BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY COMMISSION, SHIMLA

In the Matter of:

(1) M/s Ambuja Cement Ltd.
Vill. Navagraon P.O. Jajhra
Tehsil Nalagarh, Distt. Solan (H.P.) - 174101

....Petitioner

V/s

The Himachal Pradesh State Electricity Board Limited, Vidyut Bhawan, Kumar House, Shimla –171004;

....Respondent

(Review Petition No. 31 of 2016)

(2) The Nalagarh Industries Association
C/o O/o Single Window Clearing Agency, Nalagarh,
Distt. Solan- 174101

....Petitioner

V/s

The Himachal Pradesh State Electricity Board Limited,
Vidyut Bhawan, Kumar House, Shimla –171004;

....Respondent

(Review Petition No. 32 of 2016)

(Review Petition Nos. 31 and 32 of 2016
Decided on: 18th October, 2016)

CORAM

S.K.B.S. NEGI
CHAIRMAN

Counsels:-

for the petitioners/applicants:	Sh P.C. Dewan, Advocate in Petition No. 31 of 2016; & Sh. Rakesh Bansal, Authorised Representative in Petition No. 32 of 2016.
for the respondent:	Sh. Ramesh Chauhan, Authorised Representative

ORDER

(Last heard on 17.09.2016 and orders reserved)

1. M/s Ambuja Cement Ltd. Vill. Navagraon P.O. Jajhra, Tehsil Nalagarh, Distt. Solan (H.P.) and the Nalagarh Industries Association (NIA) C/o O/o Single Window Clearing Agency, Nalagarh, Distt. Solan (hereinafter referred to as 'the petitioner(s)') have moved these petitions seeking review of the Order dated 25th May, 2016, passed by the Commission in case No. 130/2015 in relation to the Second Annual Performance Review Order for the Third MYT Control Period (FY 15 - FY 19) and Determination of Tariff for FY 2016-17 for the Himachal Pradesh State Electricity Board Limited (hereinafter referred to as 'HPSEBL').

POWER TO REVIEW

1.1 The Commission's power to review its own Orders flow from Section 94(1)(f) of the Electricity Act, 2003 (hereinafter referred as "the Act") and is the same as conferred on a Civil Court by the Code of Civil Procedure (CPC). This power has been spelt out in Section 114, read with Order 47, of the CPC. The review application has to necessarily meet the requirements of Section 114 and Order 47 of the CPC.

1.2 As per the said provisions, the specific grounds on which an Order already passed can be reviewed are **--**

(a) if there are mistakes or errors apparent on the face of the record, or

(b) on discovery of new and important matter or evidence which, after due diligence was not within the knowledge or could not be produced at the time of making the Order, or

(c) if there exist other sufficient reasons.

1.2 The power of review, legally speaking, is permissible where some mistake or error apparent on the face of record is found and the error apparent on record must be such an error which may strike one on a mere looking at the record and would not require any long drawn process of reasoning. A review cannot be equated with the original hearing of a case. A review petition has a limited purpose and cannot be allowed to be an appeal in disguise and it cannot be exercised on the ground that decision was erroneous on merits. But simultaneously the materials on record, which on proper consideration may justify the claim, cannot be ignored.

1.3 Clerical or arithmetical mistakes in judgments or orders or errors arising therein from any accidental slip or omission may at any stage be corrected by the Commission under Section 152 of the CPC, either of its own motion or on the application of any of the parties. The use of word "may" shows that no party has a right to have a clerical or arithmetical mistake corrected. The matter is left to the discretion of the Court. Such discretion is required to be exercised judiciously to make corrections necessary to meet

the ends of justice. The word "accidental" qualifies the slip/ omission. Therefore, this provision cannot be invoked to correct an omission which is intentional, however erroneous. Because Section 152 does not countenance the argument on merits of fact or law, the Commission has the limited power to correct any clerical or arithmetical mistakes in its judgments or orders, or errors arising therein from any accidental slip or omission.

2 VARIOUS ISSUES RAISED IN THE REVIEW PETITIONS

2.1 These review petitions arise out of one Order and involve similar and common issues. The Commission, therefore, considered it necessary to club these petitions for their better understanding and adjudication. The Commission last heard the case on 17.09.2016 wherein the parties putforth their view points.

2.2 With the background, as delineated in the review petitions submitted, pleadings made, arguments advanced by the parties, the issues, which arise for consideration and determination, are grouped as under:-

1. Increase in Demand Charges for Industrial Consumers;
2. Contract Demand Violation Charges at Triple Rate (CDVC);
3. Low Voltage Supply Surcharge (LVSS);
4. Cross Subsidy Surcharge;
5. Wheeling Charges.

