

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL**

Sub: Application under Regulation 41 MPERC (Terms & Conditions for determination of Generation Tariff) Regulations r/w section 86(1)(b) of the Electricity Act, 2003 for declaration that “Additional Levy” raised on the Petitioner by fuel supply company, for supply of coal to the Applicant’s 1320 MW (2 X 660 MW) coal based power project at Nigrie, District Singrauli (M.P.) pursuant to the directions of the Hon’ble Supreme Court in its Order dated 24/09/2014 in W.P.(Criminal) No.120 of 2012 is recoverable as variable (fuel) charges from the procurers and to allow recovery of such Additional Levy from the Respondents.

Petition No. 37/2015

ORDER

(Date of Motion Hearing: 4th August’ 2015)
(Date of Order: 12th August’ 2015)

M/s. Jaiprakash Power Ventures Ltd.

Petitioner

V/s

1. **M. P. Power Management Co. Ltd., Jabalpur**
2. **M. P. Poorv Kshetra Vidyut Vitaran Co. Ltd. Jabalpur**
3. **M. P. Madhya Kshetra Vidyut Vitaran Co. Ltd., Bhopal**
4. **M. P. Paschim Kshetra Vidyut Vitaran Co. Ltd., Indore.**

} **Respondents**

Shri Avijeet Lala, Advocate and Shri Ashok Shukla, Authorized Representative appeared on behalf of the petitioner.

2. M/s. Jaiprakash Power Ventures Ltd., (Unit: Jaypee Nigrie Super Thermal Power Plant) filed the subject petition with the Commission on 24th June’ 2015 for declaration that “Additional Levy” raised on the Petitioner by fuel supply company for supply of coal to the Applicant’s 1320 MW (2 X 660 MW) coal based power project at Nigrie, District Singrauli (M.P.) pursuant to the directions of the Hon’ble Supreme Court of India vide order dated 24.09.2014 (in W.P.(Criminal) No.120 of 2012) is recoverable as variable (fuel) charges from the procurers and to allow recovery of such “Additional Levy” from Respondents.

3. The subject petition has been filed under Regulation 41 of MPERC (Terms & Conditions for determination of Generation Tariff) Regulations read with section 86(1)(b) of the Electricity Act, 2003.

4. The petitioner broadly submitted the following in the petition:

Sub: Application under Regulation 41 MPERC (Terms & Conditions for determination of Generation Tariff) Regulations r/w section 86(1)(b) of the Electricity Act, 2003 for declaration that “Additional Levy” raised on the Petitioner by fuel supply company, for supply of coal to the Applicant’s 1320 MW (2 X 660 MW) coal based power project at Nigrie, District Singrauli (M.P.) pursuant to the directions of the Hon’ble Supreme Court in its Order dated 24/09/2014 in W.P.(Criminal) No.120 of 2012 is recoverable as variable (fuel) charges from the procurers and to allow recovery of such Additional Levy from the Respondents.

- “(i) *That the issue of the validity of coal blocks allotted by the Screening Committee of the Central Government, as also the allotments made through Government dispensation route was examined by the Hon’ble Supreme Court in a batch of proceedings [W.P.(Criminal) No.120 of 2012] wherein, the Hon’ble Supreme Court declared all allocation of coal blocks made by the central government since 1993 as arbitrary and illegal in its judgement delivered on 25th August, 2014. However, pursuant to “Consequent Proceedings”, the Hon’ble Supreme Court vide Order dated 24th September, 2014, allowed mining activities to be carried out by the allottee of the mines till 31.03.2015 and further imposed “Additional Levy” of Rs. 295/-per tonne on all coal extracted inter alia from any captive mine. The Additional Levy is made applicable to all coal mined from the concerned mine and is therefore, retrospective in nature. This “Additional Levy” of Rs.295/-after having been grossed up with VAT works out to be Rs. 309.75 per tonne.*
- (ii) *Pursuant to the order of the Hon’ble Supreme Court, the coal invoices raised by the coal suppliers subsequently include the amount of Rs. 295/-per MT + 5% VAT and has been classified as “Additional Levy”. Copies of the invoices issued by MPSMCL claiming “Additional Levy” are annexed herewith and marked as **Annexure– P/3**.*
- (iii) *That the Petitioner has since paid an amount of Rs.46.61 Crores (Rs.22.33 Crores against demand letter dated 01-01-2015 of MPSMCL & Rs.24.28 Crores as payment against MPSMCL invoices raised from December 12th, 2014) upto 31st March, 2015.*
- (iv) *The Petitioner submits that it is entitled to recover the energy charges worked out inter alia on the basis of the landed cost of coal in accordance with the formula provided in the Tariff Regulations from the beneficiaries including the Respondents. This amount has been determined by the Hon’ble Commission in the tariff order of 26.09.2014 based on*

