

**JOINT ELECTRICITY REGULATORY COMMISSION
FOR THE STATE OF GOA AND UNION TERRITORIES
GURGAON**

Quorum
Shri S.K.Chaturvedi, Chairperson
Smt. Neerja Mathur, Member
Petition No. 204/2016
Date of Order: 25.07.2016

In the matter of:

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Review of Cross Subsidy Surcharge determination notified in Hon'ble JERC Tariff Order dated 06.04.2016 for Daman & Diu under Regulation 74 of JERC (Conduct of Business) Regulations, 2009.

And in the matter of:

M/s Wellknown Polyester Ltd., Dabhel Industrial Estate, Co-op. Society, Dabhel, Daman **.... Petitioner**

And in the matter of :

Electricity Department, Daman & Diu **....Respondent**

Present

For the Petitioner

1. Ms. Priya Dwivedi, Advocate
2. Ms. Surabhi Sinha, Legal Consultant
3. Shri Gaurav Nand, Legal Consultant

For the Respondent

Shri Anand K. Ganesan, Advocate

ORDER

Ms. Priya Dwivedi, Learned Counsel for the Review Petitioner through this Review Petition sought the review of the cross subsidy surcharge determined for the FY 2016-17.

The Learned Counsel submitted that the Review Petitioner is the biggest Open Access consumer of the UT of Daman & Diu and is most affected from the recent hike in the subsidy surcharge determined by the Commission in its Tariff Order dated April 06, 2016. The Commission notified a very high cross subsidy surcharge of Rs 0.42/Kwh on open access consumers for the FY 2016-17 an increase from the nil cross subsidy surcharge for the FY 2015-16. This increase in the cross subsidy surcharge has killed the open access in the territory and its determination has not been done as per the spirit of the Electricity Act, Tariff Policy and National Electricity Policy.

The Learned Counsel further submitted that the Commission calculated the Cross Subsidy Surcharge as per recently notified Tariff Policy but while applying the formula of the new Tariff Policy erred in computing the value of 'T' to arrive at the cross subsidy surcharge for the FY 2016-17, which led to a huge financial loss to the Open Access consumers of Daman & Diu.

The Learned Counsel further submitted that the Electricity Department of Daman & Diu is already collecting the demand or fixed charges on their full contract demand from all Open Access HT/EHT consumers even when the consumers are procuring power in Open Access. Thus, while calculating the cross subsidy surcharge for compensating the distribution licensee towards the loss of cross subsidy component in Open Access, the same shall be calculated by taking the reference value of 'T' component considering the energy charges only for taking the difference between the tariff and cost of supply to distribution licensee for determining the Cross Subsidy Surcharge.

The Learned Counsel further submitted that the Commission in its Tariff Order dated April 06, 2016 did not approve any tariff hike to any of the consumer category except the Cross Subsidy Surcharge on Open Access consumers.

The Learned Counsel further submitted that the Commission also made due adjustment while calculating the value of 'C' (cost of supply to distribution licensee) by excluding the open access purchase of the licensee for arriving at the true figure of the cost of supply component.

The Learned Counsel further submitted that JERC is the only Commission which accorded its approval to levy Stand by charges/ Temporary Charges on Open Access consumers from whom the Electricity Department is recovering full fixed / demand charges.

The Learned Counsel further submitted that the new Tariff Policy also provides that the Regulatory Commission may follow any other formula /methodology which is most appropriate.

Shri Anand K. Ganeshan, Learned Counsel for the Respondent submitted at the outset that there is no merit in the present petition. The same is an abuse of the process of the Court and the Petition is not maintainable for Review of the Tariff Order dated April 06, 2016. In the present Petition, the Petitioner does not even claim that there is any error apparent on the face of the record of the impugned Order. Therefore, the same is liable to be dismissed.