2.3 Now let us proceed to consider these issues one by one:

3 Issue No.1: –Increase in Demand Charges for the Industrial Consumers

Submissions made by the NIA:-

3.1.1 The NIA highlighted that the spokesmen of the State Government, including the Hon'ble Chief Minister and the Industries Minister of the State of Himachal Pradesh, has, at various road shows held across the country to attract industry to the State, assured the investors of no increase in power tariff for five years before and even after the announcement of this year's Tariff Order. Therefore, efforts should have been made to seek relief from the State Government in order to honour the commitment of power tariff freeze for five years.

3.1.2 The NIA asserted that the HPERC, in its impugned Order dated 25.05.2016, has allowed the amount of Rs. 132.99 Cr. to be recovered in the ARR of the HPSEBL for FY17. This amount of Rs. 132.99 Cr. has been stated to be on account of non-transfer of the incentive grant released by the Central Govt. made on the recommendations of the 13th Finance Commission. However, the same could have been deferred as the matter is subjudice before the Hon'ble APTEL. The shortfall on this account could have been allowed as a borrowing with an impact of interest/ borrowing cost in the ARR till the disposal of the matter by the APTEL. The petitioner also questioned the interim relief of Rs.30 Cr. provided by the Commission towards the Pay Commission revision which, according to him, could have also been postponed.

3.1.3 The NIA has also alleged that there appears to be clear discrimination of fixing of demand charges for the industrial category of consumers as compared to commercial category of consumers. For the commercial consumers, having contract demand of >=100kVA, the demand charges are Rs. 170/kVA, whereas demand charges for industrial consumers the same have been fixed at Rs. 250/kVA and Rs. 400/kVA for load upto 1000kVA and load between 1000 to 2200 kVA, which is not in accordance with Section 45(4) of the Act. The demand charges should be rationalised and imposed at similar rates for same voltage level to all categories of consumers as system cost parameters remain the same. The element of cross subsidy on this account should have been eliminated by now. Section 45 (4) does not allow the Commission to discriminate against or show any undue preference to a person or a class of persons. Time of Day (TOD) tariff should have been applied to commercial category on the pattern of tariff applicable to Industrial Consumers.

Submissions made by M/s Ambuja Cement Ltd.

3.2.1 In addition M/s Ambuja has submitted that the demand charges in the neighbouring States of Punjab, Haryana, etc. are far below those prevailing in the State of Himachal Pradesh. The petitioner has submitted that the demand charges in these States are lower (Rs. 170-320/kVA) than the existing demand charges (prior to the revision) of Rs. 350/kVA in Himachal Pradesh and the proposed hike of Rs. 75 /kVA in the demand charges would further increase the gap. The petitioner has also mentioned that the subsidy in the State is provided to the domestic consumers only by the State Government and, therefore, failure of the Government to remit such subsidy should be loaded on the domestic consumers only.

3.2.2 The petitioner has also submitted that as per the observation of the Hon'ble Apex Court in the case of NIISCO vs The State of Haryana AIR 1976 SC 1100, fixed charges represent the cost of power system and cannot be revised every now and then or even annually for the existing consumers without demonstrating the increase in capital cost of the same power system which has been created to meet his demand. In absence of any result/ report of any studies carried out by the HPSEBL to justify the increase in demand charges, the petitioner has requested for review of demand charges.

HPSEBL's Response

3.3.1 In response, HPSEBL has submitted that the Commission vide its impugned Order dated 25.05.2016 has increased tariff by 3.5% for various consumers for meeting the revenue gap of Rs. 154.48 Cr. In case the State Government wishes to keep the tariff unchanged for any consumer category, as contended by the petitioner, it may reduce the electricity duty or provide subsidy so that the overall tariff remains unchanged for the HPSEBL. Since the State Government has refused to provide the amount of Rs. 132.99 Cr, the Commission had to provide the same as pass through in the ARR and delay in doing this would put additional burden on consumers in the future.

3.3.2 The HPSEBL has further submitted that while the demand charges for Industrial Consumers are higher than the demand charges for the Commercial Consumers, the

energy charge for Commercial Consumers is Rs 4.70/kVA as against the energy charge of Rs.4.20/kVA for Industrial Category (HT-2). Also, while the Industrial Consumers are charged higher energy charge, during peak hours, they are also beneficiary of Night Time Concession, which is not available to Commercial Consumers and, therefore, the contention of petitioner that they are being discriminated is not true.

