

**ODISHA ELECTRICITY REGULATORY COMMISSION**  
**PLOT NO. 4, CHUNUKOLI, SHAILASHREE VIHAR,**  
**CHANDRASEKHARPUR,**  
**BHUBANESWAR-751021**  
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**Present :**      **Shri S. P. Nanda, Chairperson**  
                         **Shri S. P. Swain, Member**  
                         **Shri A. K. Das, Member**

**Case No. 14/2016**

M/s. Navabharat Ventures Limited	.....	Petitioner
Vrs.		
CEO, CESU & Others	.....	Respondents

**In the matter of:**      **An application under Section Sec. 94 (1) (f) of the Electricity Act, 2003 read with Regulation 70 (1) of the OERC (Conduct of Business) Regulations, 2004 along with O-47 R (1) (c) of the CPC for review of Order dated 29.01.2016 passed in Case Nos. 43 & 44 of 2014 regarding cross subsidy surcharge claimed by CESU for not maintaining of CGP status during FY 2010-11 to FY 2012-13.**

**And**  
**Case No. 15/2016**

M/s. Navabharat Ventures Limited	.....	Petitioner
Vrs.		
CEO, CESU & Others	.....	Respondents

**In the matter of:**      **An application under Section Sec. 94 (1) (f) of the Electricity Act, 2003 read with Regulation 70 (1) of the OERC (Conduct of Business) Regulations, 2004 along with O-47 R (1) (c) of the CPC for review of Order dated 29.01.2016 passed in Case No. 44 of 2014 regarding claim of cross subsidy surcharge by CESU for availing construction power from the CGP to construction of IPP.**

**For Petitioner:**      Shri Gopal Choudhury, Advocate, Shri Ashok Kumar Parida, Chief Resident Manager, M/s. Nava Bharat Ventures Limited.

**For Respondents:**      Shri N. C. Panigrahi, Sr. Advocate, Shri Sagar Panigrahi, Advocate on behalf of CESU, Shri S. K. Harischandan, AGM (Law), CESU, Shri Prashanta Kumar Nayak, DGM, EHT (O&M), Chainpal, OPTCL and Shri U. N. Mishra, CGM (PP), GRIDCO Limited.

**ORDER**

**Date of Hearing: 17.06.2016**

**Date of Order: 26.07.2016**

Both the petitions in the above noted cases have been filed by M/s. Nava Bharat Ventures Limited (M/s. NBVL) u/S. 94 (1) (f) of the Electricity Act, 2003 read with

Regulation 70 (1) of the OERC (Conduct of Business) Regulations, 2004 along with 0.47 R-1 of the Civil Procedure Code, 1908 for review of the common order dated 29.01.2016 of the Commission passed in Case Nos. 43 & 44 of 2014. As both the above noted cases are arising out of the common order passed by the Commission in both the Case Nos. 43 & 44 of 2014, the same are clubbed for analogous hearing.

2. Prior to hearing of the above cases, basing upon the urgency as prayed by the petitioner M/s. NBVL, the Commission vide their letter dated 25.04.2016 had directed CESU not to take any coercive action against the petitioner on the Demand-cum-Disconnection notice dated 04.03.2016 in respect to consumer Nos. LRI-0024 & LRI-0062 for payment of Cross-subsidy surcharge. Thereafter, the cases were listed for hearing on 24.05.2016. During hearing the representative of M/s. NBVL had taken adjournment as their counsel Mr. Gopal Choudary had gone abroad. Basing on the prayer of the petitioner, the Commission had adjourned the hearing and vacated the interim stay of operation of the Demand-cum-Disconnection notice dated 04.03.2016 issued by the CESU authorities.
3. Being aggrieved by the order dated 24.05.2016, the petitioner M/s. NBVL has challenged the said order before the Hon'ble High Court of Orissa under Article 226 & 227 of the Constitution of India in W.P.(C). No. 9908 of 2016. The Hon'ble High Court vide their interim order dated 08.06.2016 in Misc. Case No. 9159 of 2016 has stayed the operation of the order dated 24.05.2016 of the Commission passed in Case Nos. 14 & 15 of 2016 "till next date".
4. Both the cases are taken up on 17.06.2016 for analogous hearing on question of admissibility. Heard the parties at length.
5. During hearing the counsel appearing on behalf of the petitioner company submitted that being aggrieved by the common order dated 29.01.2016 passed in Case Nos. 43 & 44 of 2014 of the Commission, M/s NBVL has filed the above review petitions on the following grounds:-
  - i. The jurisdiction of the Commission under Section 86 (1) (f) of the Act in the facts and circumstances of the case dealing with all issues raised and in dispute, and giving findings on each and every such issue, and in giving reasons for each and every finding in a cogent manner acceptable in law.
  - ii. The Commission have erroneously considered Case Nos. 43 & 44 of 2014 to be similar in nature and have disposed of the same by the common order.

