

**ODISHA ELECTRICITY REGULATORY COMMISSION  
BIDYUT NIYAMAK BHAWAN  
UNIT-VIII, BHUBANESWAR - 751 012**

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**Present: Shri S. P. Nanda, Chairperson  
Shri S. P. Swain, Member  
Shri A. K. Das, Member**

**Case No. 26/2013**

<b>M/s Tata Sponge Iron Ltd.</b>	.....	<b>Petitioner</b>
- Vrs. -		
<b>NESCO</b>	.....	<b>Respondents</b>

**IN THE MATTER OF :**      **An Application filed by under S.94 (f) of the Electricity Act, 2003 for review of order dated 03.01.2013 passed in Case No. 129 of 2010 regarding cross-subsidy surcharge from CGPs, which have not maintained their status as CGPs and selling more than 49% of their total generation to GRIDCO.**

**For Petitioner:**      Shri Bibhu Charan Swain, the authorised representative of M/s Tata Sponge Iron Ltd.

**For Respondent:**      Shri Sudeep Mishra, Dy.Manager(Elect.), NESCO, Shri Debasish Das, AVP (Reg. Affairs), CSO (WESCO, NESCO & SOUTHCO), Ms.Niharika Pattanayak, Asst. Law Officer, DoE, GoO.

Nobody is present on behalf M/s. CCPPO, CESU, GRIDCO Ltd., SLDC, Dept. of Industry, GoO & The Engineer-in Chief (Electricity)-cum-Principal Chief Electrical Inspector, Bhubaneswar.

**ORDER**

**Date of Hearing: 28.10.2014.**

**Date of Order:23.12.2014**

The Petitioner M/s. Tata Sponge Iron Ltd. hereinafter referred as TSIL seeks to review the order dated 03.01.2013 of the Commission passed in Case No. 129/2010. The Petitioner has submitted that it has set up a Sponge Iron Manufacturing Plant at Joda in the electricity supply area of NESCO. It has also established a Co-generation based captive power plant of 26 MW capacity in its premises. The petitioner claims that the Order of the Commission in Case No. 129/2010 suffers from several apparent errors, therefore, should be reviewed. Those are as follows:

- (a) Section 11 of the Electricity Act, 2003 was imposed by the State Government till June, 2012 and balance period for 2012-13 should be July, 2012 to March, 2013 and not from June, 2012 to March, 2013. Though the Commission have considered the injection made by the CGP to the State Grid during FY 2009-10, 2010-11 and 2011-12 as deemed self consumption for the purpose of

determination of CGP status but have not considered the same for FY 2012-13 though Section 11 was imposed up to June, 2012 as per the Government Notification. The order of the Commission was issued on 03.01.2013, therefore, there very little time was left in the said financial year for the CGP to maximise their self consumption to compensate the extent of power supplied to GRIDCO during the period July, 2012 to 03.01.2013. In the event a CGP loses its status then the statute and rules framed under Electricity Act, 2003 does not empower a DISCOM to levy cross subsidy surcharge. The Rule 3 of Electricity Rules, 2005 has created a fiction of law for different purpose and has nothing to do with the charges to be recovered by a Distribution Company including surcharges and cross subsidy.

- (b) Though the Petitioner NESCO in that case have not made any application for consideration of CGP status for the financial years 2010-11 to 2012-13 the Commission have considered the same and no consolidated petition for the years 2008-09, 2009-10, 2010-11, 2011-12 & 2012-13 was sought for from NESCO.
- (c) The Commission in their interim order dated 22.09.2012 had observed that the data collection work was under progress but still the hearing was concluded and therefore incomplete.
- (d) Since the Electricity Act, 2003 has mandate for promoting Co-generation, CGP based on Co-generation should not pay cross subsidy surcharge if they lose their CGP status. The Commission in their Open Access Charges order dt.13.07.2012 in case Nos.5, 6, 7 & 8 of 2011 and 24, 25, 26 & 27 of 2012 for FY 2011-12 and 2012-13 had directed that 'no cross subsidy surcharges' are payable by the consumers drawing power from its own/ group captive power plants or availing renewable power to meet its renewable and Co-generation purchase obligation.
- (e) The consumption of electricity by the Petitioner cannot be termed as open access in case its power plant has lost CGP status since the sponge iron plant and the power plant are part of the same legal entity and situated in the same premises. The transfer of electricity within the same legal entity cannot be treated as sale of electricity to a third party. In view of the facts, OERC (Open Access Regulations) is not applicable in this case. There is no functional relationship or contractual obligation between the Respondent and the Petitioner on the basis of which the respondent could claim surcharges from the Petitioner.
- (f) SLDC, initially delayed and then refused permission for open access for 6 MW from TSIL's CGP to its Ferro Alloys plant, Joda for the period from 01.08.2011