The Learned Counsel further submitted that levy of standby charges is completely a different issue and is in no way linked with the determination of cross subsidy surcharge. It is relevant to mention here that the Review Petition did not in any manner deal with the aspect of standby charges and it was raised only in the written submissions and oral arguments by the Petitioner.

The Learned Counsel further submitted that the Commission has determined the cross subsidy surcharge strictly in terms of the formula as provided in the Tariff Policy 2016 and the provision of the said policy has been implemented by the Commission in letter and spirit.

The Learned Counsel further submitted that the Tariff Policy clearly provides for the 'T' to be the Tariff payable by the relevant category of consumers duly reflecting the Renewable Purchase Obligation. Thus there is no error in consideration of the 'T' component.

The Learned Counsel further submitted that the collection of demand charges from the retail consumers is strictly in terms of the Retail Tariff Schedule. When the consumer continues to keep the Contracted Demand with the licensee, it is required to levy the demand charges accordingly.

The Learned Counsel further submitted that the Commission has granted a substantial benefits to the consumers in the UT of Daman & Diu by permitting the consumers to take Open Access even without surrendering the Contract Demand.

The Learned Counsel further submitted that any reduction in the charges payable by the Open Access consumers would be a direct burden on other consumers, which is not permissible.

The Commission has considered the submissions made by the Review Petitioner and the Respondent. It has also examined the records placed before them along with relevant provisions of the Electricity Act, 2003 and Rules and Regulations made thereunder. The Commission's power to review its own orders flow from Section 94 (1) (f) of the Electricity Act, 2003 and are the same as those conferred on a civil court by the Code of Civil Procedure (CPC). These have been spelt out in Section 114, read with Order 47, of the CPC.

Section 94 of the Electricity Act, 2003 provides that:

Quote

“(1)The Appropriate Commission shall, for the purposes of any inquiry or proceedings under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) in respect of the following matters, namely:-

(f) reviewing its decisions, directions and orders.

(2) The Appropriate Commission shall have the powers to pass such interim order in any proceeding, hearing or matter before the Appropriate Commission, as that Commission may consider appropriate....”

Section 62 of Electricity Act, 2003 provides that:

Quote

“(1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for -

(a) supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) transmission of electricity;

(c) wheeling of electricity;

(d) retail sale of electricity:”

The provisions relating to review of an Order constitute an exception to the general Rule to the effect that once a judgment is signed and pronounced, it cannot be altered. Therefore, the Orders are not generally interfered with, till there are circumstances as defined under the law, which make it necessary for a Court to alter or modify or reverse its original judgment. The application and the scope of the review of an Order are circumscribed under Order 47, Rule 1 of Code of Civil Procedure. The Power of review is not inherently vested with a Court or a Tribunal or a Commission. The right and power of review does not exist unless conferred by law expressly or by necessary implication.

With the enactment of the Electricity Act, 2003, the State Electricity Regulatory Commission has been vested with powers for reviewing its decision, directions and Orders of Section 94 (1) (f) of the Electricity Act, 2003. The instant application, made before the Commission, for the review of its decision, directions and Orders, therefore, derives its scope and authority from the aforesaid section of the Electricity Act, 2003 read with Order 47, Rule 1 of the Code of Civil Procedure.

The above mentioned provisions of CPC mandate that a Court of review may allow a review only on three specific grounds which are as under:-

- i. Discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the aggrieved person or such matter or evidence could not be produced by him at the time when the order was made; or
- ii. Mistake or errors apparent on the face of the record; or
- iii. For any other sufficient reasons which is analogous to the above two grounds

Under Order 47, Rule 1, CPC, Order/Judgment may be opened to review, inter-alia, if there is a mistake or an error apparent on the face of record. An error, which is not self-evident, has to be detected by process of reasoning and such an error can hardly be said to be an error apparent on the face of the record, justifying the Court to exercise its power of review under the above said provisions.