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the details provided by MPSMCL. However, MPSMCL is now demanding the Additional Levy that has been imposed by the Hon’ble Supreme Court. This amount that has been charged by the fuel supplier from the Petitioner has to be treated as part of fuel price adjustment provided in Regulation 41.2 of the Tariff Regulations for change in landed cost of coal. The Petitioner states that it is liable to pay the invoices raised by MPSMCL for supply of coal, and should accordingly have the right to pass on such cost as cost of fuel (energy charges).

- (v) *Accordingly, the Petitioner has been raising supplementary invoices for recovery of impact of “Additional Cess” on the Respondent No. 1, and up to 11th April, 2015, total amount of supplementary invoices raised on Respondent No.1 has shot up to Rs.18.76 Crores. First four set of Supplementary bills pertaining to the months of September, 2014 and October, 2014 totalling around Rs. 5.42 Crores were raised on January 9th, 2015 (These bills include increased impact of “Clean Energy Cess” also). The bill wise detail of such Supplementary invoices is annexed herewith and marked as **Annexure-P/4**.*
- (vi) *Respondent No. 1, vide their letter dated 22nd April, 2015, after keeping aforesaid bills in abeyance for long, categorically refused to make payments of the same on the following grounds namely, (i) the Supreme Court judgment does not provide for pass through of the Additional Levy; (ii) the judgment indicates that the Additional Levy has to be borne by the beneficiaries of the flawed coal block allocation process i.e. the prior allottees of the coal blocks; (iii) the CERC tariff regulations do not provide for recovery of Additional Levy/ penalty as part of energy charges. Letter of refusal is annexed herewith as **Annexure-P/5**.*
- (vii) *Respondent No.1, at the very outset itself, is not justified in refusing payments of such bills, since Article 10.7.1 of PPA dated January 5th, 2011 and Article 10.6.1 of PPA dated*

Sub: Application under Regulation 41 MPERC (Terms & Conditions for determination of Generation Tariff) Regulations r/w section 86(1)(b) of the Electricity Act, 2003 for declaration that “Additional Levy” raised on the Petitioner by fuel supply company, for supply of coal to the Applicant’s 1320 MW (2 X 660 MW) coal based power project at Nigrie, District Singrauli (M.P.) pursuant to the directions of the Hon’ble Supreme Court in its Order dated 24/09/2014 in W.P.(Criminal) No.120 of 2012 is recoverable as variable (fuel) charges from the procurers and to allow recovery of such Additional Levy from the Respondents.

September 6th, 2011 render Supplementary Bills conclusive for the purpose of making payment as Respondent No.1 has not disputed these bills within 10/7 days of receiving them. Moreover, Respondent No.1 did not follow the procedures spelt out in Article 10.7.2 of PPA dated January 5th, 2011 and Article 10.6.2 of PPA dated September 6th, 2011 for disputing the amount towards Additional Levy. Therefore, it is not open to the Respondents to deny payment of such amount at this stage.

(viii) *Without prejudice to the above, Respondent No.1, while refusing to make payment, has selectively relied on Para 27 of the Order of the Hon’ble Supreme Court dated September 24th, 2015 to suggest that the Additional Levy has to be borne by the fuel supply companies. It is submitted that the Respondent has clearly misread and misconstrued the scope and intent of para 27 of the judgment. A combined reading of Para 25, Para 26 and Para 27 clearly indicates that the Hon’ble Supreme Court in these paragraphs have discussed about the issue of cancellation of coal blocks and the futility of appointing committees to consider each individual case to determine whether the coal block allotments should be cancelled or not. This paragraph does not deal with the issue of Additional Levy. The observation in para 27 that **“the beneficiaries of the flawed process must suffer the consequences thereof”** does not deal with Additional Levy. It speaks about the consequence of cancellation of coal blocks qua the coal block allottees.*

Para 25, 26 and Para 27 of the said are reproduced as under:-

“25. The learned Attorney General vehemently opposed the setting up of any committee as proposed by learned counsels. He categorically and emphatically stated that the Central Government has no difficulty in taking matters forward consequent upon the cancellation of the coal blocks.