When Case No. 43 of 2014 is founded upon alleged loss of CGP status due to captive consumption being less than 51%, the Case No. 44 of 2014 is founded on an entirely different alleged ground that the captive consumption of construction power from its own CGP attracts payment of cross-subsidy surcharge to the distribution licensee.

- iii. The Commission has not decided upon the interpretation of Rule 3 and its application to the facts and circumstances of the review petitioner's case as to whether the Petitioner is liable to pay any cross subsidy surcharge.
- iv. The Commission has referred in para 24 to the provision of Rule 3 that no 'power plant' shall qualify as 'Captive Generating Plant' unless not less than 51% of the aggregate electricity generated in 'such plant' is consumed for captive use. Therefore, consideration is to be with respect to each plant. The Commission has not stated under what provision of law the aggregate of both the power plants are to be considered for computation of captive status.
- v. The Commission has not considered auxiliary consumption as captive use without giving any basis or reason.
- vi. The Commission has decided the rate of cross-subsidy surcharge on the basis of 20% load factor which is arbitrary and irrational and without basis.
- vii. The Commission has not decided upon the issue whether the cross subsidy surcharge rate for 2011-12 could be subsequently determined while making a determination for FY 2012-13 and applied retrospectively.

6. Shri Panigrahi, Sr. Advocate appearing on behalf of CESU submitted as follows:

- (i) The present review petition is an appeal in disguise. If the Petitioner is aggrieved by the order of the Commission he has to challenge the same by way of appeal under Section 111 of the Electricity Act, 2003.
- (ii) The Commission after hearing the Case No. 43 & 44/2014 have come to the conclusion that the issues involved in both the cases are interlinked and therefore, has disposed of the case with a direction to the Petitioner to submit the information to CESU so as to calculate the cross subsidy surcharge payable by the Petitioner. The Petitioner who was opposite party at the time of hearing of both the Cases Nos. 43 & 44/2014 has never opposed at the time of hearing that both the cases are different and therefore, need to be heard independently.

- (iii) Since the Commission after being satisfied about the maintainability of the case under Section 86 (1) (f) has admitted the same and has disposed of the case on merit, there is no error in the judgement. If the Petitioner is aggrieved he can challenge the same by way of appeal under Section 111 of the Act. Hence the review petition is not maintainable.
- (iv) The Commission has considered all the submission made on behalf of the Petitioner and after considering all the submission and analysing the same has directed the Petitioner to furnish the required data as per the format provided in Case No. 129/2010 dated 03.01.2013.
- (v) The Clause 3 (1) (b) of Electricity Rules, 2005 provides that in case of a generating station owned by a company or formed as special purpose vehicle for such generating station, a unit or units of such generating station are identified for captive use and not the entire generating station. So CGP status will be verified annually taking both the 30 MW and 64 MW of M/s. NBVL in aggregate since both are declared as CGP.
- (vi) The Commission has decided that the auxiliary consumption will not be included in the captive consumption for determination of CGP status. If the Petitioner is aggrieved he can approach appropriate forum under Section 111 of the Electricity Act, 2003. This cannot be decided in a review petition of this nature.
- (vii) There is no ambiguity in the order of the Commission since the Commission has directed that after computation of CGP status if it is found that the CGP of M/s. NBVL has lost its CGP status then drawal of power from CGP to the parent industry shall be treated as drawal from a generating company. Accordingly, cross subsidy surcharge is payable.
- (viii) The cross subsidy surcharge has been levied as per open access charges order of OERC in respect to particular year. The Commission has directed that the cross subsidy surcharge determined for FY 2010-11 shall continue upto 2011-12. There is a separate open access charges order for 2012-13. Accordingly, CESU has billed the Petitioner. The open access charge applicable for consumption within 20% is considered because the consumption pattern of such type of consumer is coming under this profile. The issue has been raised earlier and the Commission has decided the same on merit. Therefore, the present order need not be reviewed.