An error apparent on the face of the record may not be defined precisely and exhaustively, as there is an element of indefiniteness inherited in the term so used and it must be left to the Court to determine judicially, on the basis of the fact of each case. However, an error must be one which speaks for itself and is glaring and difficult to be ignored. The error is not one limited to one of facts but also includes obvious error of law. Whether, the error may have crept by oversight or by mistake may need to be established. The exercise of review of judgment under Order 47, Rule 1 is not permissible for an erroneous judgment so as to render the judgment as "reheard and corrected". The law has made clear distinction between what is an erroneous decision and an error apparent on the face of the record. While the first can be corrected by a higher forum, the latter can be corrected by exercise of review jurisdiction. A Review Petition has a limited purpose that cannot be allowed to be an appeal in disguise.

On the question of scope of review the Supreme Court in the case of **Aribam Tuleshwar Sharma Vs. Aribam Pishak Sharma (AIR 1979 SC 1047)** held that-

“It may be exercised where some mistake or an error apparent on the face of the record is found. It may also be exercised on any analogous ground. But it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of Appeal. A power of review is not to be confused with appellate power which may enable an appellate Court to correct all errors committed by the Subordinate Court.”The Supreme Court while discussing the scope and jurisdiction of mistake apparent on the face of the record has held that:

“The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, Rule 1 of CPC. The Review Petition has to be entertained only on the ground of an error apparent on the face of the record and not on any other ground. An error apparent on the face of the record must be such an error which must strike one on mere looking at the record and would not require any long drawn process of reasoning on points where there may conceivably be two opinions. The limitation of powers of court under Order 47, Rule 1 of CPC is similar to the jurisdiction available to the High Court while seeking review of the order under Article 226.”

The Commission noticed that the Review Petitioner has not shown anything to indicate tht the Commission has left in its Order that can be addressed as an error apparent on the face of the record to justify the review of the impugned Tariff Order dated 18th April, 2016. It is pertinent to mention here that the Power of Review can be exercised only within the domain prescribed under Order 47 Rule 1 of CPC for rectification of an error apparent and glaring on the face which would warrant reconsideration of the judgment / order so pronounced. Further, the error should be such that its continuance would strike at the roots of justice.

The Commission is of the considered view that there is no error in considering the ‘T’ component in the formula for determination of the Cross Subsidy Surcharge. Consistently, the Commission has considered the ‘T’ component as the total tariff realization of the specific category of the consumer which includes the demand /fixed charges as well as energy charges. In fact, in one of its judgments the APTEL has also directed to consider the Average Tariff realization of the category as ‘T’ component. The abnormal increase in the Cross Subsidy Surcharge for the FY 2016-17 is due to change in the formula as per the new Tariff Policy. Earlier the cost component considered was the costly 5% power purchase cost of the licensee. In the new Policy, the cost component is the overall average power purchase cost. The Commission has strictly applied the formula as prescribed in the Tariff Policy and hence there is no error in the determination of the Cross Subsidy Surcharge for the FY 2016-17.

On the basis of the records placed before the Commission in the present Review Petition and the averments made before the Commission, the Review Petitioner has not been able to make out any case for review of the Commission’s impugned Order dated 06.04.2016. Further, the Review Petitioner has failed to show that there is any error apparent on the face of the record which would justify the Review. The Commission opines that the issues which were raised by the Review Petitioner and enumerated in this Tariff Order have already been heard and deliberated in the Commission’s impugned Tariff Order dated 06.04.2016. The said issues were decided by the Commission based upon the provisions of Electricity Act, 2003 and Rules and Regulations made thereunder. The Commission feels that the Review Petitioner has no case.

In such circumstances the Review Petition is liable to be dismissed.

Ordered accordingly.

Sd/-
(NEERJA MATHUR)
MEMBER

Sd/-
(S.K.CHATURVEDI)
CHAIRPERSON

CERTIFIED COPY

Sd/-
(KEERTI TEWARI)
SECRETARY