3.3.3 With respect to the approval of provision of the amount of Rs. 30 Cr., provided by the Commission towards the Pay Commission revision, the HPSEBL has submitted that the same is justified, considering the financial hardships faced by the HPSEBL, and large amount of true-ups is required to be allowed during Second Control Period on account of the recommendations of previous Pay Commission revision.

Commission's View

3.4.1 The Commission after exercising due diligence and prudence check has issued the retail and wheeling tariff for the distribution function of the HPSEBL on 25th May, 2016 based on the prevailing regulations and analysis of the Annual Performance Review (APR) petition filed by the HPSEBL. The HPSEBL has to recover its cost of supplying power as per the regulations framed by the Commission from time to time.

3.4.2 The HPSEBL had projected the additional revenue requirement of Rs. 1556.70 Cr. for 2016-17 in its APR filings and proposed tariff increase of about 33%. The Commission has, after hearing the stakeholders and exercising due diligence and prudence check, accepted additional requirement of Rs.154.48 Cr. only and the corresponding increase in tariff against the aforesaid demand. The effective tariff increase has been around 3.5% against the 33% proposed by the HPSEBL. Moreover, revenue gap pertaining to the previous years also is require to be trued up after the HPSEBL makes available the audited accounts. Accordingly, the Commission is duty bound to allow the HPSEBL to recover its justified cost after prudence check through tariff and reasonable hike in tariff in future years cannot be ruled out. However, in case the State Government wants to freeze the tariff for five years, the State Government can do so according to the Section 65 of the Act.

Section 65, which provides for a subsidy by the State Government, reads as under ---

"If the State Government requires the grant of any subsidy to any consumer or class of consumers in the tariff determined by the State Commission under section 62, the State Government shall, notwithstanding any direction which may be given under section 108, pay, in advance and in such manner as may be specified, the amount to compensate the person affected by the grant of subsidy in the manner the State Commission may direct, as a condition for the licence or any other person concerned to implement the subsidy provided for by the State Government:

Provided that no such direction of the State Government shall be operative if the payment is not made in accordance with the provisions contained in this section and the tariff

fixed by State Commission shall be applicable from the date of issue of orders by the Commission in this regard."

3.4.3 In view of the provisions of section 65 of the Act, in case the State Govt. intends to freeze the power tariff for next five years for any categories of consumers, suitable provisions for providing subsidy in power tariff shall have to be made in the budget as per the provisions of Section 65(ibid).

3.4.4 In view of the fact that the tariff for various categories had already been achieved +/-20% as envisaged in the Tariff Policy, the Commission in the amendments to its tariff regulations, has adopted an improved target of achieving -15% and +10% in tariff fixation of various categories by the end of the Control Period. In fact, the Commission has already achieved this target, especially in case of the Industrial Consumers. The overall tariff in case of Industrial Consumers in the State of Himachal Pradesh is lower than the tariff in neighbouring States.

3.4.5.1 The Commission had considered the amount of Rs. 132.99 Cr. in the tariff determination for FY 2015-16 with the expectation that this amount shall be transferred to the HPSEBL by the State Government. This had resulted in lowering of the ARR requirement for FY 2015-16 and, therefore, no tariff hike was undertaken in FY2015-16. However, keeping in view the fact that the said amount has not been transferred and the financial health of the HPSEBL has deteriorated over the period, the Commission has decided to consider this amount of Rs. 132.99 Cr. in the ARR of the HPSEBL for FY 2016-17. However, the Commission will take a final call based upon the decision of the Hon'ble APTEL as the matter is subjudice before the Hon'ble APTEL. This decision in fact also serves the interest of the consumers as any decision favouring the HPSEBL in this matter would tantamount leading of additional interest cost on the consumers of the State.

3.4.5.2 The amount of Rs. 30.00 Cr. has been provided towards the expected hike in salaries due to the Pay Commission recommendations. At the time of making of the impugned Order the State Govt. had already announced 5% interim relief payable with effect from 1st August 2016. It was expected that similar relief should have to be allowed by the distribution licensee also. The Orders to this effect have now also already been issued by the distribution licensee. The provision of Rs. 30.00 Cr. is, therefore, quite reasonable and is in order.

3.4.5.3 In case these amounts were not to be allowed in the ARR, the same could have resulted in cash flow problems for the HPSEBL which could have adversely affected the performance of the distribution licensee. Both these amounts i.e. Rs. 132.99 Cr. as well as Rs. 30.00 Cr. have thus been rightly included in the ARR for FY 2016-17. The

Judgement of the Hon'ble Apex Court quoted on behalf of the petitioner is not relevant in the present context.