26. Learned counsels for the allottees have essentially raised two contentions. Firstly, the principles of natural justice require that they must be heard before

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their coal block allotments are cancelled. Secondly, we should appoint a committee to consider each individual case to determine whether the coal block allotments should be cancelled or not.

27. *As far as the second contention is concerned, this is strongly opposed by the learned Attorney General and we think he is right in doing so. The judgment did not deal with any individual case. It dealt only with the process of allotment of coal blocks and found it to be illegal and arbitrary. The process of allotment cannot be reopened collaterally through the appointment of a committee. This would virtually amount to nullifying the judgment. The process is a continuous thread that runs through all the allotments. Since it was fatally flawed, the beneficiaries of the flawed process must suffer the consequences thereof and the appointment of a committee would really amount to permitting a body to examine the correctness of the judgment. This is clearly impermissible.”*

(ix) *It is clear on a reading of para 40 of the judgment that the imposition of “Additional Levy” of Rs.295/- per metric ton of coal has been made on suggestion of the Attorney General and based on the computation of CAG as compensation for loss of revenue to the state exchequer. The Para 40 of the Order is reproduced as below:-*

“40. *In addition to the request for deferment of cancellation, we also accept the submission of the learned Attorney General that the allottees of the coal blocks other than those covered by the judgment and the four coal blocks covered by this order must pay an amount of Rs. 295/- per metric ton of coal extracted as an additional levy. This compensatory amount is based on the assessment made by the CAG. It may well be that the cost of extraction of coal from an underground mine has not been taken into consideration by the CAG, but in matters of this nature it is difficult to arrive at any mathematically acceptable*

Sub: Application under Regulation 41 MPERC (Terms & Conditions for determination of Generation Tariff) Regulations r/w section 86(1)(b) of the Electricity Act, 2003 for declaration that “Additional Levy” raised on the Petitioner by fuel supply company, for supply of coal to the Applicant’s 1320 MW (2 X 660 MW) coal based power project at Nigrie, District Singrauli (M.P.) pursuant to the directions of the Hon’ble Supreme Court in its Order dated 24/09/2014 in W.P.(Criminal) No.120 of 2012 is recoverable as variable (fuel) charges from the procurers and to allow recovery of such Additional Levy from the Respondents.

figure quantifying the loss sustained. The estimated loss of Rs. 295/- per metric ton of coal is, therefore, accepted for the purposes of these cases. The compensatory payment on this basis should be made within a period of three months and in any case on or before 31st December, 2014. The coal extracted hereafter till 31st March, 2015 will also attract the additional levy of Rs. 295/- per metric ton.”

- (x) Further, on the grounds for refusal of payment by Respondent No.1, the following is mentioned in the petition:
- (a) *the contention of the Respondent No.1 that the judgment of the Hon’ble Supreme Court does not provide for pass through of Additional Levy is without merit. The judgment is on the limited aspect of the process of allotment of coal block and levy of Additional Levy to compensate loss to the state exchequer. The Hon’ble Supreme Court itself categorically observed that the judgment does not deal with individual cases.*
 - (b) *It is further pertinent that the Hon’ble Supreme Court does not prohibit pass through of Additional Levy. Therefore incidence of such levy and the recovery thereof would be guided by the procurement arrangement and extant laws relating to recovery of energy charges applicable to the power generating companies that had been supplied coal from the coal blocks.*
 - (c) *It is submitted that in the present case once the Additional Levy has been invoiced as part of fuel cost by the coal supplier i.e. MPSMCL and recovered by it, the same is entitled to be passed on by the petitioner to the respondents as energy charges in terms of the PPA and the Tariff Regulations. This would follow automatically from the Tariff Regulations and need not be so directed by the Hon’ble Supreme Court, as suggested by the Respondent No.1.*

Sub: Application under Regulation 41 MPERC (Terms & Conditions for determination of Generation Tariff) Regulations r/w section 86(1)(b) of the Electricity Act, 2003 for declaration that “Additional Levy” raised on the Petitioner by fuel supply company, for supply of coal to the Applicant’s 1320 MW (2 X 660 MW) coal based power project at Nigrie, District Singrauli (M.P.) pursuant to the directions of the Hon’ble Supreme Court in its Order dated 24/09/2014 in W.P.(Criminal) No.120 of 2012 is recoverable as variable (fuel) charges from the procurers and to allow recovery of such Additional Levy from the Respondents.

