason to review the impugned order as it contains material and apparent error on the face of record. It is stated that the petitioner in the original petition had prayed for direction to the respondent no. 1 to not impose additional

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surcharge and cross subsidy on the consumption of the electricity by its own co-located bagasse based co-generating station. It may be relevant to point out that while the said Order, in para 7, the Hon'ble Commission has clarified the position relating to cross subsidy, it has omitted to discuss/ adjudicate on additional surcharge.

- x. The petitioner seeks to draw the Hon'ble Commission's attention to this slip made in the impugned Order, through this Review Petition, as the omission does not require evidence 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.
- xi. There is sufficient reason to review the Impugned Order of this Hon'ble Commission as it contains material omission by way of accidental slip of non-adjudication of issues concerning additional surcharge, which strikes one or mere looking at record and would not require any long drawn process of reasoning.
- xii. The error is so apparent in the Impugned Order that without further investigation or enquiry, only one conclusion can be drawn in favour of the petitioner.
- xiii. 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 DISCOMs will continue to charge the additional surcharge.
- xiv. There is sufficient reason to review the judgment of this Hon'ble Court as it fails to consider contentions made by the parties and recorded in the order. Such non-consideration of contentions amounts to a manifest error in the Order, resulting in grave miscarriage of justice.
- xv. 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.
- xvi. It is true that once an Authority exercising quasi-judicial power takes a final decision, it cannot review its decision unless the relevant statute or rules permit such review. In

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the instant case, review jurisdiction has been specifically provided by Section 94 of the Act, therefore, the rule of *functus officio* does not arise at all.

8. During the hearing, the respondent stated that review petition filed *sans merit*. Therefore, liable to be dismissed. The respondent in its reply dated 26.02.2019 and during the hearing broadly stated as below:

- i. The petitioner has filed the present petition under regulation 40 of M.P.E.R.C (Conduct of Business) (Revision -I) Regulations, 2016 for review of order dated 29.11.2018. The order passed by the Hon'ble Commission is clear and does not require any interference under review jurisdiction.
- ii. The issue of levy of additional surcharge has been dealt by Hon'ble Commission in the order dated 29.11.2018. The contention of both the parties with respect to levy of additional surcharge has been categorically recorded and the commission has rejected the same. The submission of the petitioner that the issue has not been adjudicated, is apparently misconceived and the petitioner in exercise of review jurisdiction is trying to get fresh adjudication which is beyond jurisdiction of this Hon'ble Commission.
- iii. With the pronouncement of the order the Commission has become *functus-officio* and the ground which has been taken in the present revision can only be looked into appellate Jurisdiction by Hon'ble appellate tribunal U/S 111 of Electricity Act, 2003.
- iv. The power conferred upon the Hon'ble Commission U/S 94(1) (f) of Electricity Act, 2003 are limited and can be exercised only to cure an error which is apparent on the face of record. The grounds raised in the petition are beyond the purview of review jurisdiction and in fact the petitioner is seeking rehearing of the same issue under the guise of the review. It is well settled proposition of law that merely because a party failed to properly put his case or failed to sight the relevant citation in support of their submission, the final order passed cannot be recalled and re-hearing cannot be scheduled under review jurisdiction.
- v. The petitioner in the present petition has made much stress on the judgment passed by the Appellant Tribunal for Electricity in Appeal No.84 of 2015 in the matter of

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(Gujarat Urja Vikas Nigam Limited Vs. Gujarat Electricity Regulatory Commission), however, it is respectfully submitted that the said judgment was passed on peculiar facts of the case and few lines of judgment could not be read in isolation with the other discussion made therein, even otherwise the judgment cannot be ground to recall the earlier order as same would be beyond the power conferred U/S 94(1)(f) of Electricity Act, 2003.

- vi. The petition No. 02/2019 has been filed with the following prayers:
- a. Review, reconsider, modify and/ or clarify the impugned order passed in Petition No. 38/2018 and direct respondent no.1 not to impose additional surcharge on self-consumption of the electricity by its co-located bagasse based co-generation stations and direct Respondent no. 1 to refund all such amount which has been collected by it under heading of the additional surcharge : and
 - b. Pass such other or orders as this Hon'ble court may deem fit and proper in the interest of justice.
- vii. In accordance with Rule 1 Order 47 of the Code of Civil Procedure (CPC), a person aggrieved by an order may apply for a review under the following circumstances:
- a. On discovery of new and important matter or evidence which after exercise of due diligence was not within his knowledge or could not be produced by him at a time when the order was made;
 - b. An error apparent on the face of the record;
 - c. For any other sufficient reason.
- viii. The Commission has taken the note of the prayer made on petition No. 38/2018, argument and has finally rejected the prayer. It is settled proposition of law that the prayer, which is not granted is deemed to be rejected. The contention of the petitioner that with respect to levy of additional surcharge no discussion has been made in the impugned order is misconceived and even, otherwise could not be a ground of review.

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9. 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.

10. Having heard the petitioner and the respondent no. 1 and gone through their submissions, the Commission is of the view that the impugned Order issued by the Commission in the matter of Petition No. 38/2018 is aptly clear. In the paragraph 14 of the said order the Commission stated that “-----as the levy of **all** statutory charges is governed under the extant provisions of the Electricity Act, 2003, the Electricity Rules, 2005 and related Regulations. Further, in the paragraph 15 of the said order the Commission stated that “ ----- 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.