- (ix) Since no timeframe has been provided by the Commission to submit the data for computation of cross subsidy surcharge the Petitioner without complying the order has approached the Commission thereby killing valuable time of the Commission.
  - (x) The review petition is not maintainable both under law and facts and devoid of any merit.
7. When the Case Nos. 43 & 44/2014 were adjudicated by the Commission the present petitioner was a party to that proceeding. He had not raised any objection to the analogous hearing of those cases or jurisdiction of the Commission for hearing the cases and had proceeded in his arguments. He has not even challenged the interim orders passed in those cases at that time. Therefore raising this now is a departure from the earlier stand taken by the present petitioner.

The Commission had assumed jurisdiction under Section 86 (1) (f) of the Act in Case Nos. 43 & 44/ 2014 since this is a dispute between Licensee CESU and the Petitioner's Generating Company. The fact that the Commission in both the cases i.e. Case Nos. 43 & 44/2014 heard them at length and passed a detailed order clearly indicates that the Commission proceeded with assumption that it has jurisdiction to adjudicate the matter. This is self evident from the order and no separate finding on jurisdiction is considered necessary.

Earlier issues raised by the petitioner from Para 5 (iii) to Para 5(vii) except 5 (vi) were already argued, discussed during the hearing and the Commission has already given its views in its common order dated 29.01.2016 in the above cases. There is no scope for review of the same at this juncture.

Regarding calculation of cross subsidy surcharge on the basis of 20% load factor it is to be pointed out that cross subsidy surcharge is to be calculated basing on the load factor of the drawal and mutually settled as per our Regulation on security deposit. If CESU has calculated on the basis of a load factor which is not acceptable to the Petitioner it should be settled mutually. Both the parties are directed to settle the same within one month from issue of this order.

As per Section 94(1) (f) of the Electricity Act, 2003, this Commission has the same power as are vested with the Civil Court under the Code of Civil Procedure, 1908 in respect of reviewing its decisions, directions and orders among others.

As per Order 47 Rule 1 of the Civil Procedure Code, 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)).

But no such error has been brought before us by the Petitioner seeking the review of our common order dated 29.01.2016 passed in Case Nos.43 & 44 of 2014. It has become almost an everyday experience that review applications are filed mechanically as a matter of routine and there is no indication as to which grounds strictly it falls with the narrow limits of Order 47 Rule 1 of the Code of Civil Procedure, 1908. The present petition appears more to be an appeal in disguise than prayer to review our Order.

The Hon’ble Supreme Court in Ajit Kumar Rath vrs. State of Orissa (1999) 9 SCC 596 has held that the expression “any other sufficient reason” used in order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule.

None of the points raised by the Review Petitioner falls under the scope of review as prescribed under Order 47 Rule 1 of the Civil Procedure Code.

8. Accordingly, with the above observation, the review petition filed by M/s. NBVL on the common order dated 29.01.2016 passed in Case Nos. 43 & 44/2014 are dismissed as devoid of any merit.

Sd/-  
(A. K. Das)  
Member

Sd/-  
(S. P. Swain)  
Member

Sd/-  
(S. P. Nanda)  
Chairperson