(d) *The reliance placed by the Respondents on the CERC tariff regulations is also ill-founded.*

(e) *In any case, the judgment clearly indicates the Additional Levy is not a penalty.*

5. With the above contention, the petitioner prayed the following:

a) *In view of the above facts, the Applicant respectfully prays that the Hon’ble Commission may kindly:-Declare that the Energy (Variable) Charges inclusive of the “Additional Levy” of Rs.295/-per MT + 5% VAT as part of the landed cost of coal.*

b) *Direct the Procurers /Respondents to pay Energy (Variable) Charges towards “Additional Levy” of Rs.295/-per MT + 5% VAT as part of the landed cost of coal to the extent of invoices raised by the Petitioner for the period September, 2014 to March, 2015.*

c) *Pass such orders as the Hon’ble MPERC may deem fit and proper and necessary in the facts and circumstances of the case.*

6. On examination of the contents in the petition and the documents annexed with it, the Commission has observed the following:

(i) The petitioner raised supplementary invoices on Respondent No.1 for recovery of the impact of “Additional Levy” of Rs. 295 per metric ton imposed by the Hon’ble Supreme Court of India in its order dated 24th September’ 2014 in Writ Petition (CRL.) No. 120 of 2012.

(ii) In response to the above, M.P. Power Management Co. Ltd., Jabalpur (Respondent No. 1) refused to make payments of the aforesaid supplementary invoices (raised by the petitioner) on the following grounds:

(a) The judgement does not speak of pass through of the Additional levy” to

Sub: Application under Regulation 41 MPERC (Terms & Conditions for determination of Generation Tariff) Regulations r/w section 86(1)(b) of the Electricity Act, 2003 for declaration that “Additional Levy” raised on the Petitioner by fuel supply company, for supply of coal to the Applicant’s 1320 MW (2 X 660 MW) coal based power project at Nigrie, District Singrauli (M.P.) pursuant to the directions of the Hon’ble Supreme Court in its Order dated 24/09/2014 in W.P.(Criminal) No.120 of 2012 is recoverable as variable (fuel) charges from the procurers and to allow recovery of such Additional Levy from the Respondents.

the power procurers.

- (b) In Para 27 of the Hon’ble Supreme Court’s judgment, the intention of the Court, as who has to suffer the “Additional levy” is sufficiently clear. The judgement has dealt with the process of allotment of coal blocks and has found it to be illegal and arbitrary. The Court has intended that the beneficiaries of the flawed process, i.e. respective allottees of relevant coal blocks and not procurers/general public, ‘must suffer the consequences’, in the form of additional levy.
- (c) CERC Tariff Regulations does not lay down or even suggest that the landed cost of coal includes additional levy or penalty of any kind.

The petitioner has enclosed a copy of the Respondent’s letter dated 22nd April’2015 with the aforesaid contention.

7. Motion hearing in the subject matter was held on 4th August’2015 wherein Counsel of the petitioner reiterated the same legal framework under which the subject petition has been filed. He also stated that the question before the Commission is to decide whether the “Additional levy” of Rs. 295 per metric ton of coal extracted as decided by the Hon’ble Supreme Court of India needs to be considered as part of “landed cost of coal” in terms of provisions under MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, applicable to the present case.

8. Having heard the Counsel of the petitioner and also on examination of the issues raised in the petition, the Commission has come across the following issues for maintainability of this petition:

- (i) Whether the “Additional levy” of Rs. 295 per metric ton can be loaded on the end consumers of electricity in the state who were not the beneficiaries of the flawed process

Sub: Application under Regulation 41 MPERC (Terms & Conditions for determination of Generation Tariff) Regulations r/w section 86(1)(b) of the Electricity Act, 2003 for declaration that “Additional Levy” raised on the Petitioner by fuel supply company, for supply of coal to the Applicant’s 1320 MW (2 X 660 MW) coal based power project at Nigrie, District Singrauli (M.P.) pursuant to the directions of the Hon’ble Supreme Court in its Order dated 24/09/2014 in W.P.(Criminal) No.120 of 2012 is recoverable as variable (fuel) charges from the procurers and to allow recovery of such Additional Levy from the Respondents.

in terms of Para 27 of the order (dated 24th September’ 2014) passed by the Hon’ble Supreme Court of India?