11. The Commission had issued an Order on dated 22.5.2007 in respect of Petition No.02/2007. In this order, the Commission clarified that the consumers have to pay the additional surcharge on the charges of wheeling as and when specified by the Commission in this regard. The Commission also clarified that this additional surcharge would be levied even when dedicated transmission line is used. In the Open Access Regulations, 2005, the Commission specified the charges applicable for the Open Access which includes the levy of additional surcharge as determined by the Commission on yearly basis.

12. In the Civil Appeal No. 2479 of 2013 (Sesa Sterlite Limited V/s Orissa Electricity Regulatory Commission and others), the Hon’ble Supreme Court analyzed the rational behind levy of cross-subsidy surcharge and additional surcharge. The Hon’ble Supreme Court clarified that the Open Access can be allowed on payment of the surcharge, to be determined by the State Commission, to take care of the requirements of current level of cross-subsidy and the fixed cost arising out of the licensee’s obligation to supply. Consequent to the enactment of the Electricity (Amendment) Act,

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2003, it has been mandated that the State Commission shall within five years necessarily allow open access to consumers having demand exceeding one megawatt. In the rational for cross subsidy surcharge, the Hon'ble Supreme Court mentioned in the aforesaid order that the mechanism of cross-subsidy surcharge and additional surcharge are meant to compensate the licensee towards the requirement of current level of cross-subsidy and fixed cost arising out of the universal supply obligation on the Distribution Licensee. The extract of the Hon'ble Supreme Court's clarification in this regard is as under:-

“The issue of open access surcharge is very crucial and implementation of the provision of open access depends on judicious determination of surcharge by the State Commission. There are two aspects to the concept of surcharge one, the cross-subsidy surcharge i.e. the surcharge meant to take care of the requirements of current levels of cross-subsidy, and the other, the additional surcharge to meet the fixed cost of the distribution licensee arising out of his obligation to supply. The presumption, normally is that generally the bulk consumers would avail of open access, who also pay at relatively higher rates. As such, their exit would necessarily have adverse effect on the finances of the existing licensee, primarily on two counts one, on its ability to cross-subsidise the vulnerable sections of society and the other, in terms of recovery of the fixed cost such licensee might have incurred as part of his obligation to supply electricity to that consumer on demand (stranded costs). The mechanism of surcharge is meant to compensate the licensee for both these aspects”.

13. The Tariff Policy,2016 envisages the following regarding additional surcharge:-

“The additional surcharge for obligation to supply as per Section 42(4) of the Act should become applicable only if it is conclusively demonstrated that the obligation of a licensee, in terms of existing power purchase commitments, has been and continues to be stranded, or there is an unavoidable power purchase commitments, has been and continues to be stranded, or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract. The fixed costs related network assets would be recovered through wheeling charges.”

14. Section 42(4) of the Electricity Act, 2003 has specific provision for levy of the additional surcharge on a consumer or class of consumers in case State Commission permits them to receive supply of electricity from person other than distribution licensee of his area of supply to meet the

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fixed cost of such distribution licensee arising out of his obligation to supply.

15. In Order dated 22nd May, 2007 (Petition No. 02/2007) the Commission states the following:-
“While the Commission would consider levying additional surcharge on wheeling charges, yet it is the responsibility the licensee to demonstrate that they have an obligation in terms of existing power purchase commitments or they bear fixed costs consequent to such a contract. Hence, the Commission directs the licensee to demonstrate such commitments in order to levy additional surcharge on wheeling charges in terms of Section 42(4) of the Act”.
16. Seventh amendment to Madhya Pradesh Electricity Regulatory Commission (Cogeneration and Generation of Electricity from Renewable Sources of Energy) (Revision-I) Regulations, 2010 [ARG-33(I)(vii) of 2017] stipulates as below:
“12.2 Wheeling charges, Cross subsidy surcharge, additional surcharge on the wheeling charges and such other charges, if any, under Section 42 of the Electricity Act, 2003 shall be applicable at the rate as decided by the Commission from time to time in its retail supply tariff order.”
17. Accordingly, the Commission has already determined the additional surcharge under Chapter **“A3: Wheeling Charges, Cross Subsidy Surcharge and Additional Surcharge”** of the Retail Supply Tariff Order for FY 2017-18 issued on 31st March, 2017 and under Chapter **“A4: Wheeling Charges, Cross Subsidy Surcharge and Additional Surcharge”** of the Retail Supply Tariff Order for FY 2018-19 issued on 03rd May, 2018.
18. Under the above circumstances, the Commission is of the view that the additional surcharge has already been determined in the retail supply tariff orders from time to time. As such, the aforesaid issue may be raised either through review of the retail supply tariff order of the Commission or while the process of determination of retail supply tariff for FY 2019-20 is initiated.
19. In view of the above, the Petition No. 02/2019 stands disposed of.
Ordered accordingly.

(Mukul Dhariwal)
Member

(Dr. Dev Raj Birdi)
Chairman