to 31.07.2012. In one hand SLDC does not permit open access for captive consumption; on the other hand the respondent NESCO threatens to levy cross-subsidy surcharge for captive consumption, thus preventing TSIL to increase its captive consumption in order to maintain its CGP status.

2. The Respondent NESCO submitted that there are no errors apparent in the order of the Commission. The Hon'ble High Court of Orissa in its interim order dated 06.08.2014 in W.P.(C) No.18481 of 2013 has made it clear that notwithstanding the pendency of the said Writ Petition, the present review proceeding would continue. The verification team formed by the Commission may be reconstituted headed by a Electrical Inspector who is the appropriate body to determine the actual status of the companies.
3. Heard the parties at length. As per Order 47 Rule 1 of the Civil Procedure Code, 1908 review of an order can be made on the following grounds:
  - (a) Error apparent on the face of the record;
  - (b) New and important matter or evidence which is relevant for the purpose was discovered which could not be produced after exercise of due diligence or if there appears to be some mistake;
  - (c) Any other sufficient reason.

Error contemplated under the rule must be such which is apparent on the face of the record and not an error which is to be fished out and searched. It must be an error of inadvertence. We are citing two important decisions here. *“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.* (AIR 1995 SC 455).

*That no error could be said to be apparent on the face of the record if it was not self-evident and if it required an examination or argument to establish it.* (‘Batuk K. Vyas vrs. Surat Borough Municipality,’ AIR 1953 Bombay 133 (R)).

4. Let us examine the points which are claimed to be the error on the face of the record.

The contention of the petitioner is that Section-11 of the Electricity Act, 2003 was imposed for the period 2009-10, 2011-12 and 2012-13 by Govt. of Odisha and the injection made by CGPs to the State Grid during such periods is to be treated as deemed self-consumption for the purpose of determination of CGP status, even though, Govt. required energy to be injected into the State Grid upto June, 2012. This has not been

considered by the Commission in its order dt.03.01.2013 in Case No.129/2010. This is an error apparent on the face of record.

The order of the Commission on the subject states as follows:

X      X      X      X      X      X      X      X

*“However, we are of the opinion that such computation be applicable only for the past financial year 2009-10, 2010-11 and 2011-12, but not for the current FY 2012-13 where Section 11 has not been invoked for the full financial year. Since the financial year 2012-13 has not yet come to an end and Section 11 has been invoked till June, 2012 a decision regarding CGP status for FY 2012-13 can’t be taken now. As per the existing rules the annual generation has to be taken into account for determining the prescribed percentage for self-consumption and the CGP during the remaining period (from June, 2012 to March, 2013) may increase their self-consumption and retain their CGP status independently of invocation of Section 11. Therefore, for the FY 2012-13 the power injected by the CGPs to the State Grid should not be treated as self consumption for computation of CGP status.”*

Now the notification No.2991 dt.10.04.2012 of the State Govt. states as follows:

X      X      X      X      X      X      X      X

*“Further, Government has already invoked section-11 of the Act, 2003 on 25.11.2011 directing CGPs to maximise generation and supply power to the State Grid to tide over power crisis situation till June, 2012.*

*Keeping in view the larger interest of the State and difficulties faced by the CGPs due to invocation of section-11 of Electricity Act, 2003 by Government, the State Cabinet in their 21<sup>st</sup> meeting held on 21.02.2012 have decided as follows.*