- (ii) Whether the provisions under Regulation 41 of MPERC (Terms and Conditions for determination of Generation Tariff) Regulations provide for allowing such “Additional levy” (imposed by the Hon’ble Supreme Court of India in its aforesaid order) to pass on the electricity consumers of the Distribution Companies in the state through energy charges being determined for the Independent Power producers using coal from the beneficiaries of the flawed process in terms of Para 27 of the order (dated 24th September’ 2014) passed by the Hon’ble Supreme Court of India ?

9. To deal with the first issue, the Commission has gone through the judgement passed by the Hon’ble Supreme Court of India on 25th August’ 2014 and the order passed on 24th September’ 2014 in the following writ petitions:

- (i) Writ Petition (CRL) No. 120 of 2012
- (ii) Writ Petition (Civil) No. 463 of 2012
- (iii) Writ Petition (Civil) No. 515 of 2012
- (iv) Writ Petition (Civil) No. 283 of 2013

10. **Para 27 and Para 40** of the aforementioned order are reproduced as under:

*Para 27: “As far as the second contention is concerned, this is strongly opposed by the learned Attorney General and we think he is right in doing so. The judgment did not deal with any individual case. It dealt only with the process of allotment of coal blocks and found it to be illegal and arbitrary. The process of allotment cannot be reopened collaterally through the appointment of a committee. This would virtually amount to nullifying the judgment. The process is a continuous thread that runs through all the allotments. **Since it was fatally***

Sub: Application under Regulation 41 MPERC (Terms & Conditions for determination of Generation Tariff) Regulations r/w section 86(1)(b) of the Electricity Act, 2003 for declaration that “Additional Levy” raised on the Petitioner by fuel supply company, for supply of coal to the Applicant’s 1320 MW (2 X 660 MW) coal based power project at Nigrie, District Singrauli (M.P.) pursuant to the directions of the Hon’ble Supreme Court in its Order dated 24/09/2014 in W.P.(Criminal) No.120 of 2012 is recoverable as variable (fuel) charges from the procurers and to allow recovery of such Additional Levy from the Respondents.

flawed, the beneficiaries of the flawed process must suffer the consequences thereof (emphasis supplied) and the appointment of a committee would really amount to permitting a body to examine the correctness of the judgment. This is clearly impermissible.”

Paragraph 40: *“In addition to the request for deferment of cancellation, we also accept the submission of the learned Attorney General that the allottees of the coal blocks other than those covered by the judgment and the four coal blocks covered by this order must pay an amount of Rs. 295/- per metric ton of coal extracted as an additional levy. **This compensatory amount is based on the assessment made by the CAG (emphasis supplied).** It may well be that the cost of extraction of coal from an underground mine has not been taken into consideration by the CAG, but in matters of this nature it is difficult to arrive at any mathematically acceptable figure quantifying the loss sustained. The estimated loss of Rs. 295/- per metric ton of coal is, therefore, accepted for the purposes of these cases. **The compensatory payment on this basis (emphasis supplied)** should be made within a period of three months and in any case on or before 31st December, 2014. The coal extracted hereafter till 31st March, 2015 will also attract the additional levy of Rs. 295/- per metric ton”.*

11. It is observed from the above that the “Additional Levy” is also termed as Compensatory Payment. Further, there is no mention in the aforesaid order to recover/ pass on this “Additional Levy” or Compensatory payment from/to anyone like the electricity consumers of the Distribution Companies in the state (in the instant case) who are other than the beneficiaries of the flawed process in terms of Para 27 of the said order passed by the Hon’ble Supreme Court of India. Therefore, the grounds on which the petitioner has requested this Commission to “*declare that the Energy (Variable) Charges inclusive of the “Additional Levy” of Rs.295/-per MT + 5%*

Sub: Application under Regulation 41 MPERC (Terms & Conditions for determination of Generation Tariff) Regulations r/w section 86(1)(b) of the Electricity Act, 2003 for declaration that “Additional Levy” raised on the Petitioner by fuel supply company, for supply of coal to the Applicant’s 1320 MW (2 X 660 MW) coal based power project at Nigrie, District Singrauli (M.P.) pursuant to the directions of the Hon’ble Supreme Court in its Order dated 24/09/2014 in W.P.(Criminal) No.120 of 2012 is recoverable as variable (fuel) charges from the procurers and to allow recovery of such Additional Levy from the Respondents.

VAT as part of the landed cost of coal” are misplaced and having no merit to take up this issue by the Commission.

