

**ODISHA ELECTRICITY REGULATORY COMMISSION
BIDYUT NIYAMAK BHAWAN
PLOT NO.-4, CHUNOKOLI, SHAILASHREE VIHAR
BHUBANESWAR - 751 021

**Present: Shri U. N. Behera, Chairperson
 Shri S. K. Parhi, Member
 Shri G. Mohapatra, Member**

Case No. 42/2019

M/s. Aryan Ispat and Power Pvt. Ltd.	Petitioner
Vrs.		
WESCO Utility & Others	Respondent

In the matter of: **An application under Section 94 (1) (f) of the Electricity Act, 2003 read with Regulation 70 of the OERC (Conduct of Business) Regulation, 2004 for review of order dated 09.04.2019 passed by OERC in Case No. 48/2018.**

For Petitioner: Shri L. D. Pangari, Sr. Advocate

For Respondent: Shri K.C. Nanda, DGM (Fin.), WESCO Utility

ORDER

Date of hearing: 17.11.2020

Date of order: 01.12.2020

The present petitioner M/s. Aryan Ispat and Power Pvt. Ltd. has filed this case for review of our order passed in Case No. 48/2018 dated 09.04.2019. The Petitioner owns a steel plant in WESCO Utility area having an 18 MW captive power plant in the same premises. It has emergency power supply contract for a contract demand of 5000 KVA. When WESCO Utility claimed cross subsidy surcharge for FY 2015-16 and 2016-17 arising out of loss of its CGP status, the Petitioner disputed the same. It stated that cross subsidy surcharge should be calculated by excluding the total auxiliary consumption from the gross energy generation. The Commission while disposing of this case in their order dated 09.04.2019 had directed as follows:

“8. *Heard the parties at length. The cross subsidy surcharge is to be levied as per OERC (Terms and Condition of Open Access) Regulation 13 (1) (ii) when open access transaction takes place. Surcharge to be levied on open access customers under Section 42(2) of the Act, shall be determined by the Commission keeping in view the loss of cross-subsidy from these customers opting to take supply from a person other than the incumbent distribution licensee. As per the said Regulation surcharge to be levied on open access customer under Section 42 (2) of the Act shall be determined by the*

Commission keeping in view the loss of cross subsidy from these customers opting to take supply from a person other than the incumbent distribution licensee. In the instant case the industry draws power from its generating plant which would otherwise have been drawn from WESCO Utility. The consumption in steel plant is to be arrived at after deducting the auxiliary consumption and energy exported through open access from the gross energy generation. The cross subsidy surcharge should be charged on the energy consumed in the industry when such consumption falls short of 51% of the gross energy generation.

9. *It is imperative to recast the auxiliary consumption correctly. When correct meter data of auxiliary consumption is available it should be utilized to arrive at consumption in the industry and subsequent computation of cross subsidy surcharge. For this auxiliary consumption should be as per its definition in Regulation 1.7 (c) of OERC (Terms and Conditions for Determination of Generation Tariff) Regulation, 2014. In case the same is not available the auxiliary consumption level should be adopted on the basis of an efficient norm which is already given in our Generation Regulation, 2014 since norms of the same for Odisha are not available elsewhere.*
 10. *Basing on the above observation, the computation of cross subsidy surcharge should be made and billed to the Petitioner's industry. The Petitioner shall pay the same as per the OERC (Distribution Condition of Supply) Code, 2004 to WESCO Utility."*
2. Now, the Petitioner seeks review of our order under the following grounds:
- (a) Rule 3 (2) of the Electricity Rule, 2005 which creates an obligation on the captive users to consume 51% of power stipulates that in the event of failure of a captive user to comply with the said obligation the entire electricity generated shall be treated as if it is a supply of electricity by a generating company. However, the said rule is silent regarding any other obligation or liability a captive user has to comply with or will be made liable to including a financial liability in the nature of cross subsidy or any other charges.
 - (b) Law is well settled by Hon'ble Supreme Court that no type of financial liability having civil consequences can be created/ imposed without clear provision in the statute and without authority of law.
 - (c) Section 42 (2) and (4) of the Electricity Act deals with open access charges and surcharges in case of actual/ physical availing of open access in the event of a consumer permitted to receive supply of electricity from a person other than distribution licensee.
 - (d) Section 42 (4) of the Electricity Act does not authorise the Commission to any charge/surcharge for a fictional/ presumed transaction.