- (a) The quantum of supply of surplus power to GRIDCO during FY 2009-10 & 2010-11 (April 2010 to October, 2010) by the CGPs is construed as being deemed self-consumption for the purpose of determination of CGP status.*
- (b) The injection made by CGPs to the State GRID during period of invocation of Section-11 will be considered as deemed self-consumption in the FY 2011-12 and 2012-13.*

*By order of the Governor*

*Sd/-*

*(G. Mathi Vathanan)*

*Commissioner-cum-Secretary to Govt.”*

We agree with the contention of the petitioner that while Government have issued instruction under Section 11 of the Act for FY 2012-13, the consequential benefit of injection of power into grid treating the same as self-consumption as per Cabinet resolution should also be available to the petitioner for FY 2012-13 similar to preceding years.

Now that the FY 2012-13 has come to an end, it is possible to arrive at the CGP status considering various consumptions as per I.E. Rules, 2005.

**Therefore, we direct that the injection made by CGPs to the State Grid during the period of invocation of Section 11 by Government should be considered as deemed self consumption in the FY 2012-13 also. Our order be rectified to the extent mentioned above accordingly.**

5. The contention of the petitioner that the respondent, NESCO had not explicitly sought consideration of CGP status for FY 2010-11 to 2012-13 and in previous years but was allowed. The period under question is in consonance with the Govt. Resolution mentioned above arising out of the said order of Govt. The period also need to be coincide with the Govt. decision. Therefore, this is not an error apparent on the face of record. The petitioner in one hand prays for extension of relief due to self-consumption for the FY 2012 in line with Govt. orders and on the other hand, request the Commission to ignore this. This is a contradiction by the petitioner himself and not accepted.
6. The request for review of the interim order dated 22.09.2012 is meaningless since once the final order is issued the interim order merges with the same. Therefore, the prayer of the Petitioner on this point is not required to be considered and therefore dismissed.
7. The promotion of Co-generation and renewable energy is not the subject matter of the order sought to be reviewed but a separate issue. Therefore, this is not an error apparent on the face of the record rather this is an appeal by the Petitioner in disguise.
8. The contention of the petitioner that the Open Access Regulation will not be applicable to them in view of the Co-generation associated with the generation and power supply to one of its plant. In fact, relevant rules and regulations have been considered by the Commission while issuing the said order. In general, there is no error apparent on the face of record requiring any modification. The issue raised by the petitioner is in the manner of computation of captive power by DISCOMs which is not acceptable to the petitioner. For this, there are other remedies available under the law and, therefore, Commission does not intend to interfere with the order dt.03.01.2013 as a review.
9. The petitioner has raised the issue of delays and refusal of SLDC to allow Open Access to the petitioner. Such issues are not a part of order in Case No.129/2010 since this order relates to the cases supplying power to the Grid under instructions from Govt. under Section-11 of the Act, 2003. Functioning of SLDC is not a part of this order and, therefore, Commission is not inclined to incorporate this in the above order as a review.
10. Other issues raised in this review petition are not a part of the order in Case No.129/2010. Such issues can be redressed under various provisions of law in the

Electricity Act, 2003, Rules and Regulations made thereunder separately. These appeals for review are not accepted.

**Summary**

11. Out of various issues raised by the petitioner, we find that the application of the order for FY 2012-13 was an error apparent on the face of record depriving CGPs of their claims. Therefore, we direct that injection made by CGPs to the State Grid during the period of invocation of Section-11 of the Electricity Act, 2003 as per Govt. Order should also be considered as deemed self-consumption in the FY 2012-13.
12. Other issues raised are actually appeals in disguise and not a part of review, for which separate remedies are available under law and, therefore, not allowed in this review petition.
13. Accordingly, the case is disposed of and closed.

Sd/-  
**(A. K. Das)**  
**Member**

Sd/-  
**(S. P. Swain)**  
**Member**

Sd/-  
**(S. P. Nanda)**  
**Chairperson**