3.4.6 The contention of petitioners that they are being discriminated vis-a-vis the Commercial Consumers is not true. Even though, the demand charges for commercial category are lower than that of the Industrial Consumers, the energy charges for Industrial Consumers are on lower side than for the Commercial Consumers. There is neither any such discrimination nor the provisions of section 45(4) as cited by the petitioner are attracted in this case. The tariffs are fixed by duly taking into account the nature and purpose of supply, apart from various related factors delineated in section 62 (3) of the Act which provides that the Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required. The load factors of the Industrial Consumers, particularly those falling in the range of 100 kVA to 2.2 MVA which have been specifically referred to by the petitioner, are to be substantially higher than other categories of consumers. The comparison of the Commercial and Industrial Consumers reveals that the Industrial Consumers having higher load factor beyond the cut off limit would have to pay lesser overall rate than that payable by the Commercial Consumers with the same contract demand. The savings to Industrial Consumers in this regard may further increase with the increase in load factor. The Industrial Consumers with low load factors may however have to pay slightly higher overall rate but this can also be saved by the Industrial Consumers by flattening their load curve to the maximum possible extent by optimising their contract demand viz-a-viz consumption in more efficient manner.

3.4.7 No review is, therefore, required and the issue is decided accordingly.

4 Issue No.2 – Contract Demand Violation Charges at Triple Rate (CDVC)

Submissions made by the NIA

4.1 The NIA has submitted that the violation charges fixed under tariff are thrice the normal rates, which is also beyond the provisions of the sub-section (6) of section 126 of the Act. Therefore, triple rate for violation is charged in the electricity bills which are further doubled while carrying out the assessment by the Assessing Officer leading to penalty on the excess demand at a rate of six times the normal rate of demand charges. The NIA has submitted that the rates of CDVC should be fixed at a rate lower than what is provided under Section 126 of the Act (ibid) and cannot go beyond the limits provided in the main Act.

HPSEBL's Response

4.2 In its response, the HPSEBL has submitted that the Commission has taken a lenient view by imposing CDVC on consumers violating the sanctioned contract demand at a rate three times on the violated quantum of energy. The HPSEBL urged that the suggestion of petitioner should be accepted and the penalty should be imposed on full quantum of energy consumption at a rate twice of the energy and demand charges of the consumer as provided under Section 126 of the Act. The HPSEBL has requested for disconnection of such consumers who are violating contract demand thrice in a month as this amounts to violation of grid discipline.

Commission's View

4.3 The CDVC are a part of the tariff which are recovered in case the maximum demand exceeds the contract demand and are charged only to the extent the violation has occurred in excess of the contract demand. The assessment under section 126 of the Act is to be made at a rate equal to twice the tariff applicable for the relevant category of services as specified in section 126(5) of the Act. In view of this, there is no conflict between the provisions of CDVC and the section 126 of the Act, as contended by the petitioner.

4.4 No review is made out to this effect. This issue is decided accordingly.

5 Issue No.3 – Low Voltage Supply Surcharge (LVSS)

Submissions made by NIA

5.1 The NIA has referred to the provisions of LVSS as mentioned in Part II of the Tariff Order and has submitted that these provisions result in charging the consumer twice on account of transformation and distribution losses as the consumer is charged losses which are built in the tariff as well as on account of LVSS for supply at a voltage lower than the standard voltage. Therefore, such consumers are charged twice on account of transformation and distribution losses which is unreasonable. The petitioner has also submitted that there are infrastructure issues in various places where the power supply at standard supply voltage is not possible or is not feasible due to which the choice of supply voltage is not available to the consumers depending on the area based constraints. In such cases charging LVSS for supply at lower voltage may be reasonable but the condition of simultaneously charging higher of the two tariff is unreasonable and unjustified. Further, the petitioner has pointed towards the issues for charging of tariff in case of supply of power at a voltage lower than the approved voltage as the provision mentions "whichever of the two is higher".

HPSEBL's Response

5.2 In response, the HPSEBL has submitted that while supplying power at lower voltages the HPSEBL has to bear higher line losses. To compensate for these losses Lower Voltage Supply Surcharge (LVSS) is levied on such consumers availing power at reduced voltages. The HPSEBL submits that to simplify the tariff the Commission may accept

suggestion of the petitioner of charging at standard supply voltage with LVSS subject to the condition that LVSS rates may be revised accordingly to compensate the revenue loss to the HPSEBL on account of supply of power at lower voltage lesser than the Standard Supply Voltage.