- (e) Regulation 13 (1) (3) of OERC Open Access Regulation authorises the Commission to compute surcharge which shall compensate the loss of cross subsidy for giving any open access to customers to whom supply is given which means actual/ physical supply by a generator or distribution company.
 - (f) OERC (Determination of Open Access Charges) Regulation, 2006 is applicable to open access customers for use of intra-State transmission and distribution system. Similarly Regulation 4 (2) (i) of the said Regulations provides for surcharge to be levied on open access customers keeping in view loss of cross subsidy for obtaining supply from a person other than the incumbent distribution licensee. Regulation 4 (3) makes open access customers liable to pay additional surcharge in addition to wheeling charges and cross subsidy surcharge to meet the fixed cost of distribution. In the present case the distribution licensee is under no obligation to supply power to the Petitioner, as the Respondent is aware from the day one that Petitioner has constructed and is operating a captive generating plant for its own use.
 - (g) No act or rule anywhere indicate that captive user losing CGP status shall be liable to pay cross subsidy charge to a distribution company.
 - (h) Had these matters been raised during the hearing of the case sought to be reviewed now the Commission could have given a finding that the applicant is not liable to pay cross subsidy surcharge. The Commission has committed serious error of law by not giving a finding as to whether the Petitioner is at all liable to pay cross subsidy surcharge.
3. The Respondent WESCO Utility in its reply has stated that in the original application while disputing the manner of calculation of auxiliary consumption the Petitioner had prayed for directing WESCO Utility to re-determine the cross subsidy surcharge. The Commission had directed that in case auxiliary consumption data is not available it shall be determined as per the provision of Regulation 1.7 (c) of OERC (Terms and Conditions of Generation Tariff) Regulations, 2014. The consumption in steel plant is to be arrived at after deducting the auxiliary consumption and energy exported through open access from the gross energy generation. The cross subsidy surcharge should be charged on the energy consumed in the industry when such consumption falls short of 51% of the gross energy generation. The steel plant of the Petitioner is a

consumer of electricity of WESCO Utility. It comes under category of “Industries owning Generating Stations and Captive Power Plants availing emergency supply only”. The Petitioner has executed power supply agreement with WESCO Utility for supply of start up/ emergency power to its steel industry in the event of failure of generating station. The Petitioner’s unit has lost the status of CGP for the respective financial year, and is recognised as a generating plant and not as a CGP.

4. The Respondent further stated that the applicant has made certain new contentions which were not raised in the original application. Therefore, those contentions should not be taken into consideration in a review proceeding of this nature. The Respondent further pointed out an order of Hon’ble APTEL in Appeal No. 02/2018 and Appeal No. 179/2018 in the matter of M/s. Prism Cement Ltd. and BLA Power Pvt. Ltd. Vrs. Madhya Pradesh Electricity Regulatory Commission and others dated 17.05.2019 where Hon’ble APTEL has observed as follows:

*“10.1 In light of the facts that the twin-conditions as per Rule 3 are met by M/s. Prism and M/s. BLA in terms of Unit-1, we hold that Unit-1 of M/s. BLA is a CGP with M/s. Prism as its captive user. Therefore, in terms of the 4th Proviso to Section 42 (2) of the Act, cross-subsidy surcharge cannot be levied on power captively consumed by M/s. Prism from M/s. BLA’s Unit-1. Consequently, the impugned demand notices dated 02.01.2018 are set-aside. **However, we clarify that if at the end of a particular financial year it is found that the twin-conditions are not satisfied, the exemption from levy of cross subsidy surcharge would not be available.**”*

5. WESCO Utility stated that in view of the above order of Hon’ble APTEL there is no infirmity or error in the order of the Commission dated 09.04.2019 which requires review. The present application filed by the applicant is liable to be dismissed.
6. In its rejoinder the Petitioner has stated that the Respondent has lost sight of the grounds of review set out in the petition. The Commission in its order dated 09.04.2019 has indicated that conditions are to be satisfied for making CGP liable for levy of surcharge without any material records to show that said conditions are fulfilled as per law. This is apparent error on the case of the record.
7. In its rejoinder the Petitioner further stated that the judgement of APTEL in Appeal No. 2 /2018 and Appeal No. 179/2018 in the matter of M/s. Prism Cement Ltd. and

M/s. BLA Power Pvt. Ltd. Vrs. MPERC are not applicable in the instant case in as much as the said judgements had been passed in the peculiarity of that particular case and in the light of different Regulation.

8. Heard the parties at length. In the original case which is sought to be reviewed now the Petitioner had challenged non-consideration of deduction of auxiliary consumption from the gross energy generation to arrive at energy consumption by the industry. This is because cross subsidy surcharge can be calculated basing on the quantum of energy consumption by the industry. Therefore, the Petitioner had accepted that cross subsidy surcharge can be levied on the industry having CGP if they lose CGP status any year by failing to meet the twin conditions as prescribed in Rule 3 of Electricity Rules, 2005. In this review petition the Petitioner now raises grounds to dispute the validity of levying cross subsidy surcharge on industry failing to comply with the requirement of Electricity Rules, 2005 by losing the CGP status. In the original application the Petitioner had neither raised this matter nor did the Commission deal with the same. Raising extraneous matter which has not been dealt in the original petition cannot be a ground of review application.
9. 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 pointed out by the Petitioner seeking the review of our judgement. 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 within the narrow limits of Order 47 Rule 1 of the Code of Civil Procedure, 1908. The present petition appears more to be an appeal than prayer to review our Order.

10. Since the present application does not fall under any category which attracts review the application is rejected.
11. Accordingly, the case is disposed of.

Sd/-
(G. Mohapatra)
Member

Sd/-
(S. K. Parhi)
Member

Sd/-
(U. N. Behera)
Chairperson