12. In view of the above observations, the second issue for consideration of the aforesaid “Additional levy” is obviously beyond the scope of the Regulations notified by this Commission. MPERC (Terms & Conditions for determination of Generation Tariff) Regulations,2012 do not provide for onward recovery of such “Additional levy” or Compensatory payment from the electricity consumers of the Distribution Companies in the state. The relevant Regulation 41 MPERC (Terms & Conditions for determination of Generation Tariff) Regulations,2012 is reproduced below:

“41. Energy charges (Variable charges)

41.1 *The energy (variable) charges shall cover main fuel costs and shall be payable for the total energy scheduled to be supplied to such Beneficiary during the calendar month on ex-power plant basis, at the specified variable charge rate (with fuel price adjustment).*

41.2 *Energy (variable) Charges in Rupees per kWh on ex-power plant basis shall be determined to three decimal places as per the following formula:*

(i) *For coal fired stations*

$$ECR = (GHR - SFC \times CVSF) \times LPPF \times 100 / \{CVPF \times (100 - AUX)\}$$

Where,

AUX= Normative Auxiliary Energy Consumption in percentage.

ECR = Energy Charge Rate, in Rupees per kWh sent out.

GHR = Gross Station Heat Rate, in kCal per kWh.

SFC = Specific Fuel Oil Consumption, in ml/kWh

CVSF = Calorific value of Secondary Fuel, in kCal/ml.

LPPF =Weighted average Landed price of Primary Fuel, in Rupees per kg, per liter or per standard cubic meter, as applicable, during the month.

CVPF = Gross Calorific Value of Primary Fuel as fired, in kCal per kg, per liter

Sub: Application under Regulation 41 MPERC (Terms & Conditions for determination of Generation Tariff) Regulations r/w section 86(1)(b) of the Electricity Act, 2003 for declaration that “Additional Levy” raised on the Petitioner by fuel supply company, for supply of coal to the Applicant’s 1320 MW (2 X 660 MW) coal based power project at Nigrie, District Singrauli (M.P.) pursuant to the directions of the Hon’ble Supreme Court in its Order dated 24/09/2014 in W.P.(Criminal) No.120 of 2012 is recoverable as variable (fuel) charges from the procurers and to allow recovery of such Additional Levy from the Respondents.

or per standard cubic meter.

Provided that Generating Company shall provide details of parameters of GCV and price of fuel i.e. domestic coal, imported coal, e-auction coal, liquid fuel etc., details of blending ratio of the imported coal with domestic coal, proportion of e-auction coal with details of the variation in energy charges billed to the beneficiaries along with the bills of the respective month:

Landed Cost of Coal:

41.3 *The landed cost of coal shall include price of coal corresponding to the grade and quality of coal inclusive of royalty, taxes and duties as applicable, transportation cost by rail/road or any other means, and, for the purpose of computation of Energy Charges, shall be arrived at after considering normative transit and handling losses as percentage of the quantity of coal despatched by the Coal Supply Company during the month as given below:*

Pit head generating stations : 0.2%

Non-Pit head generating stations : 0.8%

As per the above provision, it should be ensured that for computing energy charges, quantity of coal as despatched by the Coal Supply Company is taken after accounting for permissible transit and handling losses alone.

13. The above Regulations provide that the landed cost of coal shall include price of coal corresponding to the grade and quality of coal including the royalty, taxes and duties as applicable. These Regulations do not provide for inclusion of such ‘Additional Levy’ as discussed and decided in the afore mentioned judgment and order passed by the Hon’ble Supreme Court of India.

Sub: Application under Regulation 41 MPERC (Terms & Conditions for determination of Generation Tariff) Regulations r/w section 86(1)(b) of the Electricity Act, 2003 for declaration that “Additional Levy” raised on the Petitioner by fuel supply company, for supply of coal to the Applicant’s 1320 MW (2 X 660 MW) coal based power project at Nigrie, District Singrauli (M.P.) pursuant to the directions of the Hon’ble Supreme Court in its Order dated 24/09/2014 in W.P.(Criminal) No.120 of 2012 is recoverable as variable (fuel) charges from the procurers and to allow recovery of such Additional Levy from the Respondents.

14. With the above observations, the Commission has found that the grounds in the subject petition for pass through of “Additional levy” (in terms of the aforesaid order passed by the Hon’ble Supreme Court of India) in the energy charges determined by this Commission for the petitioner’s power plant do not form any case to deal with by this Commission. Thus, the subject petition is not maintainable and hence disposed of.

(Alok Gupta)
Member

(A. B. Bajpai)
Member

(Dr Dev Raj Birdi)
Chairman