Commission's View

5.3.1 The phrase "whichever of the two is higher" has been extracted from Explanation (1) under para (H) of the PART-I of the Tariff Order which reads as under:

> *"In case of *__voltage based tariffs__, the tariff applicable at the standard supply voltage or at the lower voltage (i.e. voltage at which connection is actually availed), *__whichever of the two is higher__, shall be applicable and the LVSS shall be levied in addition to the said tariff."*
>
> ***** *emphasis added.*

5.3.2 Mere reading of the above reproduced provision reveals that this provision is applicable in case of voltage based tariffs. As per the tariff approved by the Commission for FY 2016-17, the categorisation has been done on the basis of contract demand and nature of supply and no voltage based tariff has been fixed so far. The contention of the petitioner is, therefore, not relevant in the present context and as such is not acceptable.

5.4 No review is made out to this effect. This issue is decided accordingly.

6 Issue No.4 – Cross Subsidy Surcharge

Submissions made by M/s Ambuja Cement Ltd.:-

6.3 In this issue, the petitioner M/s Ambuja Cement Ltd. has submitted that cross subsidy surcharge has been raised from 9 paise per unit to 39 paise per unit for STOA consumers. While the provisions for open access in the Act were made only to encourage competition and grant freedom to the consumers to take supply from any source other than the licensee of his area. The petitioner has submitted that due to the steep increase in cross subsidy surcharge the open access power supply shall not remain viable and shall over burden open access consumers and discourage the industry from availing open access.

HPSEBL's Response

6.4 The HPSEBL has submitted that the cross subsidy surcharge on STOA has already been elaborated by the Commission in the Tariff Orders and the same has been determined as per the formula defined in the National Tariff Policy dated 28th January 2016.

Commission's View

6.3.1 In view of the inherent problems in the earlier formula for cross subsidy surcharge the DISCOM was not able to recover adequate cross subsidy surcharge in the previous years, The Ministry of Power (MOP), in the Government of India has now revised the said formula in the National Tariff Policy, 2016. The Commission has accordingly also worked out the cross subsidy surcharge based on the revised formula laid down by the MOP. However, since the rates of the cross subsidy surcharge so worked out for different categories have been curtailed to keep such rates at a reasonable level. The Commission does not overburden any category of consumers, including open access consumers, but a balance between interests of all categories of the consumers has to be maintained.

6.3.2 No review is made out to this effect. The fourth issue is decided accordingly.

7 Issue No.5 – Wheeling Charges

Submissions by M/s Ambuja Cement Ltd.

7.1 In the fifth issue, M/s Ambuja Cements Ltd have submitted that while computing wheeling charges major portion of expenditure under Employee's Expense, A&G Expense, R&M Expense, interest cost, return on equity, etc. have been booked to wheeling and not to retail supply. Since the energy wheeled under STOA is just a fraction of the total retail supply, the apportionment should be done in that ratio on some logical basis. Further, the petitioner has submitted that the cost of system is being recovered from the embedded consumers in the form of demand charges and, therefore, no wheeling charges should apply on such embedded consumers as these are being paid twice i.e. as demand charges and as part of energy charges (which is determined on the basis of the ARR inclusive of the capital plan).

HPSEBL's Response

7.2 The HPSEBL in its response has submitted that the increase in wheeling charges is on account of increase in the wheeling ARR. Further, the HPSEBL has submitted that the allocation has been done as per the allocation statement approved by the Commission in the MYT Order. While replying to the issue with respect to embedded consumers, reference to Para 9.2.3 of the Tariff Order has been invited by the HPSEBL.

Commission's View:-

7.3.1 The distribution ARR approved by the Commission is allocated into wheeling and retail supply business based on the allocation statement given in the Tariff Order. This allocation statement duly takes into account the nature of various costs and is based on logic.

7.3.2 The rate of wheeling charges has been increased only marginally i.e. 49 paise to 53 paise for EHV Industrial Consumers and this marginal increase is due to normal increase in the relevant cost. The submission that no wheeling charges should be recovered from the embedded consumers availing open access, as they are already paying demand charges, the matter has already been dealt in reasonable detail in para 9.2 of the Tariff Order dated 25.05.2016 and hardly needs any review.

7.3.3 In light of the above, no review of the rate of wheeling charges is made out. The fifth issue is decided accordingly.

Both the review Petitions and connected applications are accordingly disposed of.

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Shimla : **(S.K.B.S. NEGI)**
Dated: 18th October, 2016 **Chairman**